

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC11-81**

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**MICHAEL TANZI,**

**Petitioner,**

**v.**

**EDWARD BUSS, Secretary  
Florida Department of Corrections,**

**Respondent.**

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**REPLY TO RESPONSE TO  
PETITION FOR WRIT OF HABEAS CORPUS**

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## ARGUMENT IN REPLY

Mr. Tanzi submits this Reply to the State's Response to Petition for Writ of Habeas Corpus. 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. Mr. Tanzi expressly relies on the arguments made in his Petition for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

### REPLY TO 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**

At the outset Mr. Tanzi notes that this issue does not turn upon the extent of the aggravation presented at trial. In reviewing the effect which a complained of error by counsel may have had at trial the proper inquiry is on the effect which the error may have had on the jury's deliberation and consideration of all the evidence presented. In attempting to assess the impact that this hearsay evidence regarding an alleged sexual assault had on the jury's consideration of the 'in the course of a felony aggravator', it is impossible to nullify the significance which it may have

also had in the jury's findings in support of the other aggravators which were established.

Furthermore, the State's attempt to downplay the significance of a second sexual battery is a stunning turnaround from the position they took at trial. Indeed, the State went to great lengths to present evidence of a second sexual battery, even over defense objection. The State repeatedly emphasized the possibility of a second sexual battery in closing argument:

He's already forced her to perform oral sex. Why would we believe that it would stop there? How long was he with her? How many hours? What do we know about the other evidence in the case? What do we know about what the medical examiner told us?

R. 1706

We know that he already raped her once in the Texaco Station, and now we have evidence, further evidence that he raped her again...

R. 1707

So not only do we have her raped once, we have her raped again...

R. 1707

[T]he only real question is not whether Michal Tanzi vaginally raped Janet Acosta, the real question is, how many times. How many times in that hour and a half did he rape Janet Acosta.

R. 1712. Having so aggressively argued the significance of a second sexual battery to Mr. Tanzi's jury, even though it could not be proven, the State's claim now that it made no difference to the outcome of his sentencing is beyond belief.

None of these highly prejudicial arguments would have been presented to the jury without the hearsay testimony of DNA Analyst Robin Ragsdale. The State offered Ragsdale's testimony concerning work performed by serologist Lara Bahnweg to support their argument that blood found on the inside pocket of Ms. Acosta's pants corroborated their belief that Mr. Tanzi had committed a second sexual assault. (R. 817-18; 820-21). The significance which this testimony undoubtedly had on the jury cannot be understated. As such, the State's assertion that Mr. Tanzi is incapable of establishing fundamental error or any resulting prejudice due to the extent of the aggravation is unavailing.

Moreover, the State's reliance on *Brown v. State*, 473 So. 2d 1260 (Fla. 1985), in support of its argument that Mr. Tanzi cannot prove prejudice from the admission of this evidence, is misplaced. The State argues that *Brown* supports the proposition that where multiple felonies are stated as supporting the "during the course of a felony" aggravator, and one felony is invalidated, the validity of the aggravator is not undermined where there are other felonies to support it. *Id.* This argument, however, overlooks the impact that the inadmissible hearsay evidence had on the jury's weighing of the aggravators and mitigators. Moreover, unlike

*Brown*, the evidence in this case did not conclusively establish that a second rape had actually occurred.

Contrary to the State's assertion, the putting forth of this testimony before the jury was not harmless. The focus in determining the impact which this evidence had upon the jury does not end with simply evaluating the 'in the course of a felony' aggravator. Offensive evidence such as the possibility that the victim was raped just prior to her death, undoubtedly affected the jury's consideration of the other aggravators in this case.

Mr. Tanzi had a Sixth Amendment right to confrontation of the testimonial evidence entered by the State in support of its case in aggravation. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). Regardless of trial counsel's failure to effectively object to this impermissible testimony at trial, appellate counsel had an obligation to raise this issue on direct appeal. Because this error reached down into the validity of the jury's findings with respect to each aggravator established at trial it, constituted fundamental error. Appellate counsel's failure to raise a claim challenging the issue on fundamental error grounds on direct appeal denied Mr. Tanzi the opportunity to effectively challenge the validity and fairness of the penalty phase proceedings against him. There is a reasonable probability that this error directly influenced the outcome of his penalty phase proceedings. The result

is that confidence in the outcome of Mr. Tanzi's proceedings has been undermined.  
Relief is warranted.

**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 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.

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