

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set forth nine separate claims for relief with many subsections, but three of the grounds, I-G, II-F, and VII, were withdrawn by Collateral Counsel.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

the dwelling without being invited to enter or remain in the dwelling.” The motion claims that “had Mr. Lynch known that Count III of the Indictment was defective and failed to include all of the elements of the crime of burglary, he would not have pled guilty, but would have exercised his right to trial. . . .”

This claim fails for three reasons:

(1) The facts of this case clearly show that Lynch gained entry to the dwelling through the teen-aged victim, Leah Caday, and that entry was gained by trick or fraud. *Lynch v. State*, 841 So.2d 362 (Fla. 2003); *Compare, Irazarry v. State*, 905 So.2d 160 (Fla. 3d DCA 2005). Consent to enter obtained by trick or fraud is actually no consent at all, and, therefore, the entry is unauthorized. *Gordon v. State*, 745 So.2d 1016 (Fla. 4th DCA 1999), *rehearing denied, cause dismissed*, 751 So.2d 50.

(2) The question of whether entry was by consent is an affirmative defense and does not have to be alleged in the Indictment. *State v. Hicks*, 421 So.2d 510 (Fla. 1986).

(3) Lynch’s claim that he would not have entered his plea of guilty had he known of the “defective” charge is simply *ipsi dixit*. Lynch has never testified in this case, and there is no other admissible evidence in the record to substantiate this assertion.

B. FAILURE TO ADEQUATELY AND ACCURATELY ADVISE MR. LYNCH OF THE ELEMENTS AND LEGAL DEFENSES TO THE CRIMES CHARGED IN THE INDICTMENT PRIOR TO ENTERING A GUILTY PLEA.

Lynch alleges that counsel failed to adequately and accurately advise him of the elements of offenses charged in the indictment. This claim is refuted by the record.

On October 19, 2000, Lynch stood before this Court and swore, under oath, as follows:

“I am satisfied with the representation my lawyer has given me and I have fully discussed my case and this petition with my lawyer.” (See, attached Exhibit A.) The Court made a careful inquiry as to whether Lynch knew what he was doing and that he was entering the plea freely and voluntarily. The Court read the charges in the indictment to Lynch to make sure he understood the nature of the charges. (See, attached Exhibit B.) The indictment fully sets forth the elements of each of the offenses, so Lynch was aware of them before his plea was accepted. (See, attached Exhibit C.)

The claim that Lynch was not adequately and accurately advised of the defenses he may have had to the crimes charged is without merit. His trial counsel discussed the possible defenses with Lynch. As trial counsel testified, “[w]hat we did was we said there are certain defenses that relate to this particular case in the abstract, but you’re . . . in this particular case they don’t exist.” However, the possible defenses were discussed although trial counsel concluded they were not “marketable to a jury.” (PCRT-54-58).

The Court is satisfied that Lynch was sufficiently advised of the possible defenses available to him. However, even if trial counsel overlooked a defense urged by Collateral Counsel in the instant motion, Lynch suffered no prejudice.

A defendant is not required to allege a “viable defense” in order to raise this claim. The focus is on the credibility of the assertion that the defendant, knowing of the undisclosed defense, would not have entered the plea. Of course, the question of whether the undisclosed defense would likely succeed at trial may be considered “largely,” but not “totally,” in determining the credibility of the assertion. The inquiry is “whether counsel’s constitutionally ineffective performance affected the outcome of the *plea process*.” *Grosevenor v. State*, 874 So.2d 1176, 1179, (Fla. 2004). The defenses presented by Lynch in the instant motion are all refuted by the record, could not have been established

by the facts of the case, and would not have been submitted to the jury had there been a jury trial. There is no evidence in the record to establish Lynch's claim that he would have insisted upon a jury trial had he been advised of the defenses alleged. Actually, the evidence is to the contrary for several reasons:

1. One of the defenses Lynch now asserts is that he did not intend to kill Roseanna Morgan or Leah Caday, and, therefore, would have only been guilty of second-degree murder or manslaughter because he was acting in the "heat of passion." This assertion, unsupported by any evidence, ignores the fact that the homicides occurred during the course of a burglary, and it ignores the fact that Lynch arrived at the residence fully armed with more than one firearm. Florida law recognizes the "heat of passion" defense. The court explained the defense in *Febre v. State*, 30 So.2d 367, 369 (Fla. 1947):

The law reduces the killing of a person in the heat of passion from murder to manslaughter out of recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation.

In order for a defendant to successfully present this defense, the evidence must show: (1) the temporary suspension or overthrow of the reason or judgment of the defendant; (2) by the sudden access of passion; (3) provided the killing does not proceed from a bad or corrupt heart; and (4) it must arise from legal provocation. Here, there is no room for a "heat of passion" defense. Lynch drafted a letter to his wife two days prior to the murders setting forth his intent to kill Roseanna

Morgan. He brought firearms with him to accomplish that goal - rather than using a weapon of opportunity - and there was no legal provocation for the murders.

2. Lynch also asserts that the kidnapping of Leah Caday was “slight and inconsequential.” This claim is not borne out by the facts. Lynch held Leah Caday at gunpoint for more than thirty minutes. She was thoroughly terrorized. The confinement was essential to the plan to murder Roseanna Morgan and was unnecessary for that murder to be accomplished. *Faison v. State*, 426 So.2d 963 (Fla. 1983); *Jones v. State*, 844 So.2d 745 (Fla. 5th DCA 2003). Additionally, the indictment charges kidnapping “with the intent . . . to terrorize said victim,” and that method of committing the crime does not require asportation of the victim or more than slight or inconsequential confinement. See *Lee v. State*, 770 So.2d 231 (Fla. 3d DCA 2000); *Biggs v. State*, 745 So.2d 1051, 1052 (Fla. 3d DCA 1999).

3. Lynch now claims that he would not have entered his guilty plea had he known of these supposed defenses. This assertion is not supported by any evidence whatsoever.

4. In his motion for rehearing, Lynch again asserts that his entry into Roseanna Morgan’s apartment was “consensual,” and not burglary. Lynch contends that he was not advised of the defense of consensual entry. This issue was thoroughly discussed above in Claim IA, and is refuted by the evidence.

5. Additionally, in his motion for rehearing, Lynch claims that his counsel failed to provide a factual basis for the kidnapping charge and misstated the law of burglary as it relates to consensual entry. The motion alleges that this Court failed to address this issue, but the issue is addressed in Claim I, subsection I, below.

C. FAILURE TO ADEQUATELY AND ACCURATELY ADVISE MR. LYNCH

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

factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum sentence the defendant faced at trial.

At the evidentiary hearing, Counsel testified, “ I don’t know that there was ever any discussion by [Lynch] which indicated he actually wanted to go to trial. I believe he characterized it in one of the writings to me as he had already given the prosecutor their case on a silver platter, so that like a grade school person could present it.” (PCRT 69).

Additionally, especially in this case, the question of the extent of available mitigation had nothing to do with the question of guilt or innocence. The evidence of guilt was overwhelming. Lynch left a letter to his wife in which he incriminated himself; he was arrested at the scene with several firearms; he spoke with the police dispatcher and the hostage negotiator and made incriminating statements to both of them; and he called his wife during the incident and confessed to her. Thus, there was no practical advantage in going to trial on the issue of guilt or innocence because of the existence of substantial mitigation, since none of it would be admissible in the guilt or innocence phase.

Furthermore, Lynch’s claim that there exists a *probability* that he would not have entered a guilty plea and proceeded to trial is without merit because Lynch has never testified to this assertion, and there is no other credible evidence in the record to establish that Lynch wanted to go to trial.

See Claim II.B. for further discussion about Counsel’s mitigation investigation..

E. FAILURE TO OBJECT AND/OR FILE A MOTION TO SUPPRESS THE SEARCH OF MR. LYNCH’S HOME AND THE STATE’S USE OF ILLEGALLY OBTAINED EVIDENCE.

In this claim, Lynch attacks the competency of defense counsel for failing to challenge the

sufficiency of the search warrant that was executed on Lynch's house. The claim asserts the warrant was facially invalid or over broad. Specifically, the claim attacks the warrant for failure to describe the property to be seized with particularity. The search warrant stated:

There is now being kept in or on said premises and curtilage thereof certain evidence The evidence referenced above to be found on said premises include, but is not limited to, photographs and photo equipment, computer print outs, computer, cd roms, computer discs, credit card and bank statements, all weapons, clothing pertinent to the investigation, documents or letters addressing the identification of Richard Lynch, letters written by the Defendant Richard Lynch or the victims of homicide Roseanna Morgan and Leah Caday, and any paper receipts, or other documents that pertain to, or may pertain to the crime referenced above.

In *Green v. State*, 688 So.2d 301 (Fla. 1996), the court stated:

For a search warrant to be valid it must set forth with particularity the items to be seized. This particularity requirement makes general searches impossible and limits the executing officer's discretion when performing a search. While this requirement must be given a reasonable interpretation consistent with the character of the property sought, when the purpose of the search is to find specific property, the warrant should particularly describe this property in order to preclude the possibility of the police seizing any other. (Citations omitted.).

The executing officers seized a number of items including firearms, magazines about self defense and killing, adult erotic material, and photographs. Assuming the warrant was over broad as to many of the items seized, *See United States v. Steitiye*, 73 Fed. Appx. 908 (9th Cir. 2003) (Unreported), partial over breath in a warrant will not render the remainder of the warrant invalid, and the over broad sections can be severed and the remaining components upheld. *United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986).

Lynch's main complaint involves the letter he wrote to his wife disclosing his intent to

murder Roseanna Morgan and then committing suicide. The letter was generally described in the search warrant and was obtained by law enforcement when Mrs. Lynch surrendered it upon request. (T-95). Thus, the letter, having been properly delivered to Lynch's wife, was her property and was lawfully obtained by law enforcement since Lynch had no further ownership interest in it.

Lynch additionally contends that the items seized prejudiced Lynch's ability to present mitigation to the jury about Lynch's family life and his relationship with his wife because of the "specter of pornography and out-of-mainstream gun and survival literature at the prosecutor's fingertips."¹ There is no evidence in the record to support this assertion. Nor is there any evidence that the State Attorney intended to use any of the items seized, other than the letter, for any purpose.

F. FAILURE TO CONDUCT A REASONABLE INVESTIGATION AND CONSULT FIREARMS EXPERT AND THEREBY ADEQUATELY AND ACCURATELY ADVISE MR. LYNCH OF THE LEGAL SIGNIFICANCE OF AND CORROBORATION OF THE CLAIM OF ACCIDENTAL DISCHARGE OF FIREARM

At the evidentiary hearing, Lynch produced Roy Ruel as an expert witness to testify that the shots Lynch fired from the Glock pistol were accidental. Ruel acquired a Bachelor of Science Degree in mechanical engineering from the University of Washington, and he worked in the pulp and paper industry. (PCRT 353). He began investigating and studying firearm ballistics, and he has written over thirty articles that were published in gun magazines. (PCRT 354). Although Ruel has been involved in a number of cases, he has testified in only one case, and he testified about a Glock. (PCRT 354). Mr. Ruel testified that he is completely *self-taught* concerning firearms. (PCR. 358). However, in 1987, Ruel also attended a Glock Armory School at the Portland, Oregon police range. (PCRT 358).

¹Evidence of Lynch's relationship with his wife may not have been very favorable. When Cecilia Alfonso, the mitigating specialist, tried to talk to Virginia Lynch, she shut the door in her face.

Ruel testified that he had learned of accidental shootings with Glocks in newspaper articles. (PCRT 369). Mr. Ruel testified that he believed that Lynch accidentally shot Roseanna four times and Leah once. (PCRT 375). Ruel based his conclusions on his belief that a bullet from the Glock struck Roseanna's hand and then entered her neck and exited her eye. (PCRT. 373). Ruel testified that the bullet was not found in the apartment because all the shots were fired before Roseanna was brought inside the apartment. (PCRT 373).

The Court had the opportunity to observe this witness and judge his credibility. He is among the least credible experts this Court has ever heard testify. The Glock in question is a large semi-automatic hand gun. It is inconceivable that a person could accidentally fire such a weapon seven times for a number of reasons. First, this weapon makes a lot of noise when it is fired. The noise would alert a person who accidentally pulls the trigger once and the person would not continue to pull the trigger a number of times. Second, because this weapon is a semi-automatic pistol, the trigger must be pulled each time the weapon is fired. Third, large caliber semi-automatic pistols deliver a recoil "kick" when fired that tends to throw the barrel upwards and away from the target. It is necessary to re-aim this type of weapon towards the general direction of the target each time the trigger is pulled unless the weapon is being fired in a totally random manner. The evidence in this case does not support random firing. Fourth, there is no mistaking when the firearm is discharging a round. The noise, the recoil, the smoke, and the smell of gunpowder immediately brings to the shooter's attention the fact that a round has been discharged. Fifth, it stretches the imagination to think that a person could accidentally discharge a semi-automatic weapon seven times and accidentally hit the same person four of the seven times. In such a situation, the person is a target and not the unintended victim of an accidental discharge. Sixth, the Court took the time to inspect the

weapon in chambers, and the trigger pull is not even close to being a “hair trigger.” Seventh, it is undisputed that Lynch carried several firearms to Roseanna Morgan’s apartment and fired a 9mm Luger in addition to the Glock. (T.238).

There was considerable ballistics testimony about the Glock pistol during the penalty phase hearing. Officer Doug Bottalico testified he found several projectiles at the crime scene. One projectile was located in the living room (T- 166). Another projectile was located in the inside of the front door frame. (T - 168). There was also a bullet hole in the wall of the foyer. (T - 168). Thus, in order to find Mr. Ruel’s testimony credible, the Court would have to believe Lynch accidentally discharged the firearm while he was positioned at different locations throughout the apartment and then accidentally shot Leah Caday in the back.

Moreover, Nanette Rudolph, who is employed with the firearms department of the Orlando Regional Crime Lab for the Florida Department of Law Enforcement, testified during the penalty phase. (T. 223-224). Ms. Rudolph testified that she completed a two-year formal training program in firearms identification. She explained that her training and work experience included examination of projectiles to match them with weapons. (T. 224). Ms. Rudolph testified that she tested the Glock, and the Glock was operating correctly and that the trigger pull was within normal specifications. (T. 232). She also explained that the Glock was a semi-automatic weapon which requires an individual to release the trigger each time before firing the next shot. (T. 233-234). She testified that a semi-automatic, will fire only once if a person tenses up and pulls the trigger without releasing it. (T. 233). Automatic weapons will continue to fire as long as the trigger is pulled or until the weapon runs out of ammunition. (T. 233). Additionally, during the penalty phase, Dr. Seiber, the medical examiner, testified that the projectile that caused injury to Roseanna Morgan’s eye, entered her eye

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.*

e.g., *Mitchell v. Ahitow*, 1993 WL 86809 (N.D. Ill 1993) (Not Reported) (In *Mitchell*, the trial judge asked the defendant to demonstrate how the gun accidentally had fired without two separate movements on defendant's part, namely, cocking the weapon and pulling the trigger. The trial court stated that in order for the gun to be discharged, it had to be cocked and the trigger had to be pulled. The court stated further that he had tried to bang the weapon against objects, and that one would have to cock it consciously before it could fire.); *Santiago v. State*, 900 So. 2d 710 (Fla. 3d DCA 2005) (gun itself was introduced and jury had opportunity to examine gun to determine if it was capable of causing great bodily harm). And, in Florida, the finder of fact is specifically authorized to examine items of evidence prior to rendering a ruling. Rule 3.400, Fla. R. Crim. P.⁶

The Motion for Rehearing also questions the ability of the Court to examine a semi-automatic pistol and make general observations about its characteristics and operating features. Specifically, the motion questions the Court's "knowledge or expertise in guns in general or Glockes in particular." Judges, and for that matter, jurors, are not required to leave their common sense and life experiences on the courthouse steps before deliberating the issues presented in a case. The Court's examination of the weapon in question involved no particular expertise, and the observations made were within the common knowledge of the adult population, including trial judges who have been on the bench for nearly two decades. *Marshall v. State*, 44 So. 742 (Fla. 1907); *Edelstein v. Roskin*, 356 So. 2d 38 (Fla. 3d DCA 1978).

⁶Rule 3.400. Materials to the Jury Room

(a) Discretionary Materials. The court may permit the jury, upon retiring for deliberations, to take to the jury room:

* * * * *

(4) all things received in evidence other than depositions. If the thing received in evidence is a public record or a private document which, in the opinion of the court, ought not to be taken from the person having it in custody, a copy shall be taken or sent instead of the original.

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.

disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.

The evidence establishes that Lynch drafted the letter while contemplating suicide. It has been held that a written communication by a wife to her husband while the wife is contemplating suicide is not admissible in evidence if the wife survives the suicide attempt because the communication was made during the marriage. *State v. Stewartson*, 443 So.2d 1074 (Fla. 5th DCA 1984). Here, Lynch did not carry out his plan to commit suicide. However, section 90.507 provides:

A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, *or consents to disclosure of, any significant part of the matter or communication.* (Emphasis supplied.)

The Court has carefully read the three exhibits in question and concludes that mere disclosure of the contents of Exhibits 24 and 25 would not have accomplished Lynch's stated purpose of providing the victim's parents and Virginia Lynch's parents "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. . . ." Those two exhibits contain expressions of affection and, in Exhibit 25, a sense of frustration over the break up of the relationship with Roseanna Morgan, but they do not provide a "reason and understanding" of why "it happened." Nor do they explain "the pain she caused." Only the disclosure of the contents of the murder-suicide letter, Exhibit 11, would accomplish that purpose. For that reason, the Court concludes that Lynch intended for the contents of Exhibit 11 to be disclosed, not only to the victim's parents, but also to Virginia Lynch's parents. Additionally, much of the information contained in the letter is cumulative to the statement Lynch

made to Joyce Fagan, the 9-1-1 operator, and to Stephanie Ryan, the crisis negotiator.

Lynch had two telephone conversations with his wife during and just after the time of these two murders. The telephone conversations were initiated from Roseanna Morgan's apartment. Virginia Lynch testified to these conversations at the penalty phase hearing. (T-88-97). Trial counsel did not object on the basis of spousal privilege to any of the conversations.

The first conversation was brief. Lynch told his wife that he loved his children. That was not prejudicial to Lynch in any way. He also stated he was sorry for what he was going to do. That statement was repeated later to Joyce Fagan and to Stephanie Ryan. (T-120; T-133). The statement did not prejudice Lynch because it was cumulative. Mrs. Lynch stated that she heard someone screaming in the background. Screams by a third person are not privileged. Additionally, since the conversation took place in the presence of a third person (Leah Caday), it was not intended to be privileged. Ehrhardt, *Florida Evidence*, 2005 ed., §504.3. See *Mobley v. State*, 409 So.2d 1031 (Fla. 1982); *Baker v. State*, 336 So. 2d 364 (Fla. 1976).

The second conversation took place a few minutes later. Mrs. Lynch did not hear any screams during the second conversation. During that conversation, Lynch admitted that "he'd shot someone." Then Mrs. Lynch testified, "I ask (sic) him I said did you shoot the lady that was screaming and he said yes and I said was that the lady you were having an affair with and he said yes." (T-92). This statement was repeated by Lynch to Joyce Fagan. (T-120). Lynch apparently did not intend it to be privileged since he repeated it, but even if it was intended to be privileged, it was cumulative to his later statement and not prejudicial.

During the second conversation, Lynch told his wife the location of the letter that is Exhibit 11. That is when she retrieved it. (T-94). This statement was not privileged because, as is explained

above, Lynch intended the contents of the letter to be disclosed.

The Court concludes that failure to object to the conversations did not prejudice Lynch in any way because the information contained in them was cumulative or not privileged.

I. FAILURE TO ENSURE ADEQUATE FACTUAL BASIS PRIOR TO AND DURING PLEA COLLOQUY

This issue was decided by the Supreme Court of Florida on direct appeal. *Lynch*, 841 So.2d at 375-376 (Fla. 2003). There, the court stated, “[c]learly, the appellant understood the charges and pled to them voluntarily. The evidence here is sufficient to support that the guilty plea underlying the convictions was given knowingly, intelligently, and voluntarily.”

Lynch now alleges that if “he had understood that the conduct he admitted to did not constitute the offense charged,” . . . “he would not have pled guilty to the crimes and would have insisted on proceeding to jury trial.” The conduct to which Lynch admitted constituted the offenses that were charged, and there is simply no evidence in the record to support the assertion that Lynch would have insisted on proceeding to a jury trial.

CLAIM II

MR. LYNCH WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY 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 OF THE FLORIDA CONSTITUTION AND UNDER FLORIDA COMMON LAW

A. FAILURE TO ADEQUATELY ADVISE MR. LYNCH OF THE LAW, DEFENSES AND SPENCER HEARING PRIOR TO WAIVING RIGHT TO JURY IN PENALTY PHASE.

In this claim, Lynch alleges that Counsel failed to advise him that “it would be difficult for

the judge to reject a jury's life recommendation in light of recent case law" Additionally, in his motion for rehearing, Lynch asserts that he raised additional claims in his motion and requests that this Court address each of these claims. According to Lynch, the full claim stated in his 3.851 motion is:

Mr. Lynch's lawyers failed to advise Mr. Lynch that 1) it would be difficult for the judge to reject a jury's life recommendation in light of recent caselaw decided prior to October 19, 2000, including but not limited to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), and therefor, there was no benefit to waiving the right to jury; 2) that he had a right to a *Spencer* hearing, which is in itself a sentencing bench trial conducted after the penalty phase jury trial and therefor, there was no benefit to waiving the right to a jury; 3) that he had a right to contest and defend against the aggravators (or elements of capital murder), the state was seeking to prove and therefor there was no benefit to waiving the right to a jury; 4) that the murder-suicide letter was inadmissible under the doctrine of spousal privilege; 5) that the murder-suicide letter, the pornography, guns and other items seized from his home were inadmissible as fruits of an illegal search based on a defective warrant and lack of probable cause ; and 5) (*sic*) that he could present statutory and non-statutory mitigators

As to claims 1, 2, 3, and 6,⁹ the evidence in the record supports the finding that Lynch freely and voluntarily waived a jury for the penalty phase of his trial. Lynch entered a plea as charged on October 19, 2000. At that time, he filed a waiver of the advisory jury in the penalty phase. (See attached Exhibit A.) During the plea colloquy, the Court specifically addressed the jury waiver. Lynch stated under oath that he understood the consequences of waiving a jury and wished to waive the jury. The Court advised Lynch as follows after accepting Lynch's plea:

Court: Now the second thing that you have done is you have asked me to

⁹ The second Claim 5 in the 3.851 Motion and in the Motion for Rehearing was misnumbered, and is actually Claim 6.

consider waiving a jury trial for the penalty phase of this proceeding.
Do you understand that?

Lynch: Yes.

Court: Is that what you want to do?

Lynch: Yes, your Honor.

Court: I need to advise you that you have the right to have a jury of twelve persons hear matters of aggravation which are limited by statute, and any matters of mitigation that you wish to present. You have the right to be represented by a lawyer during the course of that hearing. You're entitled to testify at the hearing or to remain silent, and your silence cannot be used against you. You have the right to the subpoena power of the Court to compel the attendance of any witnesses that you may wish to call in your behalf at the hearing. If the jury by a vote of at least six to six recommends a life sentence, I will not override that decision and will impose a life sentence upon you. Do you understand that?

Lynch: Yes, your Honor.

Court: On the other hand, if the jury should return a vote of at least seven to five and recommend that you be sentenced to death, I would have to give that recommendation, quote, great weight, end quote, although the final decision on the penalty to be imposed is my responsibility alone; do you understand that?

Lynch: Yes, your honor.

Court: Is that what you want to do, you want to waive the right to have a jury trial as far as the recommendation of the penalty is concerned?

Lynch: Yes, sir.

Court: You're sure about that?

Lynch: Yes, sir.

(R. 381-383).

The only advantage a capital defendant may have with a penalty phase jury under Florida's death penalty scheme is the possibility that the jury may recommend a life sentence.¹⁰ If that occurs,

¹⁰There is no other advantage. The jury recommendation will not include any interrogatories setting forth which aggravating circumstances were found, and by what vote; which mitigating circumstances were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating or mitigating circumstances. Nor will anyone ever know if the jury's recommendation was based upon passion or prejudice, or was simply arbitrary. *See Ibar v. State*, 31 Fla. L. Weekly S149 (Fla. Mar. 9, 2006) (Opinion not released for publication.). Accordingly, the jury recommendation (unless it is for life) is meaningless to the trial judge, *who has the ultimate responsibility to both find the facts and impose the sentence.*

the Supreme Court of Florida will seldom approve a jury override. *Tedder v. State*, 322 So.2d 908 (Fla. 1975). Here, the evidence against the defendant was overwhelming, and the aggravating factors were numerous. The likelihood of a jury returning a recommendation for a life sentence in a double murder involving an innocent teen-aged girl was remote, to say the least. Counsel cannot be faulted for avoiding the inevitable and advising the defendant to waive a penalty phase jury. *See Bolander v. State*, 503 So.2d 1247, 1250 (Fla. 1987) (Strategic decisions by counsel do not constitute ineffective assistance if alternative courses of action have been considered and rejected.) This tactic had two distinct advantages: First, it avoided the problem of the Court being required to give “great weight” to the jury recommendation. Second, the mitigation presented in the case was not the sort of mitigation that jurors readily accept as mitigating. Childhood problems, alcohol abuse, mental stress, parenting skills, and the like are often viewed by jurors as “excuses” for criminal conduct rather than mitigating factors. Sundby, *A Life and Death Decision - A Jury Weighs the Death Penalty*, Palgrave McMillan, 2005. Trial judges are trained to evaluate this kind of mitigation and are more likely to accept it and give it at least some weight.

Claim 4 (spousal privilege) is fully discussed in Claim IH above and Claim 5 (search warrant) is fully addressed above in Claim IE.

This claim also asserts that Lynch “would not have waived his right to a jury trial in the penalty phase portion of his capital trial” had he been properly advised by counsel. There is no evidence of this assertion presented by Lynch through testimony anywhere in the record, and this claim should be rejected for that reason alone.

B. FAILURE TO CONDUCT A REASONABLY COMPETENT MITIGATION INVESTIGATION AND FAILURE TO PRESENT MITIGATION

This claim is somewhat redundant to Claim ID. The gist of the claim is that trial counsel failed to hire a mitigation specialist who would have uncovered additional mitigation such as the matters presented at the hearing on the Motion for Post Conviction Relief.

In his motion for rehearing, Lynch requests the Court to apply the tests set forth in *Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed.2d 389 (2000); *Wiggins v. Smith*, 539 U. S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) and *Rompilla v. Beard*, 545 U. S. 374, 125 S. Ct. 2456, 156 L. Ed. 2d 360 (2005).

A claim of ineffective assistance of counsel, based upon a failure to investigate mitigation, must be considered with heavy deference to counsel's judgments. *Wiggins*, 539 U. S. at 510 (2003).

In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of the evidence already known to counsel, but whether the known evidence would lead a reasonable attorney to investigate further. In assessing prejudice resulting from the alleged ineffective assistance of counsel during the penalty phase, a court must reweigh the evidence in aggravation against the totality of the available mitigating evidence. *Wiggins*, 539 U.S. at 534.

For instance, the failure to investigate the facts and circumstances surrounding a prior burglary conviction may, or may not, be highly prejudicial. A prior burglary conviction may involve a classic common law burglary or little more than a trespass, given the expanded definition of burglary in many states, including Florida. Assuming the prior conviction involves the latter, failure to investigate such an offense would deprive the defendant of the ability to minimize its effect before the jury. *See, Rompilla*, supra. On the other hand, as in this case, the failure to investigate may ultimately have little or no impact on the sentencing decision.

Lynch claims that additional mitigation, including evidence to “humanize him” should have been discovered and presented at the penalty phase trial. This evidence includes, among other things, testimony from witnesses in New York and documents such as birth certificates, marriage certificates, Lynch’s childhood confirmation photograph, high school records, and credit card receipts showing Lynch had exceeded his credit limit in the month prior to the murder. The latter evidence, it is argued, “would have corroborated Lynch’s claim of financial stress.” Additionally, it was disclosed that sometime in the past, Lynch “thwarted an assault and assisted in capturing a robbery suspect.” Most of the information presented during the hearing on the present motion was either cumulative or of minimal value. Much of it was remote in time and not mitigating in the case at hand. *Knight v. State*, 726 So.2d 423 (Fla. 1998).

Some of the evidence presented at the evidentiary hearing was presented during the penalty phase hearing by Dr. Olander. For instance, Dr. Olander testified about Lynch’s past alcohol problems (T-644); the fact that his father was a strict disciplinarian (T-654); his physical and emotional abuse (T-655); his paranoia (T-659); including his fear of school (T-667); and his mental problems. (T-657-662). The Court accepted most of her testimony and considered it when weighing the aggravating and mitigating circumstances.¹¹

The record shows extensive evidence of mitigation was presented to the Court during the penalty phase. In fact, the Court found the following mitigation to have been established: (1) the crime was committed while the defendant was under the influence of a mental or emotional

¹¹Dr. Olander was a credible expert witness. The only parts of her testimony that the Court rejected were her conclusions that Lynch went to Roseanna Morgan’s apartment with the sole intent to commit suicide and not to commit murder (T-729), and her conclusion that Lynch had a schizoaffective disorder. The other evidence in the case simply did not support those conclusions.

disturbance; (2) the defendant's capacity to conform his conduct to the requirements of law was impaired; (3) the defendant has no significant history of prior criminal activity; (4) the defendant has a personality disorder; (5) the defendant was emotionally and physically abused as a child; (6) the defendant has a history of alcohol abuse; (7) the defendant has adjusted well to incarceration; (8) when possible, the defendant has sought gainful employment; (9) the defendant cooperated with the police; (10) the defendant has expressed remorse; and (11) the defendant has been a good father to his children and intends to continue being a good father while in prison.

With the exception of the testimony concerning brain damage, which is discussed later in this order, the rest of the laundry list of childhood problems and social difficulties presented do little to expand the information the Court already had during the penalty phase. An increase in the volume of this type of information does not necessarily increase the weight of it. There is no question that Lynch had mental problems - one cannot imagine a perfectly normal person committing the murders in this case.

The question presented on the instant motion is: Was Lynch prejudiced due to the failure of counsel to present the mitigation presented at the evidentiary hearing? Stated differently, do all of these mitigating circumstances somehow reduce the responsibility Lynch bears for these murders, or do they simply explain the various factors that may have contributed to his actions? The mere presentation of mitigating evidence does not preclude the imposition of the death penalty. *Bolender*, 503 So.2d at 1249. In assessing prejudice, the Court must reweigh the evidence in aggravation against the totality of the mitigation presented during the trial and the post conviction evidentiary hearing to determine if confidence in the outcome of the penalty phase trial has been undermined. *Hannon v. State*, 31 Fla. L. Weekly S539 (Fla. Aug. 31, 2006) (Opinion not released for publication.).

The Court has carefully considered each of the new mitigating circumstances presented and finds that there is no reasonable possibility that the Court would have been persuaded to impose a life sentence had they been presented during the penalty phase hearing. Accordingly, this Court concludes that counsel's failure to investigate and present the additional mitigation did not undermine the confidence in the outcome. *Compare Wiggins*, 510 U.S. at 534-535 (the mitigating evidence counsel failed to discover and present was powerful where the defendant suffered physical torment, sexual molestation, repeated rape, and homelessness, and counsel only presented mitigating evidence that the defendant had no prior convictions).

Thus, the Court finds this claim to be without merit.

C. FAILURE TO ENSURE A REASONABLY COMPETENT MENTAL HEALTH EVALUATION

This claim involves the selection of an expert to evaluate Lynch for mental disorders.

Originally, defense counsel asked Dr. Cox to evaluate Lynch. Defense counsel were not satisfied with the evaluation and substituted Dr. Olander. (PCRT-1115-1118). Dr. Cox evaluated Lynch to some extent and suspected there was brain damage. (PCRT-614, 621). Dr. Olander did not evaluate Lynch for brain damage because she assumed Dr. Cox had ruled it out. (PCRT-646). She testified at the penalty phase hearing that Lynch did not suffer from brain damage. (PCRT-647). She conceded at the hearing on the post conviction relief motion that a better answer would have been she did not know because she had not administered any neuropsychological tests. (PCRT-647).

Dr. McCraney interviewed and examined Lynch twice. (PCRT-725). He considered Lynch's family history, developmental history, social history, and medical history. (PCRT-726). He concluded that Lynch had frontal brain damage based upon the results of a word and memory game

(PCRT-728-731), as well as review of Lynch's high school records and I.Q. tests. (PCRT-733-739). He opined that there was evidence Lynch was psychotic due to his delusions about a relationship with a woman named Vesina Luvson. (PCRT-739). He testified that frontal impairment affects a person's ability to conform to laws and that people with frontal brain damage can become violent when threatened. (PCRT-741). Such persons, when exposed to stress, can be "a bad situation waiting to happen." (PCRT-742). Dr. McCraney concluded that Lynch has an inability to control his behavior and that Lynch met the statutory mitigator concerning impairment because of his inability to control his behavior. (PCRT-739). He stated that Lynch's psychosis interferes with his ability to distinguish right from wrong, but he is "not totally incapable of doing it." (PCRT-740). He stated that Lynch could have had "the perfect storm" with the stressors of the anniversary of the death of a parent (Lynch's mother), the credit card debt, and his failing marriage. (PCRT-742-743).

Dr. Joseph Wu testified that he evaluated Lynch's PET scan, and he opined that Lynch has an abnormality in the frontal lobe that is consistent with psychotic disorders. (PCRT-886). In contrast, Dr. Lawrence Holder, a doctor of nuclear medicine, disagreed with Dr. Wu. He did not believe Lynch suffered brain damage. (PCRT-819-820).

Dr. Sesta testified and concluded that Lynch has "mild brain damage." (PCRT-965). The damage is "mild," but "significant," and sufficient for a diagnosis of dementia. (PCRT-965). Dr. Sesta testified that Lynch absolutely does not have antisocial behavior, but is more likely to be manipulative and passive-aggressive. (PCRT-973). Dr. Sesta explained that people with Lynch's brain damage are fine as long as things are routine. However, when stressors occur, there can be a "disaster." (PCRT-987). Dr. Sesta did not think Lynch was insane and that he knew what he was doing and he knew it was wrong. (PCRT-982). He testified that Lynch's brain damage "might" make

him less culpable for the offenses for which he was convicted. (PCRT-983).

Dr. Riebsame testified at the penalty phase trial and at the hearing on the instant motion. He was somewhat discredited for failure to follow the appropriate protocol for testing administered to Lynch. (PCRT-1053-1057; 1060-1061; 1075-1083; 1153-1154; 1169). Dr. Riebsame re-evaluated Lynch prior to the hearing on the instant motion. (PCRT-1039). He now believes that Lynch suffers from brain damage. (PCRT-1039). However, his basic opinion did not change, and he believes Lynch has the ability to control his behavior. (PCRT-1040; 1179).

Dr. Danziger, a psychiatrist, testified at the hearing on the instant motion. He reviewed twenty different documents prior to evaluating Lynch on March 18, 2005. (PCRT-1199; 1204-1207). He testified that Lynch was not suffering from any psychotic illness or dementia at the time of the murders. (PCRT-1213-1214). He testified that Lynch had excellent memory recall, and he saw no indication of a deficit in memory. (PCRT-1213). He rejected the suggestion that the murders were “compulsive behavior” because Lynch drafted the murder-suicide letter two days prior to the murders. (PCRT-1209). He also noted that after killing two people, Lynch had sufficient self control to refrain from killing himself, and during the 9-1-1 call after the murders, Lynch indicated to the operator he did not want the police to shoot him. (PCRT-1210-1211; 1214-1216).

Although most of the various mental health experts generally agreed that Lynch suffered from brain damage, and that could affect his ability to control his behavior, none of them concluded that Lynch’s brain damage directly contributed to the events surrounding these murders. For instance, Dr. Sesta testified Lynch was not legally insane, he knew what he was doing, and he knew what he was doing was wrong. (PCRT-982). He also testified that Lynch’s brain dysfunction would be a mitigator because Lynch was less able to conform his behavior to the standards of the law and might make him

less culpable for the charged offenses. (PCRT-983). The Court accepts this testimony as accurate.

This mitigating circumstance was given “moderate weight” after the penalty phase trial. The Court is aware that brain damage can be a significant mitigating factor. *Crook v. State*, 813 So. 2d 68 (Fla. 2002). Since brain damage falls within the statutory mitigating circumstance of “extreme mental or emotional disturbance,” it must be considered and given appropriate weight even if there is a lack of nexus to the mitigating circumstance and the crime itself. *Jones v. State*, 652 So.2d 346 (Fla. 1995). Here, of course, the Court did not find Lynch’s emotional disturbance to be “extreme,” but gave it “moderate weight” anyway. The Court has carefully considered the brain damage issue in this case and, after reviewing the transcripts of both the penalty phase hearing and the post conviction relief hearing, concludes that this mitigating circumstance was appropriately weighed after the penalty phase hearing and deserves no further weight than it was originally given. Deciding what weight is to be given to an aggravating or mitigating circumstance is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Cox v. State*, 819 So.2d 705 (Fla. 2002).

D. FAILURE TO OBJECT AND/OR FILE A MOTION TO SUPPRESS THE SEARCH OF MR. LYNCH’S HOME AND THE STATE’S USE OF ILLEGALLY OBTAINED EVIDENCE.

This claim was fully discussed in Claim IE. above.

E. FAILURE TO PRESENT THE FACTUAL DEFENSE OF ACCIDENTAL DISCHARGE OF FIREARM AND EFFECTIVELY CROSS EXAMINE THE STATE GUN EXPERT DUE TO FAILURE TO CONDUCT A REASONABLE INVESTIGATION AND CONSULT FIREARMS EXPERT

This claim was fully discussed in Claim 1F above.

F. FAILURE TO CONDUCT A REASONABLE INVESTIGATION OF GREG MORGAN, ROSEANNA MORGAN AND LEAH CADAY AND THEIR

RELATIONSHIPS WITH EACH OTHER AND MR. LYNCH AND FAILURE TO EFFECTIVELY CROSS-EXAMINE GREG MORGAN

This claim was withdrawn by counsel.

G. 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 AND FAILURE TO OBJECT TO THE ADMISSIBILITY OF THE LETTER AND CONVERSATION

This claim was discussed in Claim 1H above.

H. FAILURE TO EFFECTIVELY CROSS-EXAMINE DR. REIBSAME AS TO DEPOSITION TESTIMONY AND TRIAL TESTIMONY

As has been stated in Claim II C, Dr. Reibsamer testified at the penalty phase trial and at the hearing on the instant motion. He was somewhat discredited for failure to follow the appropriate protocol for testing administered to Lynch. (PCRT-1053-1057; 1060-1061; 1075-1083; 1153-01154; 1169). However, he reevaluated Lynch prior to the hearing on the instant motion. (PCRT-1039). He now believes that Lynch suffers from brain damage. (PCRT-1039). His basic opinion did not change, and he believes Lynch has the ability to control his behavior. Lynch claims that this Court's reliance upon the testimony of Dr. Reibsamer over Dr. Olander was the fault of defense counsel for not effectively cross examining him. That assumption is not entirely correct. While the Court relied to some extent upon Dr. Reibsamer's testimony, the undisputed facts of the case were most persuasive in the Court's determination that Lynch's capacity to conform his conduct to the requirements of law was impaired, but not substantially impaired. Dr. Danzinger's testimony at the hearing on the instant motion, was most persuasive. He expressed the opinion that the murders were not "compulsive behavior" because Lynch drafted the murder-suicide letter two days before the murders, refrained from killing himself, and did not want the police to shoot him. This opinion is consistent with the

undisputed facts of the case. Additionally, Lynch's expert, Dr. McCraney, testified that Lynch met the statutory mitigator concerning impairment because of his inability to control his behavior. (PCRT-739). Dr. Mc Craney also stated that although Lynch's psychosis interferes with his ability to distinguish right from wrong, he is "not totally incapable of doing it." (PCRT. 739-740). Furthermore, Dr. Sesta, who also testified on behalf of Lynch, testified that he did not think that Lynch was insane, that Lynch knew what he was doing, and he knew it was wrong, but that Lynch's brain damage "might" make him less culpable for the offenses for which he was convicted. (PCRT. 982-983). The evidence presented at the hearing on the instant motion has not convinced the Court to change its finding that Lynch was impaired, but not substantially impaired. Thus, any failure of defense counsel to cross-examine Dr. Reibsame on this issue did not prejudice Lynch.

I. CUMULATIVELY, COUNSEL'S INEFFECTIVE ASSISTANCE DEPRIVED MR. LYNCH OF HIS RIGHTS TO A FAIR TRIAL AND PENALTY PHASE

This claim lacks merit based upon the findings and rulings set forth above.

CLAIM III

MR. LYNCH WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO DEVELOP FACTORS IN MITIGATION BECAUSE THE COURT APPOINTED PSYCHIATRIST FAILED TO CONDUCT THE APPROPRIATE TESTS FOR ORGANIC BRAIN DAMAGE AND MENTAL ILLNESS. THIS VIOLATED MR. LYNCH'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION

This claim was fully discussed in Claim II C.

CLAIM IV

THE STATE VIOLATED THE CONSTITUTIONAL REQUIREMENTS OF *BRADY v. MARYLAND* AND ITS PROGENY, THUS DENYING MR. LYNCH HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND

PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE

This claim is refuted by the record. In order to establish a *Brady* violation, the defense must prove: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) the defendant must have been prejudiced. *Rogers v. State*, 782 So.2d 373, 376-377 (Fla. 2001).

Lynch claims the State Attorney failed to disclose documents including notes by Lynch's mother regarding his premature birth, Lynch's high school records, a certificate of commendation showing Lynch had helped discover and prevent criminal activity as a security guard, employment records, a statement from Marianne Giger corroborating Lynch's claim that Greg Morgan was abusive and that Roseanna Morgan was afraid of him, a statement of Virginia Lynch that Lynch was behaving in a very strange fashion prior to the offenses, and evidence of Lynch's arrest in New York over an assault of a girlfriend.

The State Attorney argues that some, if not all, of this material was in fact disclosed or known to the defense and that the evidence supports that conclusion. The State Attorney obtained Lynch's high school records by subpoena. Trial counsel made an attempt to obtain the same records, but did not follow through. (PCRT-141-145; 157-158). There is authority supporting the finding that no *Brady* violation occurs if the prosecutor and defense counsel have equal access to the evidence. *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003). In any event, there is no reasonable probability that, had the evidence been disclosed to trial counsel, the result of the proceeding would have been different. *Rogers v. State, supra*; *Floyd v. State*, 902 So.2d 775 (Fla. 2005); *Lewis v. State*, 497 So.2d 1162 (Fla. 3d DCA 1986).

As the State Attorney pointed out, *Strickland's* prejudice inquiry is no sanitary, academic exercise. In reality, some cases cannot be won by the defense. Sometimes, "the best lawyering, not just reasonable lawyering, cannot convince the sentencer to overlook the facts" involving two senseless, brutal murders. *Clisby v. Alabama*, 26 F.3d 1054 (11th Cir. 1994).

CLAIM V

THE STATE VIOLATED THE CONSTITUTIONAL REQUIREMENTS OF *GIGLIO v. UNITED STATES* AND ITS PROGENY, THUS DENYING MR. LYNCH HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE STATE'S ACTION AND OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE

This claim arises out of the evaluation of Lynch and subsequent testimony of Dr. Reibsame.

To establish a *Giglio* claim, the defense must show: (1) the testimony was false; (2) the prosecutor knew it was false; and (3) the statement was material. Additionally, assuming the statement to be material, there must be a reasonable probability that the false evidence may have affected the outcome. *Ventura v. State*, 794 So.2d 553 (Fla. 2001).

Dr. Reibsame interviewed Lynch and based some of his opinions on the information Lynch provided him, including his high school grades. (T-817; 819-820). The State Attorney had subpoenaed Lynch's high school record, but did not make them available to Dr. Reibsame. Dr. Reibsame's testimony and opinions did not materially change after he was made aware of Lynch's high school records. (PCRT-1040; 1179).

Dr. Reibsame based his opinion upon the information he had. His statement was not "false," although it may have been based upon the inaccurate information given to him by Lynch. If Dr.

Riebsame had received accurate information from Lynch's high school records, that information would not have affected the outcome of this case. Thus, there is no *Giglio* claim here.

CLAIM VI

MR. LYNCH'S GUILTY PLEA WAS NOT KNOWINGLY AND VOLUNTARILY ENTERED AND WAS THEREFORE OBTAINED IN VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.172, AND 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 OF THE FLORIDA CONSTITUTION AND UNDER FLORIDA COMMON LAW AND THE DECISIONAL LAWS OF THE STATE OF FLORIDA

This claim, and its subparts, were fully discussed in Claim I above.

CLAIM VII

THE STATE COMMITTED FUNDAMENTAL ERROR BY DESTROYING OR LOSING EXCULPATORY PHYSICAL EVIDENCE WHILE THIS CASE WAS PENDING DIRECT APPEAL. THIS MISCONDUCT VIOLATES MR. LYNCH'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION BECAUSE MR. LYNCH CANNOT TEST THE EVIDENCE WHICH WOULD REVEAL HIS INNOCENCE OF THE DEATH PENALTY

This claim was withdrawn by counsel.

CLAIM VIII (MISNUMBERED VII)

NEWLY DISCOVERED EVIDENCE RENDERS THE STATE MENTAL HEALTH EXPERT'S OPINION UNRELIABLE

This claim is based upon Dr. Riebsame's testimony that he "rescored" Lynch's MMPI test based upon the "subtle" versus "obvious" responses and the new scoring indicated that Lynch might be malingering or faking the answers to questions. Lynch now claims this is newly discovered evidence because Dr. Riebsame subsequently discovered that the "subtle" versus "obvious" scoring method had been discredited. There are two reasons why this claim is without merit.

First, the defense rebutted Dr. Riebsame's testimony. During the penalty phase trial, after Dr. Riebsame testified, the defense recalled Dr. Olander. She testified that using an incomplete MMPI invalidated the scoring, and she discredited Dr. Riebsame's testimony. (T-946-950). The Court did not take into consideration Dr. Riebsame's testimony on this issue when deciding whether to impose the death penalty. It was a minor point and other, stronger, evidence (including other testimony and the undisputed facts of this case) convinced the Court that Lynch was mentally impaired, but not substantially impaired.

Second, the evidence is not newly discovered evidence. Newly discovered evidence is evidence that must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of the evidence by the use of diligence. *Jones v. State*, 591 So.2d 911, 916 (Fla.1991). For a defendant to obtain relief based on newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. *Id.* at 915; *State v. Gunsby*, 670 So.2d 920 (Fla. 1996). Here, the defense rebutted the "newly discovered evidence," so it was not unknown. Further, as has been previously stated, it would not have produced a different sentence than the sentence imposed.

CLAIM IX

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED RICHARD LYNCH OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Lynch does not present anything new in this claim. Since each and every claim presented has been rejected, the Court concludes it is without merit.

IT IS ADJUDGED:

1. The Motion to Vacate Judgments of Conviction and Sentence with Special Request

for Leave to Amend is denied.

2. Except as provided herein, the Motion for Rehearing is denied.

3 The defendant is advised that he has the right to appeal this order to the Supreme Court of Florida within thirty days from the date of its rendition.

4. The defendant is declared to be indigent for costs on appeal.

ORDERED at Sanford, Seminole County, Florida, this _____ day of October, 2006.

O. H. EATON, JR.
Circuit Judge

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DATED October _____, 2006