IN THE SUPREME COURT OF FLORIDA

RICHARD LYNCH,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC01-217
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The original record on appeal comprises nine (I through IX) volumes and 1129 consecutively numbered pages. Counsel will refer to the record on appeal using a Roman numeral for the volume number followed by the appropriate page numbers. The subsequently filed supplemental record is only one volume containing 164 consecutively numbered pages. Counsel will refer to this portion of the record using the notation (SR I) with the pertinent page numbers.

STATEMENT OF THE CASE

On March 23, 1999, a grand jury in Seminole County, Florida, indicted Richard E. Lynch, the appellant, on two counts of first-degree premeditated murder, one count of armed burglary of a dwelling, and one count of kidnaping. (I 23-25) On March 25, 1999, the state filed a notice of intent to seek the death penalty. (I 28)

Numerous motions were filed by appellant attacking the constitutionality of Florida's death-sentencing scheme. (I 72-168) Following two hearings, the trial court granted several of appellant's motions and denied others. (SR I 35-148; II 267-68)

On October 19, 2000, appellant withdrew his previously tendered plea of not guilty. He pleaded guilty as charged to both counts of first-degree murder, one count of armed burglary of a dwelling, and the kidnaping of Leah Caday. (II 285-87; IX 1070-97) Appellant also waived his right to a penalty phase jury and chose to allow the trial court to be the finder of fact. (IX 1085-97)

The trial court conducted a penalty phase beginning January 9, 2001. (II 394-96; III 298-314) Following the penalty phase, both sides submitted written arguments in support of their respective positions. (III 415-96)

On February 6, 2001, the trial court conducted a Spencer[1] hearing. (III 497) On April 3, 2001, the trial court sentenced appellant to death on each of the first-degree murder convictions. The trial court found three aggravating factors as to the murder of Rosanna Morgan:

> (1) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. - Great weight
>
> (2) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. - Moderate weight
>
> (3) The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnaping. - Little weight

(III 518-19 The trial court also found three aggravating factors as to the murder of Leah Caday:

> (1) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. - Great weight
>
> (2) The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnaping. - Moderate weight

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[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).

(3) The capital felony was especially heinous, atrocious or cruel. - Great weight.

(III 519) The trial court found nine mitigating factors as to both murders:

(1) The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme[2] mental or emotional disturbance. - Moderate weight

(2) The defendant's capacity to conform his conduct to the requirements of law was substantially[3] impaired. - Moderate weight

(3) The defendant has no significant history of prior criminal activity. - Moderate weight

(4) The defendant suffered from mental illnesses at the time of the offense. - Little weight

(5) The defendant was emotionally and physically abused as a child. - Little weight

(6) The defendant has a history of alcohol abuse. - Little weight

(7) The defendant has adjusted well to

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[2] The trial court summarized his findings and termed Appellant's mental or emotional disturbance "extreme." In the body of his findings, the trial court concluded the disturbance was present but not extreme. (III 514-15, 519).

[3] In summarizing his findings, the trial court wrote that appellant's capacity to conform his conduct to the requirements of the law was "substantially" impaired. (III 519) However, in the body of his findings, the trial court concluded that appellant's capacity to conform his conduct was impaired but not "substantially". (III 515)

> incarceration. - Little weight
>
> (8) The defendant cooperated with the police. - Moderate weight
>
> (9)Other mitigating factors including the defendant's expression of remorse, he has been a good father to his children and his intention to maintain his relationship with his children while in prison. - Little weight

(III 519-20) The trial court sentenced appellant to concurrent life sentences for the armed burglary of a dwelling and the kidnaping. (IX 1127-28) The trial court allowed 757 credit for time served.

Appellant filed a notice of appeal on April 9, 2001. (IX 524-25) This brief follows.

STATEMENT OF THE FACTS

Preamble

The facts of this case involve mental illness, passion, adultery, and credit card debt. Richard Lynch, the appellant, was a stay-at-home husband/father. His wife worked as a registered nurse in Winter Park. Richard Lynch began a torrid affair with Rosanna (Rose) Morgan, a married woman who was estranged from her own husband. In July of 1999, using his own credit cards, Richard Lynch bought Rose a car and helped her move into an apartment. After several months, Rose reconciled with her husband who had just returned to the United States. A devastated Richard Lynch attempted to woo Rose back into his arms. Lynch also desperately needed Rose to continue payments on the outstanding credit card balances that were in his name. This tug of war went on for several weeks. In a last-ditch effort to accomplish both goals, Lynch went to Rose's apartment to confront her one last time. He left a suicide note for his own, unsuspecting wife. During the confrontation at the apartment, Rose and her thirteen-year-old daughter, Leah, were tragically shot to death. After a ninety minute standoff, law enforcement successfully talked Lynch out of suicide. He surrendered to police, pleaded guilty, and was sentenced to die, not at his own hand, but at the hands of the state.

Events Leading up to the Murders

Appellant married Virginia, his wife, in 1988. (IV 80) The couple moved to Sanford, Florida from New York in 1990. In 1993, they had a son, Chris. Another son, Steven, was born in 1997. (IV 79-81) Virginia Lynch[4] (Gigi) worked as a registered nurse at Winter Park Memorial Hospital. (IV 77) Appellant worked as a bus driver and a security guard in New York and in Florida. (IV 82) At his wife's suggestion, appellant stopped working in 1995 and became a house-husband. (IV 82) He took care of Chris and, two years later, had a new baby to care for also. (IV 83-84) After the birth of their second son, Richard and Gigi grew apart. They had not been intimate since early 1997. (VI 550-51)

In July, 1998, appellant met Rosanna Morgan who was working at a convenient store near his home. (VI 546) Rose was married to James Morgan with whom she had a young son. Rose also had a thirteen-year-old daughter, Leah Caday.[5] (VI 417-20) James Morgan was working overseas. (VI 420) James and Rose had their own marital problems which were exacerbated by long periods of separation which were the result of James' employment. (VI 420-22)

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[4] Both Gigi (appellant's wife) and Rose (his mistress) were Filipino. (IV 55-56, 149-50; VI 417-20)

[5] Leah was the product of a rape in Rose's native Philippines when Rose was just seventeen. (IV 143, III 417-20, 592)

Meanwhile, appellant and Rose began a relationship that blossomed into a torrid affair. (IV 100-1; State's Exhibit 11) The affair was not merely a sexual one. Rose and Richard truly loved each other. (VI 565-68, 586-87) The affair raged on for the next six months. Rose desperately wanted to move out of her marital home that she shared with her mother-in-law. (VI 561-62, 590-91) Rose had a low-paying job, while appellant had no income of his own. Nevertheless, the generous credit card companies provided appellant with several credit cards.[6] Appellant was able to access cash, with which he helped Rose's financial situation. (VI 549) Appellant used the maximum amount of $700.00 from one card along with $200.00 from another to buy Rose a 1985 Buick Rivera. (VI 554-55) He also used credit card money to move Rose and her children into an apartment. The couple managed to accumulate a $6,000.00 balance on one of appellant's credit cards. (VI 586)

The idyllic affair was shattered when James Morgan returned to the United States on February 9, 1999 and reconciled with Rose. (VI 421-24) As a result, Rose broke off her relationship with Richard Lynch. Lynch was extremely distraught about the termination of their passionate love affair. (VI 422-25)

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[6] Needless to say, Appellant was mildly surprised that he was able to obtain lines of credit despite the fact that he was unemployed. (VI 549)

Problems remained in both households. Rose and James were anxious to recover all of the explicit, nude photographs that Lynch had taken of Rose during their affair.[7] (VI 432-33) On the other hand, Richard Lynch was anxious for a reconciliation with Rose. He also desperately needed the Morgans to take responsibility for and to continue repayment of the credit card debt.

Lynch called the Morgans' apartment on the day that James returned to the United States. Appellant expressed his hurt and anger regarding the termination of the affair and the Morgans' reconciliation. (VI 424-27) The Morgans sometimes noticed the appellant following them over the next couple of weeks. (VI 429-44) Between February 9, 1999 and March 5, 1999, the Morgans had several telephone conversations and meetings with the appellant in an attempt to retrieve the offensive photographs. (VI 424-51) Appellant turned over some, but not all of the photographs to the Morgans. (VI 444-47) During their last meeting, appellant gave the Morgans what Lynch purported to be the last of the photographs. (VI 449-51) At this meeting, appellant attempted to tell James about his relationship with Rose. Appellant gave James a love letter that Rose had written to Lynch on February 2,

[7] Rose had told her husband of the affair.

1999, only one week before their break-up.[8] After the meeting near the end of February, the Morgans did not see or hear from Lynch until the day of the murders. (VI 452-53)

The Day of the Murders

On March 5, 1999, the Morgans had not heard from the appellant for approximately one week. They believed that he had returned all of the pictures. (VI 452-53) Nevertheless, James Morgan had a premonition during the day. James drove to Rose's place of employment shortly before 3:00 p.m., the end of Rose's shift. (VI 453-54) James parked his car and waited for his wife. Within a few minutes, Richard Lynch drove up and parked behind Morgan's car.[9] Morgan got out of his car to confront Lynch. Lynch once again brought up the financial problem regarding the credit cards. (VI 453-54) Morgan explained that Rose thought the money was a gift. Morgan added that Lynch got the better end of the deal anyway. (VI 453-54) Morgan advised Lynch to get a lawyer. The Morgans refused to pay back any of the debt. Morgan suggested that Lynch leave the premises. (VI 456)

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[8] Appellant was attempting to show Morgan the depth of their love. (VI 449-51) In prior meetings, appellant detailed his sexual exploits with Rose. James Morgan believed that appellant was attempting to provoke him. (VI 435-37)

[9] Lynch had his youngest son in the car with him.

During the conversation between James Morgan and Richard Lynch, Rose Morgan walked out into the parking lot. When she saw the confrontation, she froze in shock. (VI 455-56) As Lynch drove away, he looked over at Rose with what James Morgan described as a combination of a smile and a smirk. (VI 457) Rose was too shaken up to drive, so James took her on several errands. Rose agreed that they should involve the police at this point. (VI 458-59)

After running some errands for about one hour, James dropped off Rose at her car. They planned for James to pick up their son from daycare, while Rose went to the apartment to pick up Leah for a Friday evening family outing. (VI 459-60) Meanwhile, Richard Lynch had picked up his older son at school at approximately 3:30 that afternoon. (IV 89-90) He dropped both children off at his home, where Gigi was recovering from minor surgery. (IV 85, 91-92) Appellant then drove to the Morgans' apartment on Lake Mary Boulevard. A neighbor saw Lynch lurking outside the Morgans' apartment door on the second floor. When the neighbor left his apartment at approximately 4:15 p.m., he again noticed Lynch pacing while looking at his watch. (IV 46-51) About that same time, Leah Caday, Rose's daughter, was coming up the steps of the apartment building. (IV 51-52)

Because of Lynch's prior stalking-type behavior, Leah Caday was probably alarmed when she saw her mother's jilted boyfriend waiting on the building's

landing. By hook or by crook, Lynch gained entry to the apartment. He explained to Leah that he wanted to talk to Rose. The pair sat and waited for Rose to arrive. (VI 544-45, 556-58) For the next thirty minutes, Lynch and Leah waited inside the apartment. (VI 558) Lynch showed Leah that he had a gun. He took it out of his bag and placed it beside him. Leah was very scared, but Lynch assured her that he would not hurt her. During the course of their wait, Leah began to get upset. Lynch attempted to calm her down. (VI 545, 563) At some point before Rose arrived, Lynch called his wife from the Morgans' apartment. Richard told Gigi to take care of his boys whom he loved very much. Richard told Gigi, "He [had] to do something and he's sorry for what he is going to do." (IV 92-96; VI 583-85) During the short conversation, Gigi heard a frightened Leah yelling in the background. (IV 92-93; VI 585) It was about then that Rose arrived.

When Rose arrived, she stood in the open doorway while Lynch talked to her with his gun in his hand. Lynch asked Rose to come in so they could talk about the debt repayment. He promised to release Leah if she complied with his request. (VI 563-64) By Lynch's estimation, the estranged couple talked for approximately ten minutes. Rose refused to enter the apartment to discuss the matter in private. (VI 568)

Lynch thought he heard someone coming up the stairs. Thinking that it

might be the police or Rose's husband, the urgency of the situation became more pressing. Lynch "made a move" with the gun and it fired. (VI 568-69, 581) Lynch thought the first bullet hit Rose in her leg. He was not sure where the second bullet hit. (VI 568-70) Rose fell down outside the apartment. The gun went off once more and a bullet from close range went into Leah Caday's back resulting in her death. (VI 570-71)

A panicked and suicidal Richard Lynch dragged an unconscious Rose into the apartment from the landing and closed the door. (VI 582) If she was not dead already, Lynch did not want Rose to suffer. Concluding that she was mortally wounded, Lynch fired a round into the back of Rose's head to end any potential suffering. (IV 139; VI 597-99; VII 605-6, 612-13)

In the meantime, police had responded to the scene. (IV 31-34) When police attempted to gain entry to the apartment, Lynch fired a warning shot. The police retreated and waited for backup. (IV 35-37, 159-60; VI 582-83) After the shootings, Richard Lynch called 9-1-1.[10] He talked to Joyce Fagan, the 9-1-1 operator, for quite sometime. Lynch explained what happened during a sometimes very emotional conversation. (IV 119-182) Despite the fact that Lynch threatened

[10] Lynch also called his wife again after the shootings. He told her he had shot his mistress. He told Gigi where to find an explanatory letter. (IV 97-101)

to kill himself several times during the conversation, Fagan was able to talk him out of it primarily by reminding Lynch of his two small sons.[11] (IV 156, 171-72, 175-76)

After he surrendered, Lynch gave a detailed interview with the police that evening. (VI 539-VII 640) Throughout his conversation with the 9-1-1 operator and the police, Lynch maintained that he went to the apartment that day to confront Rose about the relationship and the outstanding debt. The discussion became heated and the gun in his hand began to discharge. Lynch blamed the hair trigger on his Glock with which he was unfamiliar. (IV 137-39, 177; VI 568-75) Lynch admitted that he subsequently shot Rose in the back of the head to end her suffering. (IV 139) Lynch maintained that the single shot that killed Leah was fired accidently when he attempted to put the gun down on the counter. (IV 192-93)

Appellant's Mental Problems

Dr. Jacquelyn Olander, a licensed psychologist with a doctorate in counseling and specializing in neuropsychology, evaluated appellant's mental condition. (VII 733-40) Dr. Olander used numerous psychological tests and

[11] Fagan had help from a hostage negotiator who also talked to Lynch in an unrecorded telephone conversation. (IV 186-99)

interviewed appellant. (VII 740-44) Appellant was of normal intelligence and showed no signs of malingering. (VII 745, 748) At the time of the evaluation, Lynch was experiencing a significant amount of tension, unhappiness, and pessimism. He was withdrawn and had difficulty concentrating. He had low self-esteem and interpersonal difficulties. These factors put him at increased risk for self-harm or suicide. (VII 750) Although some of appellant's problems arose from his circumstances at the time of the evaluation, others were of long-term duration. (VII 750-51)

Dr. Olander diagnosed Richard Lynch as suffering from a major mental disorder. Specifically, Lynch suffered from a personality disorder, not otherwise specified, with obsessive-compulsive features. (VII 766) Appellant also suffered from a paranoid personality disorder. This resulted in a pervasive sense of suspicion and distrust of others. Not surprisingly, such a disorder causes significant distress. (VII 772-73) Lynch had extreme difficulty maintaining interpersonal relationships.[12] (VII 773)

Perhaps most significantly, Dr. Olander concluded that Lynch suffered from a psychotic disorder at the time of the murders. Specifically, she diagnosed a

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[12] Richard's only "friend" was Burt who owned the gun shop where Lynch bought and sold weapons. (VIII 772)

schizoaffective disorder, a psychotic disorder that combines schizophrenia and a mood disorder. (VII 796-98)

The doctor categorized appellant's mental problems as a major mental illness. The illness resulted in a very immature thought process. (VII 796-98) The doctor opined that appellant decompensated during the time prior to the murders. This resulted in a diminished awareness of reality and diminished emotional and behavioral control. Eventually, Lynch lost the ability to discriminate between subjective fantasy and reality. He felt like he was in a dream-like trance. (VII 798-99)

Dr. Olander also concluded that, at the time of the murders, Lynch was under such extreme emotional, psychological and mental duress that his ability to control his behavior was significantly impaired. (VIII 809-10) At the time of the murders, Lynch was suffering from a formal thought disorder, a significant psychotic process. As a result he lost contact with reality. This impacted his ability to act and think rationally. (VIII 816) The doctor further concluded that, at the time of the murders, Lynch was under the influence of an extreme mental or emotional disturbance. (VIII 820) Additionally, his capacity to conform his conduct to the requirements of the law was substantially impaired. He knew that his actions were wrong, but the psychotic process took control. (VIII 820-821) As

a result he could not control his behavior.

Dr. Olander testified that Richard Lynch shot the two victims while he was in a psychotic state. Lynch was under such extreme emotional physiological and mental duress that his ability to control his behavior was significantly impaired. This resulted from a schizoaffective disorder in combination with his personality disorder with obsessive-compulsive and paranoid features. Lynch became extremely confused, lost control, and saw himself at the mercy of uncontrollable forces. Although he was aware of his actions, he was not in charge of the situation. (VIII 808-12) Dr. Olander found that Lynch met the criteria for both statutory mental mitigators, i.e., he was under the influence of extreme mental or emotional disturbance and his capacity to preform his conduct to the requirements of the law was substantially impaired at the time of the murders. (VIII 820-21)

Appellant's Background

Richard Lynch was raised in Brooklyn, New York by his two parents. While his mother worked, Richard's father reared the children.[13] Richard's father was a strict disciplinarian.[14] Richard had to "check in" with his father every thirty minutes throughout the day. He had to stop whatever he was doing and return to

[13] Richard's father had been laid off from his job. (VII 760-62)

[14] This fact was corroborated by appellant's aunt. (VII 760-62)

his home where his father waited. If his father was not home, Richard had to sign a sheet to prove that he had come home every half-hour.[15] Richard's playmates would hold him down, thus preventing his compliance with his father's rules. The result was severe ridicule from his friends and severe trouble with his father. (VII 760-62)

When Richard failed to comply with his father's strict rules, Richard endured spankings and emotional abuse. (VII 762) As a result, Richard learned that parental love was conditional instead of the more traditional and normal unconditional love that one expects from a parent. (VII 762) Richard grew up with low self-esteem, no sense of autotomy, and no competency. (VII 762) A child of these circumstances becomes dependent on the system for care. They comply out of fear of rejection and risk of abandonment. (VII 762-63) They don't trust the world to take care of them.[16] (VII 763)

Richard and his mother were very close.[17] She attempted to protect him from his father, the strict disciplinarian. (VII 770-71) For her efforts, Richard's

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[15] In comparison, public restrooms are checked for cleanliness every hour under ideal circumstances.

[16] This explained appellant's need to carry a gun. (VII 763)

[17] Richard lived with his mother until he married in 1988 at the age of 35. (VII 771-72)

mother was also abused, usually in Richard's presence. (VII 771)

As a child and adolescent, Richard was a "very caring, kind" individual. (VII 764) He always took his cousins for car rides and bought Slurpees for them. He also took care of his cousins' dog. (VII 764) Richard Lynch's extended family found it incredible that he killed Rose and Leah. He had never exhibited any violent behavior with family or friends. (VII 769-70) In fact, Appellant had no criminal history whatsoever. He had one arrest in 1977. The charge was dropped the following day. (VII 775)

Although relatives noticed Richard's kindness, they also noticed that he was weird and acted strangely. (VII 764) Richard's uncle once found him reading a gun magazine upside down. His uncle described Richard's appearance at the time as "spaced out." (VII 764)

Richard exhibited excessive-compulsive behavior. Prior to a meal he would wash his hands repeatedly over a two hour period. (VII 764) He spent afternoons repeatedly cleaning and polishing his already clean car. (VII 765) His relatives complained that their water bill rose whenever Richard visited. (VII 764-65) Dr. Olander explained that Richard's compulsive actions reduced his anxiety in

addition to developing a moralistic presentation.[18] (VII 765) Dr. Olander called appellant's personality disorder, not otherwise specified, with obsessive-compulsive features, a major mental disorder.[19] (VII 766)

After Richard's father died, Richard switched from Catholic to public school because of the financial strain on the family. He became so fearful of school violence that he dropped out and did not finish high school. (VII 774) In Florida, he attempted to obtain his GED[20] and successfully completed all parts save for the math tests. (VII 775)

The State's Doctor in Rebuttal

Dr. William Riebsame, also a psychologist, testified for the state in rebuttal. Dr. Riebsame interviewed Lynch one time on December 5, 2000, and conducted various tests. He also reviewed significant material related to the case that was provided to him by the prosecutor. (VIII 917-24) Dr. Riebsame agreed that Lynch

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[18] Dr. Olander pointed out that Richard's obsessive-compulsive behavior was consistent with being the product of a controlling, strict father who demanded perfect behavior. (VII 765) Richard was constantly seeking approval and affection. (VII 767)

[19] Dr. Olander pointed out that appellant's obsessive-compulsive disorder interfered with his work schedule making him late for jobs. He had to engage in repeated rituals made him late for work. As a result, his employment history was spotty. (VII 769)

[20] Graduation Equivalency Diploma.

suffered from a long-standing personality disorder with obsessive-compulsive and paranoid features. (VIII 997) However, Dr. Riebsame disagreed with Dr. Olander in that he saw nothing indicating any psychotic thought process either currently or at the time of the murders. (VIII 930-31)

As the trial court noted in its finding of fact in support of the death penalty sentences, Dr. Riebsame and Dr. Olander both agreed that, at the time of the murders, Richard Lynch was under the influence of a mental or emotional disturbance. Both doctors also agreed that Lynch's capacity to conform his conduct to the requirements of the law was clearly impaired. However, the two doctors disagreed about the degree of appellant's mental or emotional disturbance as well as the degree of impairment concerning appellant's capacity to conform his conduct to the requirements of the law. Dr. Riebsame concluded that the latter was impaired, although not substantially impaired. He also opined that Lynch's mental or emotional disturbance was "less than extreme." (III 514-15) The trial court apparently agreed with Dr. Riebsame, although the trial court's summary of these mitigating circumstances implies otherwise. (III 519)

SUMMARY OF THE ARGUMENTS

The trial court incorrectly found substantial competent evidence to support his conclusion that the murder of Leah Caday was especially heinous, atrocious or cruel. Although Leah was obviously upset during the ordeal, she had no inkling that her life was about to end. The cause of death was a single gunshot wound that resulted in almost instantaneous death. The fear that she felt, during the relatively short wait for her mother's arrival, was not based on her fear of death. Additionally, appellant clearly did not intend for Leah Caday to suffer whatsoever.

The trial court also erred in finding that the murder Rosanna Morgan was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification. The murder of Rose Morgan was not the type of murder envisioned by this aggravating circumstance. The trial court incorrectly interpreted appellant's suicide letter as an intent to commit murder prior to his own suicide. The trial court concedes that the letter does not specifically mention murder, but "does in so many words." Such an inference cannot form the basis of a death sentence in this State.

Rose's murder was not calculated. Instead, it was the product of jealousy, anger, and panic. As such, the murder fails to meet the "cold" prong that is necessary for the finding of this particular aggravating factor. Likewise, appellant

had no calculated plan to kill Rose Morgan. He only intended to confront Rose and to kill himself.

Appellant argues that this Court's proportionality review must result in sentences of life without possibility of parole rather than death. The valid aggravating factors weighed against the substantial mitigation accepted and found by the trial court leads to this conclusion. These murders were not the most aggravated and least mitigated of first-degree murders in this State. Appellant was a man in his mid-forties with absolutely no criminal history whatsoever. He became involved in a torrid affair that ended abruptly. Aside from the devastation from the jilting, appellant faced insurmountable credit card debt that would surely lead to the end of his marriage and change his relationship with his sons forever. This was a crime of heated passion arising from violent emotions brought on by jealousy and anger.

Appellant also points out the internal contradictions contained in the trial court's written findings of fact in support of the death penalty. The trial court's order is unclear as to the two mental health mitigating factors. Appellant also challenges the constitutionality of Florida' s death sentencing scheme.

ARGUMENTS

Appellant discusses below the reasons which, he respectfully submits, compel the reversal of his death sentences. Each issue is predicated on the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, & 22 of the Florida Constitution, and such other authority as set forth.

POINT I

THE TRIAL COURT ERRED IN CONCLUDING THAT THE MURDER OF LEAH CADAY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Introduction

Leah Caday died as the result of a single gunshot wound that entered her back and exited through her chest. (VII 693-703) The medical examiner opined that Leah lost consciousness within ten to twenty seconds of the wound and died in less than one minute. (VII 720)

In finding this particular aggravating factor which the sentencing court gave great weight, the judge wrote:

> Leah Caday was confined in the apartment with the defendant for between thirty and forty minutes before her mother came home. During that time she was terrified of the defendant and his gun. After her mother came home she watched in horror while her mother was brutally murdered. Virginia

> Lynch heard her screaming in the background during the first phone call the defendant made to her. She had time to contemplate her impending death. See, Hannon v. State, 638 So.2d 39 (Fla. 1994). Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even when the victim's death is almost instantaneous. Preston v. State, 607 So.2d 404 (Fla. 1992). The heinous, atrocious, or cruel aggravating circumstance may be proven in part by evidence of the infliction of "mental anguish" which the victim suffered prior to the fatal shot. Henyard v. State, 689 So.2d 239 (Fla. 1997). The actions of the defendant prior to shooting Leah qualify her murder as especially heinous, atrocious and cruel. This aggravating circumstance has been established beyond a reasonable doubt and is given great weight.

(III 513)

Standard of Review

At trial, the state had the burden of proving aggravating circumstances beyond reasonable doubt. Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993) Moreover, the trial court may not draw "logical inferences" to support a finding of particular aggravating circumstance when the state has not met its burden. Clark v. State, 443 So.2d 973, 976 (Fla. 1983) Most recently, this Court has stated that it will not reweigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt. "Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of

law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Willacy v. State, 696 So.2d 693, 695 (Fla. 1997) (Footnote omitted). See also, Way v. State, 760 So.2d 903, 918 (Fla. 2000).

Applicable Law

One of the most fundamental principals set forth by this Court is that this circumstance does not apply to "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders." Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981). The reason behind this bedrock principal is that this circumstance applies "only in torturous murders-- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of suffering of another." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). After Sochor v. Florida, 504 U.S. 527 (1992), this Court has said, before this factor applies, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim. Nelson v. State, 748 So.2d 237 (Fla. 1999) and Richardson v. State, 604 So.2d 1107 (Fla. 1992).

The trial court concluded that the evidence established this aggravating circumstance beyond a reasonable doubt. The trial court focused not on the single, quick, and fatal shot, but rather on the thirty to forty minutes where Leah was

confined in the apartment with appellant before her mother came home. Undoubtedly, Leah was scared, upset, and nervous during the wait for her mother. Appellant admitted to police that she was upset. She attempted to talk to Lynch, a man she knew as her mother's boyfriend. At one point, she talked loudly and appellant quieted her by showing his gun to her.

However, there is no evidence that Leah had any reason to believe that her life would end that day. She knew that her parents had been meeting with and talking to Lynch over the past several weeks. She knew that there was clearly concern about the situation. However, there is no inkling that Lynch, a man she knew, would end up killing both her and her mother. Indeed, appellant had no intention of the day ending as it did. Therefore, Leah Caday did not suffer the requisite knowledge that she was going to die. She was not beaten or raped either.[21]

Even though Leah was clearly agitated and afraid, she had no awareness of her impending death. See e.g., Knight v. State, 338 So.2d 201 (Fla. 1976)[victims knew they were going to die several hours prior to their deaths]. Leah's death is

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[21] Following his arrest, appellant pointed out that he certainly had the opportunity to do horrible things to Leah during the half-hour wait. Appellant offered this observation to show that, before the shootings began, he was the "good guy" in all of this. (VI 558-60, 564)

more comparable to that in Maggard v. State, 399 So.2d 973 (Fla. 1981), where the victim was killed without ever knowing he was about to die. Consequently, his execution-death style murder was not heinous, atrocious, or cruel. In Robinson v. State, 574 So.2d 108 (Fla. 1991), this Court disapproved HAC where the victim was kidnaped, raped, and robbed before being shot. Even though the victim was treated so poorly, the codefendant assured the victim during the ordeal that she would not be killed. These reassurances were enough to invalidate the finding of HAC. See also, Donaldson v. State, 722 So.2d 177 (Fla. 1998)[victims held at gunpoint for hours before being shot, but during that time, they were assured that they would not be killed]. Similarly, Appellant repeatedly reassured Leah that he simply wanted to talk to her mother. He attempted to calm Leah throughout the situation. (VI 544-45, 563)

This Court should disapprove the trial court's finding of HAC based on additional grounds. First, it is clear that appellant did not intend for Leah Caday to suffer whatsoever. As appellant told police following his arrest, he thought Rose and her husband would come home where he would then confront them. Unfortunately, Leah came home earlier than he expected. (VI 544) Lynch wanted to confront Rose. He had no interest in Leah. Her arrival simply complicated the situation. Since appellant had no intent that Leah should suffer unnecessarily, this

Court should disapprove HAC. See e.g., Wickham v. State, 593 So.2d 191, 193 (Fla. 1991); Santos v. State, 591 So.2d 160, 163 (Fla. 1991); Omelus v. State, 584 So.2d 563, 566-67 (Fla. 1991). See also, Bonifay v. State, 626 So.2d 1310 (Fla. 1993) [HAC inapplicable to a contract killing where the victim begged for life before being shot, as there was no evidence the defendant intended to cause unnecessary, prolonged suffering] and Porter v. State, 564 So.2d 1060 (Fla. 1990)[HAC rejected since the murders were crimes of passion rather than designed to painful].

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF ROSANNA MORGAN WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Introduction

This case involved passion, jealousy, despair, and credit card debt. The murder of Rosanna Morgan was a tragic wrong. However, the murder was clearly not cold, nor was it calculated. Additionally, there was, at the very least, a pretense of moral justification.

In finding this particular factor (given great weight by the sentencing court) the judge wrote:

> The facts that tend to establish this aggravating factor are: (1)the defendant's letter to his wife in which he asked her to notify Roseanna Morgan's parents about "the pain she caused," that the homicide was not "a random act of violence" and that she had to "pay the price;" (2) the defendant carefully packed three firearms in a black bag along with ammunition and took them with him to Roseanna Morgan's apartment; (3) the passage of time between the date of the letter and the killing; (4) the passage of time while the defendant held and terrorized Leah while awaiting Roseanna Morgan's return and (5) the coup de grace.
>
> The defense presented a psychologist, Dr.

Jacqueline Olander, who opined that the defendant's motive in going to the apartment was to commit suicide in front of Roseanna Morgan. Dr. William Riebsame, a psychologist presented by the state, disagreed. It was his opinion that the defendant's motive was a murder-suicide and that the defendant simply did not carry out the second part of the plan. Dr. Riebsame's opinion is more supportive of the evidence in the case and it is accepted by the court. The contents of the defendant's letter set forth a murder suicide plan without saying as much in so may words. It would have been unnecessary for Roseanna Morgan's parents to be notified "about the pain she caused" or that the killing "was not just a random act of violence" or "(t)hat is why she must pay the price" unless the defendant fully intended to kill her. But for the actions of Joyce Fagan, the dispatcher for the Sanford Police Department, and Stephanie Ryan, the hostage negotiator, the defendant may have carried out the second part of his plan. These two individuals had extensive conversations with the defendant after the murders and dissuaded him from harming himself or anyone else.

The court finds this aggravating circumstance to have been established beyond a reasonable doubt. The mental mitigation presented by the defendant has been carefully considered by the court in light of the holding in Alameida v. State, 748 So.2d 922 (Fla. 1999). The court is convinced that the defendant was sufficiently in control of his faculties to plan and carry out the murder of Roseanna Morgan. Accordingly this aggravating circumstance is given great weight.

(III 506-8)

Standard of Review

At trial, the state had the burden of proving aggravating circumstances beyond reasonable doubt. Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993). Moreover, the trial court may not draw "logical inferences" to support a finding of particular aggravating circumstance when the state has not met its burden. Clark v. State, 443 So.2d 973, 976 (Fla. 1983). Most recently, this Court has stated that it will not reweigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt. "Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Willacy v. State, 696 So.2d 693, 695 (Fla. 1997) (Footnote omitted). See also, Way v. State, 760 So.2d 903, 918 (Fla. 2000).

Applicable Law

In Jackson v. State, 648 So.2d 85, 89 (Fla. 1994), this Court held:

> [I]n order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)...; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)...; and that the defendant exhibited heightened premeditation (premeditated)...; and that the defendant had no pretense of moral or

legal justification.

[Citations omitted.]

Richard Lynch's killing of Rose Morgan was not the type of murder envisioned by this aggravating circumstance. Lynch had been jilted by Rose, a woman for whom he cared very deeply. Additionally, Rose refused to repay the substantial credit card debt incurred by Lynch for her benefit. Clearly Lynch went to the apartment to confront Rose. Beyond that, he had no plan other than to commit suicide in Rose's presence. He clearly had no carefully calculated plan to murder Rose Morgan. His plan was haphazard at best.

If Lynch had calculated to murder Rose Morgan, he could have done so long before March 5, 1999.[22] He did not lie in wait for Rose. Instead, he stood in an open area outside Rose's apartment where he could be and was seen by a neighbor. Lynch called his wife before the shooting erupted and again afterwards. He also called 9-1-1 from the apartment and confessed to what he had done. The first shots that were fired at Rose Morgan hit her legs. A calculating killer would have fired at the chest or head area.[23]

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[22] Lynch pointed out this fact to police shortly after his arrest. (VI 546-47)

[23] Lynch clearly had much experience with handling and shooting guns. (IV 155-57)

The trial court appears to place great emphasis on his acceptance of Dr. Riebsame's conclusion that Lynch's motive was a murder-suicide. The trial court rejects Dr. Olander's opinion that Lynch's intent was to only commit suicide in front of Rose Morgan. In rejecting Dr. Olander's opinion, the court writes, "The contents of the defendant's letter set forth a murder suicide plan **without saying as much in so many words.**" (III 507) The trial court should not draw even a logical inference to support a finding of this particular aggravating circumstance when the state has not met its burden of proof. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983).

Although appellant clearly discusses his own death in the suicide letter (State's exhibit #11), he does not even mention killing anyone, not even the woman who has caused him such pain. Instead, Lynch clearly wants to shame and humiliate Rose Morgan in the eyes of Rose's family, the people she cares for the most. That is the reason that Lynch asked his wife to send copies of their love letters and nude photographs to her parents.

Dr. Olander testified that Lynch's instructions to his wife were not at all surprising considering Lynch's personality with compulsive features. People suffering from such an affliction fear pubic humiliation and embarrassment. In fact, it is their greatest fear. (VII 794) By sending Rose's parents the embarrassing

material, Lynch was inflicting the ultimate punishment in his mind, the shame of her parents.[24] (VII 795) Lynch did not want Rose to be able to rationalize to her parents after a strange man committed suicide inside her apartment in her presence. Lynch wanted to make sure that Rose's parents knew the truth, even if that truth did not come from their own daughter. The "random act of violence" referred to Lynch's suicide. Rose "must pay the price" by being humiliated before her family.

Since Lynch's suicide note did not mention any threat of murder, the passage of time between the date of the letter and the killing is completely irrelevant. Likewise, the evidence does not support the trial court's conclusion that Lynch "carefully packed three firearms in a black bag along with ammunition" which he then took to the apartment. (III 506) The record is absolutely devoid of any evidence supporting this bald assertion. In fact, the only evidence on the issue to the contrary. During his voluntary interview with the police on the night of his arrest, Lynch explained that the guns had been riding around in his car for days. (VI 575-76) The bag containing the guns also contained the credit card statements that he wanted to use in his confrontation with Rose. (VI 576) Lynch also told the 9-1-1 operator shortly after the shootings that he carried a gun "day in and day

[24] This was consistent with appellant's belief that parental love was conditional on the child's behavior.

out." (IV 157) He also explained to the operator that he had plans to go to the shooting range that day and was thinking about selling some of his guns to pay some of the credit card debt. (IV 160-63, 167) Simply having possession of the guns in the apartment does not establish the requisite "heightened" premeditation. He may have only intended to use the guns to confront Rose and force her to listen to his complaints. This is not proof that he intended to shoot anyone.

Even the state's own written argument on this issue belies the application of this factor. In the written argument to the court on the issue, the prosecutor writes:

> The State's position is that when he [appellant] realized that Rose was not going to take him back and was going to let him face the music for his acts during the affair and of that day, he followed through on his promise in the letter that this would not be a random act of violence. As previously quoted, just before the shootings the defendant was trying to persuade Rose to just act like nothing happened and make the payments.

(III 434) The state's own position sets forth a scenario in which the "heightened" premeditation to kill is clearly not present. Appellant started shooting **only** after Rose refused to reconcile and declined to repay her outstanding debt.

Appellant's killing of Rose Morgan was a hot-blooded crime of passion. The trial court accepted the fact that Lynch was under the influence of mental or emotional disturbance at the time of the crime and that his capacity to conform his

conduct to the requirements of the law was impaired. The trial court also agreed that Lynch suffered from mental illness at the time of the offense. (III 519) Against that backdrop, we have a desperate man who has lost his dream lover and is faced with losing his family (including his beloved young sons) when the unpaid credit card debt reveals his infidelity to his wife. With his mental condition, appellant felt that there was no way out and exploded under the pressure. Therefore, appellant's action did not meet the requisite "**cold**" prong of CCP. He had no "**calculated**" plan other than to kill himself. These facts cannot support a finding of this aggravating circumstance.

Almeida v. State, 748 So.2d 922, 933 (Fla. 1999) is extremely helpful in this Court's disposition of this issue. In disapproving CCP in Almeida, this Court pointed out that in his own statement to police, Almeida described the killing as an impulsive act. Similarly, immediately after the shootings, appellant told the 9-1-1 operator that he had no intention of killing anyone. He did not mean for this to happen. "This is not cold blooded." (IV 146) "It was just a panic situation." (IV 148) "It was no cold-blooded execution or anything like that." (IV 154) Lynch consistently told the operator and later the police that he thought he heard someone coming and simply panicked. (IV 148, 164; 568-70)

Like the Almeida trial court, appellant's sentencing judge found at least

some form of both mental health mitigators. Appellant, like Almeida, was particularly unstable at the time of the crimes because of his recent split from the woman he sincerely loved. Additionally, like Almeida, Richard Lynch's mental health led him to believe that he was without any other recourse and he lacked impulse control.

Additionally, appellant asserts that he had a **"pretense**" of moral or legal justification. The victim's rejection of him as a lover as well as her refusal to repay a debt that was rightly hers supports this exception to the application of the aggravating factor. Counsel recognizes that this Court appears reluctant to apply this particular phrase to first-degree murders. However, in Cannady v. State, 620 So.2d 170 (Fla. 1993), this Court concluded that the CCP factor did not apply when the defendant murdered the man he believed had raped his wife two months earlier because the murder was not cold, although it may have been calculated.

This Court has also disapproved the finding of this aggravating factor in other cases where there was at least a pretense of moral or legal justification. In Blanco v. State, 452 So.2d 520 (Fla. 1984), the victim confronted and struggled with the defendant during a burglary. In Christian v. State, 550 So.2d 450 (Fla. 1989), this Court concluded the evidence did not support CCP in a prison murder where the victim knocked the defendant unconscious and, for three weeks after the

attack, made death threats until the defendant surprised and killed the victim.

In contrast, this Court approved a finding of CCP in a prison murder where the defendant thought the victim would stab his friend over a debt, even though the victim had not threatened such action prior to the murder. Williamson v. State, 511 So.2d 289 (Fla. 1987). In Hill v. State, 688 So.2d 908 (Fla. 1996), this Court refused to recognize an anti-abortionist's murder of an abortionist (to protect innocent, unborn life) as being within the purview of a "pretense" of moral or legal justification. In light of Hill, this aggravating factor may not sufficiently narrow the class of death-eligible defendants sufficiently to meet constitutional muster, thereby rendering Florida's death sentencing scheme unconstitutional (arbitrary and capricious). State v. Dixon, 283 So.2d 1 (Fla. 1973); Proffitt v. Florida, 428 U.S. 242 (1976). Appellant attacked the constitutionality of this factor prior to trial on these grounds (failure to narrow the class.) (III 147-50)

POINT III

THE TRIAL COURT'S WRITTEN FINDINGS OF FACT IN SUPPORT OF THE DEATH SENTENCES IS UNCLEAR AS TO WHETHER THE JUDGE FOUND THE TWO STATUTORY MENTAL HEALTH MITIGATORS.

In the written findings of fact, the trial court assess the mitigating circumstances proposed by the defense. In dealing with Section 921.141 (6)(b), Florida Statutes the trial court wrote:

> **The crime for which the defendant is to be resentenced was committed while he was under the influence of extreme mental or emotional disturbance.**
>
> The experts called by the defense and the state presented evidence on this mitigating circumstance. They did not agree with each other. Dr. Olander believed the defendant was under the influence of extreme mental or emotional disturbance. Dr. Riebsame believed the disturbance to be less than extreme. Dr. Riebsame's testimony is the most credible. The defendant was emotionally disturbed. His girlfriend had decided to return to her husband and this meant loss of a sex partner for whom he had strong feelings. However, he was able to plan his course of action and carry out all but the suicide portion of the plan. The court gives the emotional disturbance suffered by the defendant moderate weight.

(III 514-15) In dealing with the mitigating circumstance set forth in Section 921.141 (6)(f), Florida Statutes, the trial court wrote:

> **The defendant's capacity to conform his conduct to the requirements of law was substantially impaired.**
>
> The experts, Dr. Olander and Dr. Riebsame, agreed that the defendant's capacity to conform his conduct to the requirements of law was impaired. They disagree on the degree of impairment. Dr. Olander believes the defendant has a schizoaffective disorder. Dr. Riebsame did not believe the defendant has a schizoaffective disorder. He noted that the defendant did not suffer delusions or have difficulty recalling events about the murders. He testified that it is usual for a person with such a disorder to report a very bizarre description of events that makes sense to him or her but not to anyone else. Dr. Riebsame's testimony on this issue is the most credible and is accepted by the court. The fact that the defendant's capacity to conform his conduct to the requirements of law was impaired, but not substantially impaired, is given moderate weight.

(III 515) However, in the summary of the mitigating circumstances contained in the written order, the trial court lists these two mitigating circumstances:

> The crime for which the defendant is to be sentenced was committed while he was under the influence of **extreme** mental or emotional disturbance. – Moderate weight
>
> The defendant's capacity to conform his conduct to the requirements of law was **substantially** impaired.–Moderate weight.

(III 519) (Emphasis added)

It is therefore unclear whether the trial court found these two mental health

mitigating factors as **statutory** mitigators or **nonstatutory** mitigators. Since the written findings of fact are confusing on this issue, this Court should either construe the trial court's order as support that the **statutory** mental health mitigators were found by the trial court or remand for clarification. See e.g., Larkins v. State, 655 So.2d 95 (Fla. 1995) A trial court may reject a defendant's claim that a mitigating circumstance has been proved, it the record contains competent substantial evidence to support that rejection. See e.g. Nibert v. State, 574 So.2d 1059 (Fla. 1990). By its very nature, internal inconsistencies in a trial court's order should be subject to *de novo* review.

POINT IV

THE DEATH PENALTY IS DISPROPORTIONATE WHEN ONE CONSIDERS THE REMAINING VALID AGGRAVATORS WEIGHED AGAINST THE MITIGATING EVIDENCE.

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first-degree murders. Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999); Almeida v. State, 748 So.2d 922, 933 (Fla. 1999). "Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated and (2) the least mitigated of murders". Cooper, 739 So.2d at 82; Almeida, 748 So.2d at 933 (Emphasis in opinions). Proportionality review is a "unique and highly serious function of this Court", which arises from a variety of sources in the Florida Constitution, and "rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." See Tillman v. State, 591 So.2d 167, 169 (Fla. 1991); Sinclair v. State, 657 So.2d 113, 114 (Fla. 1995); Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Knight v. State, 721 So.2d 287, 299-300 (Fla. 1998); Woods v. State, 733 So.2d 980, 990 (Fla. 1999).

Proportionality review by this Court is a necessary prong in Florida's death sentencing scheme. By its very nature, *de novo* review is the standard. Kramer v. State, 619 So.2d 274 (Fla. 1993).

At the time of these crimes, Richard Lynch was a 46-year-old man who had no prior criminal history whatsoever. A married father of two young sons, Lynch, by all accounts was under the influence of a mental or emotional disturbance. Additionally, his capacity to conform his conduct to the requirements of the law was definitely impaired.[25] Against this backdrop of acknowledged mental illness, this Court should note that Lynch cooperated with police. He pleaded guilty as charged and has adjusted well to incarceration. He has a history of alcohol abuse and he was emotionally and physically abused as a child. He has repeatedly and sincerely expressed remorse for his actions.

This was not the most aggravated nor the least mitigated first-degree murders in the state of Florida. The killings arose out of a domestic dispute that escalated into tragedy. The intense emotional feelings involved were shaded by Rose Morgan's refusal to repay thousands of dollars in debt that was incurred in her name. Although this Court has never created a "domestic dispute" exception to

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[25] The only questions were the degree of disturbance and degree of impairment.

death sentencing, Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1996), it has, nonetheless, recognized that family relations often create "intense emotions". Wright v. State, 586 So.2d 1024 (Fla. 1991) This Court has, with consistent regularity, refused to affirm death sentences where defendants have killed their wives, girlfriends, and children when the former were intensely jealous or filled with an unmanageable anger. See, e.g., Douglas v. State, 575 So.2d 165, 167 (Fla. 1991) Farinas v. State, 569 So.2d 425, 431-32 (Fla. 1990).

A Comparison to Similar Cases involving Domestic Disputes

Although appellant recognizes that this Court has never approved a per se "domestic dispute" exception to the imposition of the death penalty, those are the type of cases that appellant's case is best compared. In Farinas v. State, 569 So.2d 425(Fla. 1990) the death sentence was found to be disproportionate where the defendant was obsessed with the idea of having the victim (his former girlfriend) return to live with him and was intensely jealous. This Court found it significant that the record reflected that the murder was the result of a heated, domestic confrontation. Farinas forced his ex-girlfriend's car off the road and confronted her about reporting to the police that he was harassing her and her family. Farinas then kidnaped her. When the victim jumped out of the car and attempted to escape, Farinas fired a shot that hit the victim in the lower middle back causing instant

paralysis from the waist down. He then approached the victim as she lay face down and after unjamming his gun three times, fired two shots into the back of her head. Farinas v. State, 569 So.2d 425, 427 (Fla. 1990). Despite the fact that two valid aggravating factors existed, this Court concluded that the death sentence was not proportionately warranted in this case.

In White v. State, 616 So.2d 21 (Fla. 1993), this Court also found the death sentence disproportionate. White and the victim had dated for some time before the relationship ended badly. Several months later, White physically assaulted the victim's date with a crowbar. While in jail for that incident, White swore that he would kill his former girlfriend when he was released. A day later, White picked up his shotgun at a pawn shop and drove to the victim's place of employment. He drove rapidly into the parking lot, and stopped a few feet from the victim who was walking to her car. When she screamed and turned to run, White shot her with the shotgun. After she fell face down, he approached her and fired a second shot into her back. After proclaiming, "I told you so," White quickly drove away. White v. State, 616 So.2d 21, 22 (Fla. 1993) Despite the finding of one valid aggravating factor, this Court concluded that the death sentence was disproportionate.

This was a crime of heated passion arising from violent emotions brought on by jealousy. This Court has found the death penalty disproportionate in such cases.

See Halliwell v. State, 323 So.2d 557 (Fla. 1975) (death sentence disproportionate where the defendant, who was in love with the victim's wife, became violently enraged at the victim's treatment of her, and beat him to death with a breaker bar); Douglas v. State, 575 So.2d 166, 167 (Fla. 1991) (death sentence disproportionate where the defendant, who had been involved in a relationship with the victim's wife, abducted the victim and his wife, tortured them over a four-hour period by forcing them to perform sexual acts at gun point, hit the victim so forcefully in the head with the rifle that the stock shattered, and then shot him in the head); Ross v.State, 474 So.2d 1170 (Fla. 1985) (death penalty disproportionate for bludgeoning murder of wife; HAC).

Closer Scrutiny of the Valid Aggravating Factors

The trial court found only three aggravating factors as to each of the two murders. Appellant discusses in Points I and II the reasons why only two valid aggravating factors exist as to each of the two murders. The trial court inappropriately found the "heightened" premeditation aggravator as to the murder of Rose Morgan. The trial court similarly erred in concluding that the murder of Leah Caday was especially heinous, atrocious or cruel. Even if this Court rejects appellant's argument on these two issues, appellant submits that the appropriate weight to be given to these factors should be minimal. This Court has certainly

seen much more egregious "torture" murders than that of Leah Caday. Additionally, any premeditation as to the murder of Rose Morgan is diminished by the volatile domestic situation compounded by the dispute over a debt of several thousand dollars.

In light of the fact that he pleaded guilty to the accompanying felony, appellant must concede that these murders were committed during the commission of a felony. Close scrutiny of this particular aspect of the tragic events of that day reveal that the kidnaping and armed burglary in this case are inextricably entwined with the murders. Even the trial court points out the "much criticized felony-murder rule and gives the factor only little weight for one murder and moderate weight for the other." (III 508-10, 512) Additionally, this particular aggravating factor is almost a "garden variety" aggravating circumstance that is present and almost all first-degree murders. As such, it is unremarkable and should be given limited importance.

The final aggravating factor found on both murders is the "previous" conviction for another capital felony. (III 508, 511) The trial court gives this factor moderate weight as for the murder of Rose Morgan based upon the fact that she was the first victim to be killed. (III 508) In contrast, the trial court assigns great weight to this aggravator as to the murder of Leah Caday based upon the fact that

she was the second victim killed. (III 511) Appellant points out that the contemporaneous nature of the "prior" conviction is one reason to afford the factor less weight than otherwise. See e.g., Terry v. State, 668 So.2d 954, 965-66 (Fla. 1996). Additionally, the weight given to this circumstance should be considered in light of appellant's spotlessly clean criminal record before the fateful day.

There Was Substantial Mitigation Accepted and Found by the Trial Court.

Appellant sets forth the written findings of fact concerning the extensive mitigation filed by the trial court in this case:

The defendant's capacity to conform his conduct to the requirements of law was substantially impaired.

The experts, Dr. Olander and Dr. Riebsame, agreed that the defendant's capacity to conform his conduct to the requirements of law was impaired. They disagree on the degree of impairment. Dr. Olander believes the defendant has a schizoaffective disorder. Dr. Riebsame did not believe the defendant has a schizoaffective disorder. He noted that the defendant did not suffer delusions or have difficulty recalling events about the murders. He testified that it is usual for a person with such a disorder to report a very bizarre description of events that makes sense to him or her but not to anyone else. Dr. Riebsame's testimony on this issue is the most credible and is accepted by the court. The fact that the

defendant's capacity to conform his conduct to the requirements of law was impaired, but not substantially impaired, is given moderate weight.

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The defendant has no significant history of prior criminal activity.

This mitigating factor has been established and is not controverted. However, the circumstances of this double murder, including the murder of the second victim, "militate against" this factor and it is given little weight. Ramirez v.

State, 739 So.2d 568 (Fla. 1999).

Any other aspect of the defendant's character or background.

The defendant suffered from mental illnesses at the time of the offense.

The expert witnesses agreed that the defendant has a depressive disorder and that he had this condition at the time of the offense. The evidence also established that he has a personality disorder not otherwise specified with paranoid features, obsessive-compulsive features and passive aggressive features. As previously stated, while Dr. Olander believes the defendant to have a schizoaffective disorder, Dr. Riebsame disagrees and the court has accepted Dr. Riebsame's opinion. The defendant's personality disorders are given little weight.

The defendant was emotionally and physically abused as a child.

The evidence established that the defendant's father was a strict disciplinarian who insisted upon the defendant reporting to him every half hour if he was playing or "sign in " if the father was not present. The experts disagreed about whether this amounted to emotion and physical abuse but the court considers this mitigating factor to have been established. However, since there is no real connection between this mitigator and the murders, it is given little weight.

The defendant has a history of alcohol abuse.

The defendant reported a history of alcohol abuse to Dr. Olander and there is

no evidence to the contrary. However, the defendant was neither under the influence of alcohol at any time during the events that led up to the murders nor at the time of the murders themselves so this mitigator is given little weight. Mahn v. State, 714 So.2d 391 (Fla. 1998).

The defendant has adjusted well to incarceration.

There is no direct evidence of this mitigating factor. However, the court has observed the defendant during these proceedings and views this mitigator as having been established but assigns little weight to it.

When possible, the defendant has sought gainful employment.

The defendant has been employed during much of his lifetime. He has been a truck driver, a transit authority policeman, a security guard and a bus driver. He was not employed at the time of the murders. He took care of the two young children while his wife worked as income provider. This mitigating circumstance has been established but it is given little weight.

The defendant cooperated with the police.

The evidence is clear that the defendant remained at the scene of the murders and made several statements implicating himself in the murders. While the evidence contradicts the defendant's version of the events as being accidental, the court agrees that the degree of cooperation given resulted in the guilty pleas

entered in this case. The fact that this case did not have to be tried convinces the court to give this mitigator moderate weight.

Other mitigating factors:

During the Spencer hearing the defendant made a statement in which he expressed remorse for his actions and stated that he has been a good father to his children and intends to continue being as good a gather as he can while in prison. The court accepts these factors as mitigating but assigns little weight to them. (III 514-19)

Conclusion

As this Court can readily see, the trial court found substantial, valid mitigating evidence. The few valid aggravating factors are unremarkable especially in light of other first-degree murders that this Court reviews on a daily basis. The murders of Rose Morgan and Leah Caday were tragic indeed. However, they are not the most aggravated, least mitigated of first-degree murders committed in this State on an annual basis. In a few short minutes, Richard Lynch went from a life-long law-abiding, dedicated father to a killer. Immediately after he put his guns down, called 911, and admitted that he had killed two people he loved. Only because of the extraordinary work of the 911 operator and the hostage negotiator, appellant did not kill himself also. One can hear the emotion in his

voice on the recorded 911 conversation. The murders here were the literal fulfillment of what this Court said about homicides for which a death sentence is inappropriate. They were the explosion of total criminality this Court recognized in State v. Dixon, 283 So.2d 1 (1972), that sometimes overcomes fundamentally decent people. While they may be guilty of first-degree murder, they do not deserve a death sentence. Richard Lynch should spend the rest of his life in prison without the possibility of parole.

POINT V

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant candidly concedes that many of the pretrial challenges to the constitutionality of Florida's death sentencing scheme became moot when appellant pleaded guilty and waived the penalty phase jury. However, several challenges remain valid. Although this Court has clearly rejected all of the following arguments, the spectre of "procedural bar" compels their inclusion. By its very nature, this issue is reviewable using a *de novo* standard.

Florida's statute is unconstitutional based on its failure to provide notice as to aggravating circumstances. This deprives appellant of his constitutional right to due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amends. VI & XIV, U.S. Const.; Art. I, §§ 9 & 15 (a), Fla. Const. Appellant challenged the constitutionality on these grounds prior to trial. (I 125-27, 131-33)

The statute is also unconstitutional based on the limitation of unrestricted consideration of mitigating evidence. The statute puts limitations on mitigating circumstances especially statutory factors. Additionally, not all evidence is accepted as mitigating. Additionally, this Court has held that mitigating

circumstances must be "reasonably established" by the defense. Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). By placing restrictions on mitigating evidence as well as shifting the burden of proving mitigating circumstances to the defendant, the statute is unconstitutional. Appellant challenged the statute on these grounds prior to trial. (I 136-40)

Appellant also challenged the constitutionality of the statute based on the vague and indefinite standard set forth in Section 921.141(5)(h), Florida Statutes (1999), purportedly defining "especially, heinous, atrocious, or cruel." (I 141-42) This particular aggravating circumstance has especially been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984)(Ehrlich J. concurring in part and dissenting in part.)

The "felony murder" aggravating circumstance was applied to both capital homicides in this case. Section 921.141 (5)(b), Florida Statutes (1999) creates an "automatic" aggravating factor in all felony murders. This results in arbitrary application of this circumstance and a presumption of death without the finding of some mitigating circumstance. Appellant challenged the constitutionality of the statute on these grounds. (I 143-44)

The statute was unconstitutional on its face where it allows excessive and

disproportionate penalties to be imposed upon persons who have not deliberately taken the life of another in violation of Eighth and Fourteenth Amendments of the United States Constitution. Appellant challenges the constitutionality of the statutes on this ground prior to the trial. (I 147-150)

Finally, the state of Florida is unable to justify the death penalty as the least restrictive means available to further its compelling goals where a fundamental right, human life, is involved, as required under Roe v. Wade, 14 U.S. 113 (1973). Appellant challenged the statute on this ground prior to trial. (I 165-66)

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate his death sentences and remand for imposition of life imprisonment without possibility of parole.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Richard Lynch, #E08942, Florida State Prison, P.O. Box 747, Starke, FL 32091, this 7th day of December, 2001.

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CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
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