

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
OF FLORIDA, SEMINOLE COUNTY

STATE OF FLORIDA,

Case No. M99-881-CFA

Plaintiff,

v.

RICHARD E. LYNCH,

Defendant
_____ /

SECOND AMENDED
ORDER DENYING MOTION FOR POST CONVICTION RELIEF
(RULE 3.851) AND ORDER ON DEFENDANT'S MOTION FOR REHEARING

The defendant, Richard E. Lynch, a prisoner under a sentence of death, filed a Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, pursuant to Rule 3.851. The motion set forth nine separate claims for relief with many subsections, but three of the grounds, I-G, II-F, and VII, were withdrawn by Collateral Counsel. A hearing was set for the remaining grounds on July 25, 2005, and it was concluded on July 30, 2005. Counsel requested time to file written arguments. After receiving the written arguments, this Court entered an amended order denying the motion. Thereafter, Lynch filed a Motion for Rehearing requesting that this Court revisit several issues, which the Court has considered. The Court is now ready to rule on the Motion for Post Conviction Relief, taking into consideration the issues raised in the Motion for Rehearing.

Each of the nine claims contained in the motion are addressed in the sequence they appear in the motion. Citations to the testimony in the original penalty phase hearing are identified as "(T-)" and citations to the testimony in the hearing on the post conviction relief motion are identified as

“(PCRT-).”

CLAIM I

MR. LYNCH WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. LYNCH’S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS UNDER THE FLORIDA CONSTITUTION AND UNDER FLORIDA COMMON LAW.

Throughout Claim I, Lynch raises several claims of ineffective assistance of counsel and asserts that he would not have entered a guilty plea if Counsel had been effective. In *Hill v. Lockhart*, 474 U. S. 52, 106 S. Ct. 366, 88 L. Ed.2d 203 (1985), the Supreme Court established a two-pronged test for determining claims of ineffective assistance of counsel relating to guilty pleas. The first prong is the same as the deficient performance prong of *Strickland*. The second prong requires the defendant to demonstrate “a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59. The Court has applied this test to each of the ineffective assistance claims.

A. FAILURE TO OBJECT TO, CHALLENGE, AND MOVE TO DISMISS COUNT III OF THE INDICTMENT.

Count III of the indictment charges armed burglary of a dwelling. The pertinent portion of the charge is as follows:

In the County of Seminole, State of Florida, on March 5, 1999, Richard E. Lynch did enter or remain in a structure, to wit: a dwelling located at 534 Rosecliff Circle, Sanford, the property of Roseanna Morgan and/or Leah Caday, as owner or custodian, with the intent to commit an offense therein, and in the course of committing said burglary, Richard E. Lynch was armed or became armed with an explosive or dangerous weapon, to wit: a firearm, contrary to Sections 810.02(1), 810.02(2)(b), 810.07, Florida Statutes.

The motion claims that the charge is deficient because it “fails to allege Mr. Lynch entered

THAT HIS PLEAS AUTOMATICALLY ESTABLISHED STATUTORY AGGRAVATORS THE STATE WAS REQUIRED TO PROVE BEFORE THE STATE COULD OBTAIN A DEATH SENTENCE.

Lynch claims he was not advised by counsel that entry of a plea to first-degree murder would automatically establish the aggravating circumstances the state would rely upon in the penalty phase. This claim is refuted by the record. Trial counsel discussed aggravating circumstances with Lynch, and he understood what they were. (PCRT - 68-69; 1099). He wrote lengthy letters to his lawyers discussing aggravating circumstances. (PCRT - 1102). There is no credible evidence in the record to establish this claim.

D. FAILURE TO INVESTIGATE AND THEREBY ADEQUATELY AND ACCURATELY ADVISE MR. LYNCH OF MITIGATION PRIOR TO ENTERING A GUILTY PLEA DUE TO A FAILURE TO INVESTIGATE.

Lynch's Motion for Rehearing claims the Court misapprehended this claim. Accordingly, the Court will address the specific argument raised by the motion.

Lynch asserts that at the time he entered his guilty plea, Counsel had failed to conduct a reasonably competent and thorough mitigation investigation. He contends neither he nor his Counsel were aware of the extensive mitigation available that was presented at the evidentiary hearing. Lynch argues that had Counsel conducted a reasonable investigation and then advised Lynch of the wealth of available mitigation evidence, there exists the probability that Lynch would not have entered a guilty plea, and would have elected to proceed to trial.

In *Grosenor v. State*, 874 So. 2d 1176 (Fla. 2004), the Court provided a test to determine if there is a reasonable probability a defendant would have insisted on going to trial, The test requires a court to consider:

The totality of the circumstances surrounding the plea, including such

and exited from her neck, and not the other way around as Mr. Ruel testified.

In his Motion for Rehearing, Lynch takes the Court to task for rejecting Mr. Ruel's testimony and making findings not supported by the evidence. Additionally, in his motion, Lynch takes the opportunity to chastise the Court because "the trigger pull of the gun was conducted *ex parte*, without notice to counsel and without being subject to cross examination." Both of these allegations require, but do not deserve, discussion.

It is alleged in Lynch's Motion for Rehearing, and in a separate Motion for Disqualification,² that the Court somehow erred in examining the Glock pistol.³ The Motion for Disqualification claims that the Court conducted this examination "*ex parte*, without notice to counsel" and thereby "made itself an expert witness for the State in these Proceedings." The examination of this particular piece of evidence occurred during the Court's deliberations, with neither party present. Such an examination is *in camera*,⁴ not *ex parte*. An "*ex parte*" examination would have required the State Attorney to have been present.⁵ It is entirely proper for the finder of fact to examine items of evidence introduced at a trial before making findings of fact. *See People v. Schultz*, 425 N. E. 2d 1267 (Ill. App. 1981) (a trial judge, as trier of fact, can examine the physical evidence introduced at trial). *See*,

²The Court denied the Motion to Disqualify Judge as being legally insufficient. Lynch filed a Petition for Writ of Prohibition with the Supreme Court of Florida. The Supreme Court denied the petition without prejudice for Lynch to raise this claim on appeal. Thus, the Court is free to address it on its merits.

³Lynch's Motion to Disqualify Trial Judge alleges "the gun was missing at the time of the hearing." Perhaps it was not in the courtroom during the hearing, but it was admitted into evidence at the penalty phase trial as State's Exhibit 39, and it received substantial attention at that time.

⁴*Black's Law Dictionary*, Revised Fourth Ed.

⁵*Id.*

The Court concludes that calling a ballistics expert to testify about the murder weapon would not have benefitted the defendant at trial.

G. FAILURE TO CONDUCT A REASONABLE INVESTIGATION OF GREG MORGAN, ROSEANNA MORGAN AND LEAH CADAY AND THEIR RELATIONSHIPS WITH EACH OTHER AND MR. LYNCH.

This claim was withdrawn by counsel.

H. FAILURE TO ADEQUATELY AND ACCURATELY ADVISE MR. LYNCH OF THE SPOUSAL PRIVILEGE AS IT RELATED TO HIS MURDER-SUICIDE LETTER TO HIS WIFE AND HIS PHONE CONVERSATIONS WITH HIS WIFE.

The contents of Lynch's murder-suicide letter includes the following:⁷

Send copies of letter and card to her family. . . .I want them to have a sense of why it happened, some decent closure, a reason and understanding. . . . I want them to know the pain she caused and that it was not some random act of violence . . . make your parents understand.

Trial counsel testified that when Lynch stated, "send copies of the letter...", he assumed Lynch was referring to the letter containing the above language. If that assumption had been accurate, the spousal privilege would have been waived. However, it appears that Lynch may have been referring to another letter and a card which were located in a gray box by Collateral Counsel.⁸ The question presented is, assuming he was referring to the other letter and card, whether Lynch waived the spousal privilege in the murder-suicide letter? Close analysis reveals that he did waive the privilege.

Section 90.504, Florida Statutes, provides as follows:

A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from

⁷Exhibit 11 introduced during the penalty phase hearing.

⁸ Exhibits 24 and 25, introduced on July 25, 2005 at the hearing on the instant motion.

