IN THE SUPREME COURT OF FLORIDA

CASE NO. SC007-1246

RICHARD LYNCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT FOR SEMINOLE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Cites to the record are as follows: "V" refers to the volume of the record, followed by the volume number. "R" signifies the pleadings, followed by the page number of the record. The transcripts of the evidentiary hearing begins in Volume 13 with number "1." "EH" signifies the transcripts of the evidentiary hearing. The trial judge refers to the record of the evidentiary hearing as "PCRT," and these cites appear in the citations to the trial judge's order. "TT" refers to the record on direct appeal.

STATEMENT OF THE CASE

Richard Lynch was indicted for the March 5, 1999, murders of Roseanne Morgan and her daughter, Leah Caday. (V1, R2). He was also indicted on charges of armed burglary and kidnapping of Leah. Lynch pled guilty as charged on October 19, 2000. (V12, R2064-2090). Judge Eaton conducted the judge-alone penalty phase from January 8-12, 2001. The *Spencer* hearing was held February 6, 2001. On April 3, 2001:

> [t]he judge sentenced appellant to death for the murders of Roseanna Morgan and Leah Caday. He found three aggravating factors as to the murder of Morgan: (1) the murder was cold, calculated, and premeditated ("CCP") (given "great weight"); (2) appellant had previously been convicted of a violent felony (given "moderate weight"); and (3) the murder was committed while appellant was engaged in committing one or more other felonies (given little weight"). As to the murder of Caday, the judge found (1) that the murder was heinous, atrocious, or cruel ("HAC") (given "great weight"); (2) that appellant was previously convicted of a violent

felony (given "great weight"); and (3) that the murder was committed while appellant was engaged in committing one or more other felonies (given "moderate weight"). He also found one statutory and eight nonstatutory mitigators as to each murder. [FN5]

> FN5. The statutory mitigating factor found was that Lynch had no significant history of prior criminal activity (moderate weight). The eight nonstatutory mitigators were: (1) the crime was committed while defendant was under the influence of a mental or emotional disturbance (moderate weight); (2) the defendant's capacity to conform his conduct to the requirements of law was impaired (moderate weight); (3) the defendant suffered from a mental illness at the time of the offense (little weight); (4) the defendant was emotionally and physically abused as a child (little weight); (5) the defendant had a history of alcohol abuse (little weight); (6) the defendant had adjusted well to incarceration (little weight); (7) the defendant cooperated with police (moderate weight); (8) the defendant's expression of remorse, the fact that he has been a good father to his children, and his intent to maintain his relationship with his children (little weight).

Lynch v. State 841 So. 2d 362, 368 (Fla. 2003).

Lynch argued five issues on direct appeal.

(1) The trial court erred in finding the aggravating factor of HAC as to the murder of Caday;

(2) The trial court erred in finding the aggravating factor of CCP as to the murder of Morgan;

(3) The trial court's sentencing order is unclear as to the findings of the mental health mitigators;

(4) The death sentence is disproportionate; and

(5) Florida's death penalty is unconstitutional on its face and as applied.

Relief was denied as to all issues. *Lynch v. State* 841 So. 2d 362 (Fla. 2003).

The United States Supreme Court denied the Petition for Writ of Certiorari on October 6, 2003. *Lynch v. Florida*, 540 U.S. 867 (2003).

Lynch filed a Rule 3.851 motion for post-conviction relief on July 27, 2004, raising the following issues:

(1) Lynch was deprived of an adversarial testing due to ineffective assistance of counsel at the guilt phase.

(a) Failure to object or move to dismiss Count 3;

(b) Failure to advise Lynch of defenses;

(c) Failure to advise Lynch a plea automatically established aggravating circumstances;

(d) Failure to investigate and advise Lynch on mitigation;

(e) Failure to suppress evidence seized at Lynch's residence;

(f) Failure to consult a firearms expert and advise Lynch on accidental discharge of a firearm;

(g) Failure to investigate the relationship of Greg Morgan, Roseanna and Leah's relationship with each other and with Lynch;

(h) Failure to advise Lynch of the spousal privilege as it affected his suicide letter;

(i) Failure to ensure an adequate factual basis at the plea hearing;

(2) Lynch was deprived of an adversarial testing due to ineffective assistance of counsel at the penalty phase.

(a) Failure to advise Lynch on the waiver of a penalty phase jury;

(b) Failure to investigation mitigating circumstances;

(c) Failure to ensure a competent mental health evaluation;

(d) Failure to suppress evidence pursuant to a search of Lynch's residence;

(e) Failure to present the defense of accidental discharge of firearm and effectively cross-examine the state gun expert;

(f) Failure to investigate the relationship of Greg Morgan, Roseanna and Leah's relationship with each other and with Lynch;

(g) Failure to advise Lynch of the spousal privilege as it affected his suicide letter;

(h) Failure to effectively cross-examine Dr. Riebsame;

(i) Cumulative error.

(3) Incompetent mental health assistance pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985);

(4) The State violated *Brady v. Maryland*, 373 U.S. 83 (1963);

(5) The State violated *Giglio v. United States*, 405 U.S. 150 (1972);

(6) Lynch's guilty plea was not knowing and voluntary;

(a) Failure to advise Lynch of defenses;

(b) Failure to advise Lynch a plea automatically established aggravating circumstances;

(c) Failure to ensure an adequate factual basis at the plea hearing;

(7) The State lost or destroyed exculpatory evidence;

(8) Newly-discovered evidence renders the State mental health expert's opinion unreliable.

(V1, R40-179). The State responded. (V3, R323-420).

Lynch filed a motion for a court order to allow his confidential defense expert to examine the guns in evidence. (V3, R424-426). The motion was granted. (V3, R442-449). Defense counsel also moved to inspect all exhibits admitted at trial. (V4, R531-32). The motion was granted. (V4, R533-34).

The State moved to exclude the testimony of Robert Norgard as an expert on ineffective assistance of counsel. (V4, R550-555). The State also moved to exclude Dr. Joseph Wu as a witness on PET scans, and requested a *Frye* hearing. (V4, R558-560). The State also filed a motion *in limine* to exclude the testimony of Robert Norgard as an expert on ineffective assistance of counsel. The motion was argued before Norgard's testimony and granted. (V15, EH547-550, 567). Collateral counsel argued that Norgard was not testifying as a "*Strickland* expert" but as an expert in the standard of practice by a Florida capital defense attorney in the years 1999-2001. (V15, EH548). The purpose of Norgard's testimony was

proffered. (V15, EH550-567). After he was excluded as an expert, his testimony was proffered. (V15, EH568-591).

An evidentiary hearing was held July 25-30, 2005. On April 3, 2006, Judge Eaton denied relief on all claims. (V11, R1852-1907). An amended order was entered April 10, 2006. (V11, R1910-62). An order clarifying the prior order was entered April 10, 2006. (V11, R1294-64).

Lynch moved to disqualify Judge Eaton on April 13, 2006. (V11, R1965-72). On April 18, 2006, Lynch filed a Motion for Rehearing. (V11, R1999-2017). Judge Eaton denied the motion to disqualify on April 21, 2006, (V11, R1997-98) and Lynch filed an Emergency Writ of Prohibition in this Court. Florida Supreme Court Case No. SC06-721. This Court denied the writ on July 11, 2006, "without prejudice for Lynch to raise this claim in his appeal from the trial court's order denying his motion for post conviction relief."

On October 29, 2006, Judge Eaton entered a Second Amended Order Denying Motion for Post-Conviction Relief (Rule 3.851) and Order on Defendant's Motion for Rehearing. (V12, R2017-2092). This appeal follows.

STATEMENT OF THE FACTS

The facts of this case were outlined by this Court on direct appeal:

> On March 23, 1999, a grand jury returned an indictment against appellant, Richard Lynch, for two counts of first-degree premeditated murder, one count of armed burglary of a dwelling, and one count of kidnapping. The indictment was the result of events that occurred on

March 5, 1999, culminating in the deaths of Roseanna Morgan ("Morgan") and her thirteen-year-old daughter, Leah Caday ("Caday").

On October 19, 2000, appellant pled guilty to all four counts of the indictment. Subsequently, the trial judge granted appellant's request to have the penalty phase conducted without a jury. During the penalty phase, the State produced a letter written by the appellant two days prior to the murders. In the letter, addressed to appellant's wife, Lynch admitted to having a "long affair" with Roseanna Morgan, which lasted from August 1998 until February 9, 1999. He detailed the affair and asked his wife to send copies of cards Morgan had written to Lynch and nude pictures Lynch had taken of Morgan to Morgan's family in Hawaii. Lynch wrote: "I want them to have a sense of why it happened, some decent closure, a reason and understanding...."

The testimony elicited during the penalty phase regarding the events of March 5, 1999, included a tape of a telephone call that appellant made to the "911" emergency assistance service while still in the apartment where the murders occurred. On that tape, Lynch is heard admitting to the 911 operator that he shot two people at 534 Rosecliff Circle. He said he initially traveled to the apartment only to attempt to have Morgan pay a credit card debt, but resorted to shooting her in the leg and in the back of the head. He told the 911 operator that he had three handguns with him and that he shot Morgan in the back of the head to "put her out of her misery." Appellant also admitted to firing at the police when they first arrived on the scene.

As to Caday, appellant informed the 911 operator that he had held Caday at gunpoint while waiting for Morgan to return home. He related that she was terrified during the process prior to the shootings and asked him why he was doing this to her. Appellant admitted that he shot Caday, and said "the gun just went off into her back and she's slumped over. And she was still breathing for awhile and that's it." Appellant told the operator he planned to kill himself.

During the course of these events on March 5, 1999, appellant telephoned his wife three times from the apartment. His wife testified that during the first call she could hear a woman screaming in the background. Appellant's wife further testified that the screaming

woman sounded "very, very upset." When Lynch called a second time, he admitted to having just shot someone.

Prior to being escorted from the apartment by police, Lynch also talked to a police negotiator. The negotiator testified that Lynch told her that during the thirty to forty minutes he held Caday hostage prior to the shootings, Caday was terrified, he displayed the handgun to her, she was aware of the weapon, and appeared to be frightened. He confided in the negotiator that Caday had complied with his requests only out of fear. Finally, appellant described the events leading to Morgan's death by admitting that he had confronted her at the door to the apartment, shot her in the leg, pulled her into the apartment, and then shot her again in the back of the head.

Several of Morgan's neighbors in the apartment complex also testified as to the events of March 5, 1999. Morgan's neighbor across the hall [FN2] testified that she looked out of the peephole in her door after hearing the initial shots and saw Lynch dragging Morgan by the hands into Morgan's apartment. She further testified that Lynch knocked on the door to Morgan's apartment and said, "Hurry up, open the door, your mom is hurt." The neighbor testified that Morgan was screaming and was bloody from her waist down. Morgan's neighbor further testified that the door was opened, then after entering with Morgan, Lynch closed the door and approximately five minutes later she heard the sound of three more gunshots. A second neighbor in the apartment complex also testified that approximately five to seven minutes after she heard the initial gunshots, she heard three more.

> [FN2] The neighbor lived in the apartment directly across the hall from Morgan's apartment in the same apartment building.

After his arrest, appellant participated in an interview with police in which he confessed to the murders. He again admitted the events of the day, telling police he showed Caday the gun and that she was very scared while they were waiting for Morgan to arrive home. He told the detective that Caday was afraid and that he was "technically" holding her hostage. He admitted to shooting Caday's mother, Morgan, four or five times in the presence of her daughter.

> In his post-arrest interview, Lynch also admitted that he planned to show Morgan the guns he brought with him to let her know he possessed them, and to force her to sit down and be quiet. He told the detectives he did not know why he did not just leave the guns in his car. He admitted shooting Morgan four or five times, dragging her into the apartment, and then shooting her in the back of the head with a different firearm.

Lynch v. State 841 So. 2d 362, 366-368 (Fla. 2003).

Evidentiary hearing testimony. Lynch presented the testimony of James Figgatt, one of Lynch's trial attorneys; Tom Artingstall, a State Attorney investigator; Cecilia Alfonso, a mitigation specialist; five family friends from New York: Nicole Robinson, Eddie Corso, Danelle Pepe, George Kabbez, and Joy Joyce; Vesna Lovsin, a woman Lynch dated one time; Gene Cody, a gun shop owner; and five mental health professionals: Dr. David Cox, Dr. Jacqueline Olander, Dr. David McCraney, Dr. Joseph Wu, and Dr. Joseph Sesta. The State called Lynch's other trial attorney, Tim Caudill, and three experts relating to the mental health issues: Dr. Lawrence Holder, Dr. William Riebsame, and Dr. Jeffrey Danziger. The Defendant called Dr. Sesta in rebuttal.

Alleged *Brady* evidence. Tom Artingstall has been employed as a State Attorney Investigator since 1995. He participated in the Lynch investigation in March 1999. (V13, EH16). Artingstall had written letters to various entities requesting information about Lynch. (V13, EH18, 21; V5, 700-795; Defense Exhibits 1-17). He received documents from the New York Police Department,

New York Public Safety and the Transit Authority regarding Lynch's employment as a special patrol officer and bus driver. (V5, R700-769). There were also records of Lynch's credit cards (V5, R770-792), a statement from Lynch regarding an incident in March 1982 during which Lynch responded as a special patrol officer (V5, R794-795), and Lynch's 1967-69 school grades. (V5, R795). Mr. Figgatt, Lynch's defense attorney, had not seen the documents. (V13, EH193-199). Figgatt was not concerned about the school grades because they were situational. (V14, EH205). Lynch failed some courses in the 11th grade. (V14, EH214). Mechanical drawing was his worst class. (V14, EH215). The State expert, Dr. Riebsame, had testified at the penalty phase that Lynch thought he "did well" or "did all right" in school. (V14, EH215). Dr. Riebsame did not have the school records when Figgatt deposed him. (V14, EH223). Lynch told Figgatt about the citizen's arrest he made in New York, but Figgatt didn't consider that incident relevant to Lynch's conduct at the time of the murders. (V14, EH223).

Trial Attorneys. Arthur Haft and Tim Caudill were Lynch's original defense attorneys. Early in the case, Mr. Haft realized that one of the victims had attended school with his daughter, so James Figgatt took Mr. Haft's place. (V13, EH35). Figgatt had been a Public Defender since 1976, and tried his first capital case in Marion County in 1978. (V14, EH250). He had tried 50-100 capital cases. (V14, EH250). Figgatt was familiar with the book *Defending Capital Cases in*

Florida published by the Florida Public Defender's Association, and had attended the seminar "Life over Death" many times. (V13, EH98).

Mr. Figgatt visited Lynch "probably a dozen times" in jail between July 1999 and October 2000. (V13, EH37). Before Figgatt was involved, Caudill and Haft had visited Lynch in jail. (V14, EH256). The meetings were lengthy, there were phone conversations, and Lynch would write the attorneys. (V14, EH256). Lynch's letters to the attorneys were admitted. (V14, EH258; State Exhibit 1). Mr. Figgatt and Mr. Caudill would sometimes visit Lynch together, and sometimes visit separately. Mr. Figgatt was considered lead counsel. (V13, EH40). Lynch was arrested March 6, 1999; indicted March 23, 1999; and entered a plea on October 19, 2000. (V13, EH51; V12, R2064).

Mr. Figgatt had examined the indictment for defects. (V13, EH54-55). He noted that the indictment did not alleged "without consent," but case law at the time held that lack-of-consent was an affirmative defense, not an element of the crime. (V13, EH54). He did not notice anything in the indictment that would lead him to believe it did not charge a crime. (V13, EH54). The attorneys discussed possible defenses with Lynch. (V13, EH54). The shooting of Roseanne, the mother, was arguably a second-degree murder; however, Lynch brought a bag with several firearms to the scene. The shooting of Leah, the daughter, was arguably an accident; however, it occurred during a felony. (V13, EH55). Arguing that a

burglary was not committed was a possibility, but Lynch approached the residence with several firearms. (V13, EH56). Figgatt did not see any defenses to the kidnapping charge. (V13, EH57). There are always lesser included crimes of false imprisonment or trespass, but they did not exist in this case. (V13, EH57).

The hierarchy of concerns in Figgatt's opinion was: death of the child, death of the mother, kidnapping of the child, and the burglary. The kidnapping of the child was more severe than the burglary. (V14, EH260). Even if the State had dismissed the burglary charge, the kidnapping was still a violent felony. (V14, EH260-61).

The morning of the plea hearing, the State presented a written factual basis. (V13, EH59). Figgatt objected to their factual basis, and in phrasing his version of the facts stated that Lynch entered the home voluntarily. That was a misstatement and was the best-case scenario. (V13, EH60). Figgatt prevented the judge from considering the State's factual basis (which was slanted toward aggravating circumstances), and recited the factual basis most "complimentary" to his client. (V13, EH63; V15, EH412). Figgatt agreed that *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), held that if a person enters voluntarily, it is not burglary. (V13, EH62). *Ruiz v. State*, 863 So. 2d 1205 (Fla. 2003), designated the applicable periods during which *Delgado* applied, and Figgatt agreed that *Delgado* would have applied in March 1999. (V13, EH62-63). When Figgatt objected to the factual basis, he was

concerned about the premeditation aspect and the cold, calculated, premeditated aggravating circumstance. (V13, EH63). Further, he had just been presented a copy of the State's version. (V13, EH64). The State's theory of the kidnapping of Leah was not based on asportation, but on terrorizing the child. (V15, EH418).

Figgatt discussed aggravating facts with Lynch. (V13, EH66). He explained that this was not a "spur of the moment" offense because there had been a stalking event earlier in the week and there was planning. (V13, EH66). Figgatt and Lynch discussed entering a plea and waiving the penalty phase jury. (V13, EH67). Aggravating facts included CCP, possible HAC due to the manner of Roseanne's death, and the contemporaneous violent felonies. (V13, EH68). Lynch had written a letter to Figgatt stating he had already "given the prosecutor their case on a silver platter." (V13, EH69). Figgatt had extensive discussions with the State regarding the State agreeing to a life sentence for Roseanne's death. The State rejected any proposals. (V13, EH71). There was never really any doubt as to guilt because Lynch admitted everything to the police dispatcher in a 30-45 minute conversation. The issue in this case was the sentence. (V13, EH73).

Pleading to the charges and waiving the jury was a tactical decision. (V13, EH75). The attorneys discussed all aspects of whether or not to have a jury. (V15, REH435). Given the facts of this case, Figgatt did not anticipate a favorable jury recommendation, especially since death of a child was involved. (V13, EH76; V14,

R253). The attorneys considered all aspects of the case in recommending whether Lynch should plead to the charges. (V13, EH78). Figgatt viewed the guilty plea and jury waiver as mutually beneficial because Judge Eaton had only imposed the death penalty one time: in the mid '80s. (V13, EH78). Figgatt was familiar with Judge's Eaton as a jurist, and the chances of trial error "creeping" into the record was "very unlikely in light of the fact that my client had committed this crime while on the phone to nine-one-one." (V14, EH254-55).

The guilt-phase investigation included reviewing a "huge mass of material from the State Attorney," transcripts of the tape recordings between Lynch and the police dispatcher, a taped video made by news media the day of the murder, and the videotape of Lynch's conversation with the police after he was taken into custody. (V13, EH86-88). Figgatt visited the apartment building where Roseanne and Leah were murdered, and drove by Lynch's home. (V13, EH89).

Lynch had told the dispatcher the Glock misfired. (V13, EH90). Lynch fired the gun repeatedly which, in Figgatt's belief, is not a "misfire." (V13, EH94). Figgatt knows about guns and knew that a Glock is not an automatic pistol. (V13, EH94). Roseanne was shot a total of 5 times with two different guns. (V14, EH264). Lynch told the attorneys that Leah "came into the line of fire," but he did not mean to shoot her. (V14, EH265). Figgatt was familiar with the FDLE firearms expert, Nanette Rudolph, and knew she was credible. Rudolph said the

Glock had not been modified. (V15, EH409).

The "murder/suicide" letter Lynch left at this house before going to kill Roseanne and Leah was significant to the State to establish CCP. (V13, EH95). Figgatt could not come up with a viable theory that would allow him to exclude the letter as a privileged spousal communication. (V13, EH95). He even called the appellate division of the Public Defender in Daytona Beach. (V13, EH95). Figgatt also reviewed Professor Ehrhardt's book on evidence. The law was clear that if the communication was intended to be distributed to third parties, it was not privileged. (V13, EH96). Lynch had asked his wife, Virginia, to send information he was providing in the letter to Roseanne's parents. (V13, EH96). Figgatt did not assert the spousal privilege as to Lynch's letter. He also sent the letter to Dr. Olander. (V13, EH107).

The trial court's sentencing order referenced the letter which was obtained from Lynch's house, and Figgatt saw no basis for a motion to suppress. (V13, EH113-14). The wife gave the police permission to enter while she was on the phone with Lynch during the murders. (V13, EH115). Virginia gave the letter to police consensually. (V13, EH115). Lynch had called his wife in the midst of the murders and told her to go find the letter. (V14, EH273).

Virginia was interviewed by the police on March 6 and March 16, 1999. (V13, EH126; V5, R796-896; Defense Exhibits 18 and 19). In her March 6

statement, Virginia asked for a copy of the letter because she had not finished reading it. Police arrived shortly after the murders and Virginia gave them the letter.

Police subsequently obtained a search warrant. (V13, EH115). Figgatt did not file a motion to suppress evidence seized. (V13, EH121). A gray lock box was seized from the nightstand. The box contained bank papers, birth certificates, legal paperwork and collectible coins. (V13, EH125). Figgatt did not go to the Sanford Police Department to look at this box. (V13, EH125). Lynch had written the attorneys asking them to retrieve items from the box regarding his mother's estate. Figgatt was aware the box was at the police department. (V14, EH270). he felt that some of the items in the box contained useful background information. (V13, EH160, 164, 166-169; V5, R848-398; V6, 894-1092; V7, R1093-1290; V7, R1289-1430; Defense Exhibit 23). Two cards in the lock box dated February 2 and January 11 were letters from Roseanne. (V13, EH176; V8, R1431-36; Defense Exhibits 24 and 25). There were photography certifications for Lynch. (V13, EH179; V8, R1437-40; Defense Exhibits 26, 27, and 28). Lynch had written a Valentine card to Roseanne and 4-page letter after the break up and placed them in the lock box. (V13, EH181-82; V8, R1440-1444; Defense Exhibits 29 and 30). There were various cards Lynch sent to Rosanne and Leah for holidays. (V13, EH185; V8, 1445-52; Defense Exhibits 31, 32, 33). Hotel receipts for the

Comfort Inn were in evidence at the Sanford Police Department, but Figgatt had not seen them. He did not know how they would "fit in" to the case. (V13, EH187-188; V8, R1453-54; Defense Exhibit 34). There was also a credit card statement dated February 25, 1999, showing the "card is tapped out past the six thousand dollar credit line." (V13, EH190-92; Defense Exhibit 35; V8, R1455).

Figgatt did not speak to Lynch's wife, Virginia, because he "didn't think that she was ever going to be in our camp." (V13, EH113). Dr. Olander did speak with Virginia about penalty phase issues. (V13, EH114).

Figgatt and Lynch discussed how to proceed with the mental health expert. (V13, EH67). Figgatt first tried to hire Dr. Riebsame, but he had already been hired by the State. Figgatt then retained Dr. Cox. (V13, EH69). After reviewing Cox's report and having phone conversations with him, Figgatt decided not to use him. (V14, EH225). Dr. Cox had prepared a report. (V14, EH225; V8, R1456-1462; Defense Exhibit 36). However, the report did not relate the information to the facts of the crime. (V15, EH410). Cox's report did not relate any condition to Lynch's offenses. (V14, EH228). Figgatt knew Dr. Cox had all the facts of the offense, yet the report never related to the offense itself. (V14, EH220). Figgatt also did not like the diagnosis of paranoid personality disorder because Dr. Cox did not specify whether the condition was situational or not. (V14, EH230). In fact, Dr. Cox wrote nothing about the event he was retained to analyze. (V14, EH231).

Figgatt then retained Dr. Olander, who has a specialty in neuropsychology. He hired Dr. Olander to conduct neuropsychological testing. (V14, EH233). He also gave her all the information on Lynch's background and family. (V15, EH440). Although Figgatt may not have used the words "brain damage" with Dr. Olander, he hired a neuropsychologist as opposed to a "simple forensic psychologist" because the focus of the neuropsychologist is on brain damage. (V14, EH235). Dr. Olander was hired to do neuropsychological testing. (V14, EH235). Dr. Olander was not provided a copy of Dr. Cox's report, because Figgatt "did not want Dr. Olander to be influenced by anything that Dr. Cox had prematurely concluded in writing." (V14, EH235). Figgatt met with Dr. Olander at least two times at her office. (V14, EH237).

Figgatt and Lynch discussed mitigation. (V13, EH79). Both Figgatt and Caudill investigated mitigation. (V13, EH86). Figgatt was aware Lynch completed only to the 10th or 11th grade in school, but did not obtain school records. (V13, EH65, 141). Dr. Olander presented facets of Lynch's childhood. (V14, EH215). Lynch was basically a "nice guy who had a really bad day." (V13, EH80). Figgatt was not aware Lynch slept in the same bedroom with his parents until he was 17 years old. They had only a one-bedroom apartment and Lynch slept in a separate bed. (V14, EH216). Even after his father died, Lynch continued to live with his mother. (V14, EH216). Figgatt got some indication of that from Ms. Aiossa, but

she didn't think that was unusual given the fact his mother was a widow and Lynch was her only son. (V14, EH216).

Figgatt prepared a witness list and made notes about the mitigation witnesses; however, he never filed it or disclosed the witnesses to the State. (V14, EH398). One factor in presenting evidence was that Judge Eaton "likes things to get to the point," and Dr. Olander could present the background history of Lynch. (V14, EH278). By not filing the witness list, Dr. Olander was able to testify without disclosing the witnesses to the State. (V14, EH398). In hindsight, Figgatt wishes he had brought the witnesses in to testify rather than rely on Dr. Olander's interview skills. (V14, EH279). He admitted that was "armchair quarterbacking." (V14, EH279).

Figgatt was not aware of any "anecdotal evidence" that Lynch was delusional. (V14, EH218). Lynch wrote a letter to the attorneys on February 9, 2000, stating he was "leaning towards a religious or lack of satanic influence" defense. (V14, EH268). The letter was written before Lynch met with Dr. Cox. (V14, EH269). Figgatt was aware Lynch had a "relationship" with his wife's sister, and didn't know whether that was a delusion. (V14, EH221). If Figgatt had a PET scan showing brain damage, he might have advised Lynch differently in terms of waiving the jury because they could have presented a picture as to why an otherwise nice guy would kill a mother and child. (V13, EH81). Juries are more

receptive to something physical like brain damage than to "the common scheme of poor upbringing and mental illness." (V13, EH82). If Figgatt had evidence of mild to moderate brain damage, it might have affected the recommendation or entry of a plea. (V13, EH84).

Lynch provided a list of persons who might have information on his life. (V13, EH136; V5, 840-41; Defense Exhibit 20). Figgatt did not speak with Virginia Lynch, Juliet Cardines, Robert Cardines, Bert Nelson, Gene the barber, Fredrick Aiossa, Eileen Aiossa, Allison Yrshus, or Eddie Corso. (V13, EH136-138, 144-45; V14, R207). Figgatt did not recall the name Vesna Lovsin. (V14, EH208). He sent a letter to Sister Mary Joseph and Nazareth High School, but they came back unclaimed. (V13, EH145). He did speak with Maureen Aiossa and Danielle Pepe. (V13, EH138-39). Aiossa had not seen Lynch for years. (V13, EH139). She described Lynch as "odd, quiet, polite, and basically nerdy" whose father was a strict disciplinarian who was home on disability. (V13, EH147). Lynch would wash his hands repeatedly, and Aiossa would yell at him about the water bill. (V13, EH147). Lynch's mother spoiled him and waited on him hand and foot even after he grew up. (V13, EH147-48; V5, R842-845; Defense Exhibit 21). Figgatt also spoke to Danelle Pepe. (V13, EH146). Figgatt spoke to George Kabbez, Sr., who said to talk to George Kabbez, Jr. Figgatt did not talk to George Kabbez, Jr. (V13, EH146). One of Lynch's neighbors, J.T. Matthews, came into

the office for an interview. (V13, EH149). Figgatt knew that Lynch was a "house husband" after he lost his job. He took the children to school and picked them up. (V13, EH150). Figgatt asked Dr. Olander to contact some of the witnesses. (V13, EH151-52). He wanted her to have the information that supported a diagnosis. (V13, EH152). Figgatt had even drafted a motion to continue the penalty phase for four weeks so that he could contact witnesses out of the area. (V5, R846). He also made a tactical decision to rely on the expert's recitation of Lynch's background and family history rather than call a myriad of lay witnesses. (V15, EH437).

Tim Caudill has 20 years experience defending capital cases. (V18, EH1087). He and Figgatt talked with Lynch at length about waiving the jury. It was entirely a strategic decision. The death of the child, Leah, was a concern with a jury. (V18, EH1090). Another concern was the sordid relationship with Roseanne, pornography, and the massage parlors. The attorneys were afraid the jury would unanimously recommend the death sentence. (V18, EH1091). The attorneys knew that Judge Eaton understood capital law. They thought they had a better chance to receive a life sentence if they presented their case to the judge alone. Judge Eaton has a more intellectual and less emotional approach to cases. (V18, EH1092). With a jury, there was also the danger of inflaming them during the guilt phase. (V18, EH1107).

The attorneys reviewed the seizure evidence and decided there were no

suppression issues. (V18, EH1108). They discussed whether they could assert the spousal privilege as to Lynch's letter to his wife. (V18, EH1109). They did not think they had a valid basis to exclude the letter. (V18, EH1110). They had nothing to gain by hiring a firearms expert. Lynch admitted shooting Roseanne in the head to put her out of her misery. Leah's murder was felony murder. (V18, EH1111). There was also an issue of transferred intent. If Lynch was shooting at Roseanne and hit Leah, it was still first-degree premeditated murder. (V18, EH1112).

The attorneys did not see any possibility of an acquittal in the guilt phase and there was no benefit to having a jury trial. (V18, EH1093-94). Lynch agreed "wholeheartedly" that it was best to plea. (V18, EH1096). There was no question in the attorneys' minds that there was an adequate factual basis for the plea. (V18, EH1120). Even if Lynch's letter to Virginia had been excluded, they would have entered a plea. (V18, EH1192).

Mr. Caudill was aware of the statement of Ms. Morales across the hall that Lynch told Leah to open the door after he shot Roseanne because her mother was hurt. (V18, EH1098). This statement was inconsistent with Lynch's statement he shot Leah as she ran to the door when Roseanne arrived. Other witnesses testified there were several shots, then silence, then three more shots. (V18, EH1098). This was consistent with Lynch shooting Roseanne in the torso three times, dragging

her inside, then shooting Roseanne in the face and head and shooting Leah in the back. (V18, EH1099).

Mr. Figgatt asked Mr. Caudill to obtain a mental health expert for the penalty phase. The first person that came to mind was Dr. Riebsame. (V18, EH1112). The State had already retained Dr. Riebsame, so Mr. Caudill contacted Debra Day. Ms. Day was not available, and gave Caudill the name of Dr. Cox. (V18, EH1113). They retained Dr. Cox, but were not happy with his report. (V18, EH1114). Mr. Caudill was at the interview with Lynch and Dr. Cox. Cox did not seem to know what he was doing and was not familiar with mitigation. (V18, EH1116).

They then retained Dr. Olander. (V18, EH1115). Mr. Caudill had successfully used Dr. Olander in another case, and saw positive interaction between Judge Eaton and Dr. Olander. (V18, EH1117). Further, she was hired because she is a neuropsychologist. (V18, EH1117). Dr. Cox had recommended further neuropsychological testing, so that was another reason to hire Dr. Olander. Mr. Caudill knew that neuropsychological testing can determing whether there is organic brain damage. (V18, EH1118).

Mr. Caudill knew that Lynch gave Mr. Figgatt names of witnesses. (V18, EH1103). They made a strategic decision on which witnesses to call. (V18, EH1102, 1130). It was also a strategic decision not to present testimony from the

lay witnesses on Lynch's list. (V18, EH1130). They made a strategic decision to present background testimony through Dr. Olander. (V18, EH1103-04). An expert can synthesize all the information. With witnesses, there can be a disconnect between a defendant's history and the crime, but an expert can put it all together. (V18, EH1104). The attorneys discussed with Lynch that the felony for the aggravating circumstance of during-a-felony could be either the kidnapping of Leah or the burglary. (V18, EH1100).

Mental health and biopsychosocial experts.

Dr. David Cox, psychologist, was qualified as an expert in neuro- and rehabilitative psychology. (V15, EH594). He was retained in the Fall of 1999 to evaluate Lynch. The attorneys sent him records. (V15, EH595). He met with Lynch and conducted psychological testing. (V15, EH597). Lynch was quite depressed when Dr. Cox interviewed him. (V16, R627).[1]

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[1] Dr. Cox's gathered Lynch's psychosocial history via interview in 1999 and reported:

-his father was abusive;
-he attended parochial school and dropped out in the 10th grade;
-he married Virginia in 1988 and moved to Florida in 1990;
-he worked for New York Transit Authority for 6 years;
-he worked in Florida for Tri-County Transit but was fired 2 months later for being late;
-he worked at Express Label a few months but was fired for being too slow;
-his wife wanted him to work close to home and only certain hours so he could take care of the children due to her flexible schedule as a nurse;
-his manhood felt threatened by his wife and he became depressed;
-he felt inferior because he did not work;

The results of the Weschler IQ test administered to Lynch revealed average scores. However, there was a 27 point difference between Lynch's verbal IQ and performance IQ. (V15, R606-07; 623-24). Dr. Cox said a 15-point difference between verbal and performance scores may indicate the possibility of "cerebral dysfunction or brain damage." (V15, R608). Lynch's point differential is atypical, leading to where "one needs to ask questions." (V16, R623). He recommended Lynch be more thoroughly evaluated. (V16, R614).

The results of the MMPI indicated Lynch has extreme or bizarre thoughts and suffers from the presence of delusions or hallucinations. (V16, R609-10; 612). Further, Lynch tended to manipulate others. (V16, R633). He exhibited a high level of antisocial personality traits. (V16, R634). During the 911 call Lynch made

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-he lost his faith and began watching pornographic videotapes and frequenting massage parlors for "hand jobs";
-he met Roseanne, whose marriage had also "lost the fire";
-he took nude and swimsuit photos of Roseanne and they had an affair;
-he lent Roseanne approximately $7,000;
-Roseanne's husband discovered the affair and insisted it end;
-supernatural or satanic forces influenced his killing Roseanne and Leah;
-he denied any significant psychiatric or psychological history, hospitalizations, illnesses or injuries;
-he drank heavily for three years, but stopped in 1985;
-he last smoked marijuana or used cocaine in the early 1980's.

(V8, R1456-1462; Defense Exhibit 36).

after the murders, he did not mention a "demonic" force nor confess to it to police afterwards. He did not mention it to Dr. Riebsame, either. (V16, R683).

In Dr. Cox's opinion, Lynch has low impulse control and frustration tolerance, and his profile indicated he is likely to be psychotic. Dr. Cox diagnosed Lynch with a cognitive disorder NOS and "likely paranoid personality disorder," likely due to a "brain damaged situation." (V16, R610-11). Although some personality disorders relate to brain damage, some do not. (V16, R628). Brain damage that is causes by strokes, restriction or lesions can be seen in different types of scans. (V16, R629). Dr. Cox has never ordered a PET scan for any of his patients. (V16, R629).[2]

Dr. Jacquelyn Olander, neuropsychologist, was retained in April 2000, to evaluate Lynch after trial defense counsel "were not satisfied [with Dr. Cox] and wanted additional evaluation." (V16, R644; 646; 673). Dr. Olander testified she did not discuss brain damage with counsel and did not assess Lynch for the existence of brain damage.[3] (V16, R646-647). However, when she initially interviewed him, she saw signs of "possible brain damage" and eventually

[2] Dr. Cox's diagnosis in the report to trial counsel was:

(1) Cognitive Disorder NOS
(2) Paranoid Personality Disorder

(V8, R1461; Defense Exhibit 36).

[3] At the penalty phase, Dr. Olander testified Lynch did not have brain damage. (V16, R647).

diagnosed a schizoaffective disorder and anxiety disorder. (V16, R674, 676).[4] Her diagnosis was based on her clinical interview and jail medical records which indicated Lynch was "in an altered state for a period of time." (V16, R676). Lynch's altered state could have been due to severe depression and being incarcerated. (V16, R677, 686). Lynch has a chronic history of perceptual distortion in his ability to differentiate what is real and not real. (V16, R578).

Subsequent to Lynch's sentencing, Dr. Olander reviewed Dr Cox's report and the results of the tests administered by Drs. Riebsame and Sesta. (V16, R648). Lynch's test scores were consistent. (V16, R650-51). Dr. Olander said Dr. Cox's finding of cognitive disorder NOS indicates brain damage. (V16, R654). The test scores from the executive functioning test administered by Dr. Sesta indicated brain damage. (V16, R656-57; 667). Impairment to the frontal lobe is linked to violent behavior and impulse control. (V16, R667). The impairment to Lynch's frontal lobe would significantly have impacted his ability to conform his conduct to the requirements of the law. (V16. R673).

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[4] Dr. Olander's report to trial counsel diagnosed Lynch as:

(1) Schizoaffective Disorder
(2) Anxiety Disorder, NOS
Rule/Out Psychotic Disorder NOS
(3) Personality Disorder NOS, with Paranoid and Obsessive-Compulsive Features.

(V8, R1498; Defense Exhibit 40).

Dr. Olander's opinion was that Lynch had a chronic history of perceptual distortion, i.e., a cognitive dysfunction as she testified at trial. (V16, EH378). She did not think Lynch had a "good working memory" of the murder events because he was impaired by depression. (V16, EH688). However, he could remember specific events. (V16, EH689). Dr. Olander diagnosed Lynch with schizoaffective disorder because he told her about "demonic forces." (V16, EH679). She acknowledged that Lynch never told the 911 dispatcher, Dr. Riebsame, or the detective conducting his post-arrest interview, about the demonic forces. (V16, EH 683). Lynch did not mention Vesna Lovsin to Dr. Olander. (V16, EH687). In Dr. Olander's opinion, the IQ score of 90 shown in Lynch's school records was not significant for various reasons. Likewise, his 11th grade scores could have been the result of dropping out of school to work. (V16, EH692). Dr. Orlander stands by her original (trial) diagnosis of schizoaffective disorder. (V16, EH695).[5]

[5] Dr. Olander's report to the trial attorneys relates the following about Lynch's background:

-his father died of cancer in 1970 and his mother in 1996;
- he had a strange childhood and his father made him report to him every half hour;
-other children would tease him and not allow him to check in with his father;
-he slept in the same bedroom with his parents;
-his father was very physical and would punish Lynch by hitting him on the back or with a ruler;
-he lived with his mother through adulthood even after he was married;
-he moved with his family to Florida in 1990;
-his sons were born in 1993 and 1997;

Dr. McCraney, a neurologist, evaluated Lynch and reviewed materials. (V16, EH707, 725, 726). Lynch is grandiose and meticulous in recounting his history. (V16, EH728). Lynch showed some suggestions of frontal lobe abnormality. (V16, EH729). The discrepancy between verbal and performance IQ can indicate brain dysfunction. (V16, EH 732, 736). In school, Lynch was good in language and religion and bad in math. (V16, EH734-35). Lynch denied any history of mental problems. (V16, EH750). Dr. McCraney thinks Lynch has obsessive compulsive symptoms: he is obsessed with pornography. (V16, EH749-50). However, obsessive compulsive traits are inconsistent with frontal lobe impairment (V16, EH752). Lynch does not have obsessive compulsive disorder

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-he was very close to his mother and grieved when she died;
-felt depressed after the birth of his second child;
-his depression worsened when Roseanne broke up with him;
-he was raised a Catholic and attended Catholic schools;
-he drank a lot in New York, but stopped in 1991;
-after his father died, money was tight;
-he had to attend public high school where there was violence;
-he dropped out of school and worked as a truck driver;
-he wanted to be a police officer;
-he became a security guard, then a transit bus operator;
-he worked for Pony Express in Florida but was fired for being late;
-he stayed at home with his sons;
-he was arrested one time and the charges were dismissed;
-he often talked about guns with police officers and bought his first gun in 1975;
-he reported a robbery when he worked as a security officer at a bank.

(V8, R1484-1487; Defense Exhibit 40).

("OCD"), just obsessive personality traits. (V16, EH753). In Dr. McCraney's opinion, the developmental defect in Lynch's brain has been with him all his life. (V16, EH756). Dr. McCraney ordered a PET scan, but did not receive a report, and the images he received were incomplete. (V16, EH757).

McCraney believed Lynch met the statutory mitigating criteria for "substantially impaired" because he has psychosis. (V16, EH740-41). McCraney could not say with a reasonable degree of medical certainty that the mild impairment contributed to the murders, but he could say that it "more like than not" contributed. (V16, EH759-60). He does not know the facts of the crime: he was only asked to look at current conditions. (V16, EH760). There are two manifestations of impairment: (1) a person can't control behavior, and (2) psychosis. (V16, EH761). Lynch has "diminished capacity" and is always substantially impaired. McCraney had no opinion on whether Lynch met the statutory mitigating criteria for "extreme emotional disturbance." (V16, EH763).

Dr. Holder, Florida-licensed M.D and board certified by the American Board of Radiology and the American Board of Nuclear Medicine, has 30 years of experience in nuclear medicine. (V16, EH772). He is an attending physician at Shands and a professor at the University of Florida. (V16, EH786). Before that, he was professor of radiology and director of nuclear medicine at University of Maryland for 10 years. (V16, EH786). He was qualified as an expert in nuclear

medicine and radiology. (V16, EH788). Dr. Holder was provided images of Lynch's PET scan conducted by Dr. Wu. (V16, EH790).[6] Wu uses the "visual vigilance" method, but Dr. Holder has never seen that specific protocol validated. (V16, EH794, 795). Dr. Holder had researched the method and had found no baseline published anywhere. (V16, EH 795-76). Neither could Dr. Holder find any medical or scientific literature to support Wu's protocol. (V16, EH797).

Dr. Holder did find one article on the visual vigilance method, but it was done by Dr. Wu's department at University of California at Irvine. (V17, 799, 805). Dr. Holder knew 3-4 doctors who use the continuous performance test ("CPT"), which is similar to the visual vigilance. (V17, EH806). Dr. Wu did not write a report. (V17, EH807). In Dr. Holder's opinion, the grayscale image of the PET scan is better than the colored image because color makes the variations look greater. (V17, EH809-10, 821). Lynch's PET scan showed normal distribution. (V17, EH 817). There is normally less activity in the frontal lobe of the brain as a person gets older. (V17, EH819). Dr. Wu refers to a 20% variation, but when you look at the grayscale image, there are normal variations. (V17, EH821). In Dr. Holder's opinion, Lynch's PET scan showed nothing abnormal. Futhermore, there is no proof of correlation to mental illness that can be illustrated by a PET scan. (V17, EH827). Diagnosing mental illness is not an accepted use of the PET scan.

[6] The State moved to exclude Dr. Wu's testimony and requested a *Frye* hearing. (V4, R558-560).

(V17, EH829). Dr. Wu's methods may be used in research, but it is not an accepted protocol to diagnose mental illness. (V17, EH830).

Dr. Wu, California M.D. and associate professor at University of California Irvine College of Medicine Brain Imaging Center, noted various abnormalities in Lynch's PET scan. (V17, EH852, 880-93). He noted that Lynch's PET scan was inconsistent with a diagnosis of OCD. (V17, EH893). Lynch has hypofrontal abnormalities which cause impairment in executive functioning, including "impairment in higher cortical cognitive and emotional thinking." (V17, EH921). Possible causes of Lynch's PET pattern are "some type of psychotic spectrum disorder" like schizoaffective disorder. It could also be psychotic depression or schizophrenia. (V17, EH932). Dr. Wu could not say specifically what disorder Lynch had, just that it was in the "psychotic spectrum." (V17, EH933).

Lynch's PET scan was performed May 12, 2005. It would have been more effective to have a PET done closer to the time of the murder on March 6, 1999. (V17, EH936). Dr. Wu has examined other murderers and they all have the same abnormality as Lynch. (V17, EH937).

Dr. Sesta was qualified as an expert in forensic neuropsychology. (V17, EH950). In his opinion, Lynch has mild brain impairment, sufficient for a diagnosis of dementia. (V17, EH965). Lynch's right cerebral hemisphere is dysfunctional. (V17, EH966). This is most likely a "neuro developmental

aberration." (V17, EH969). Lynch is decompensating under the stress of Death Row. He knew what he was doing was wrong when he murdered Leah and Roseanne. (V17, EH982). However, the mild dysfunction diminished Lynch's volitional capacity. (V17, EH983). Dr. Sesta's diagnosis was mild brain impairment that is static. The location of the dysfunction is the right anterior hemisphere. (V17, EH984). Dr. Sesta's "provisional diagnosis" was "neuronal aberration." (V17, EH984). Insofar as DSM diagnoses, Dr. Sesta would diagnose psychotic disorder NOS, dementia NOS, and personality disorder NOS. (V17, EH985). Lynch also meet the criteria for an Axis II personality disorder with schizoid and paranoid traits. (V18, EH1004). Lynch also had erotomanic components that reach delusional proportion. (V17, EH986). However, Lynch did not have delusions. (V18, EH1004). Lynch never mentioned Vesna Lovsin. (V18, EH1010). Dr. Sesta's diagnosis was basically the same as Dr. Cox's and Dr. Olander's. (V17, EH986-87). Lynch was not a full schizoid, but he as a "schizoid flavor" to his presentation. (V18, EH1018). Sesta testified there was not much difference between the diagnoses of Dr. Riebsame and Dr. Olander. (V18, EH1005). Lynch also meets the criteria for a diagnosis of dementia.

Sesta did not talk to Lynch about the murders; however, he thinks anyone who is suicidal has an extreme emotional disturbance. (V17, EH993-94). Sesta did not conduct an evaluation of Lynch's mental state at the time of the offense. (V17,

EH994). However, in Sesta's opinion, the brain dysfunction existed at the time Lynch committed the murders. Therefore, Lynch was substantially impaired at the time. (V18, EH1015).

Dr. Riebsame evaluated Lynch at the time of trial. (V18, EH1024). He agreed with Dr. Cox's evaluation that Lynch is self-centered, manipulative, and emotionally impulsive. (V18, EH1029). Lynch did not mention Vesna Lovsin even though they talked at length about his background. (V18, EH1030). Lynch remembered every detail of his life, and there was no psychotic thinking in 2000. (V18, EH1031). Lynch did not mention the devil or satan. The first mention was to Dr. Olander. (V18, EH1032).[7] Lynch denied hallucinations or delusions. (V18, EH1035). Lynch told Dr. Riebsame he was raised Catholic but lost touch with his faith when he became addicted to sex and pornography. (V18, EH1036). Dr. Riebsame's diagnosis in 2000 was major depressive disorder and personality disorder NOS. (V18, EH1037). Reibsame also felt Lynch was rather "excessive, compulsive" and had paranoid characteristics. (V18, EH1038). A learning disorder could explain the mild cognitive impairment. This cognitive impairment was apparent in Riebsame's 2005 testing. (V18, EH1039). This diagnosis is consistent

[7] Dr. Riebsame's interview with Lynch was December 5, 2000. (V18, EH1024; State Exhibit 1). Lynch's letter to Mr. Figgatt that he was "leaning toward a religious (or lack of) satanic influence" defense was dated February 9, 2000. (V4, R588). Dr. Olander's interviews with Lynch were April 14, 2000, and May 15, 2000. (V8, R1484; Defense Exhibit 40).

with Dr. Sesta's. (V18, EH1151). Test data is one source of information but Dr. Riebsame primarily relies on information from other sources to understand the defendant's mental state at the time of the murder. (V18, EH1179).

In Dr. Riebsame's opinion, Lynch is emotionally disturbed, but it is not extreme. There were no signs of psychosis or dementia. (V18, EH1040, 1081). Lynch did not lack the capacity to appreciate the criminality of his actions, and he said he knew what he was doing was wrong. (V18, EH1040). Lynch said he shot Roseanne to put her out of her misery. (V18, EH1041). He then made a rational decision not to commit suicide. (V18, EH1080). He controlled the impulse to kill himself. (V18, EH1181).

Dr. Danziger, psychiatrist, examined Lynch in March 2005. (V18, EH1197). He reviewed materials. (V19, EH1204). Lynch related detailed information on family history, the murders and what led up to the murders. He did not mention delusions or hallucinations. Lynch has no memory difficulties. (V19, EH1207-08). Lynch did mention that after he killed Leah and Roseanne, he felt something evil. That is not unusual to feel when a person is in a room with two people he just killed. (V19, EH1209). Lynch planned the murder two days ahead. He also considered suicide. The day of the murders he rationalized his actions, stating the shootings were an accident or that he shot in self-defense because he thought Roseanne's husband was coming. (V19, EH1210). Lynch showed impulse control

by not killing himself. (V19, EH1211). There was a lot of data on the murders, including Virginia's interviews, the 911 calls, and Lynch's interview with Inv. Parker. (V19, EH1212). In Dr. Danziger's opinion, Lynch showed no signs of psychotic illness, schizoaffective disorder, dementia, or memory impairment. (V19, EH1213). The murders were not an impulsive act. Lynch wrote a note to his wife two days prior to the murders. He then cared for his children and dropped one son at school. He put three loaded guns into a bag and drove to Roseanne's apartment where he parked so Roseanne could not see his car. (V19, EH1214). Lynch saw Leah and managed to get into the apartment. He waited for Roseanne and shot her when she arrived. He dragged Roseanne into the apartment. (V19, EH1215).

Lynch has no history of psychiatric problems. (V19, EH1215). He was experiencing some distress because Roseanne broke up with him, she owed him $6,000, and his wife was going to find out about the affair. (V19, EH1216).

Dr. Danziger considered PET scans "fascinating research tools," but they are not appropriate to diagnose psychiatric problems. (V19, EH1216). PET scans are not accepted as a diagnostic tool in psychiatry. (V19, EH1217). Even if Lynch had a mild cognitive impairment, it is irrelevant to the crime because he made a plan and successfully carried it out. (V19, EH1218). Lynch was not substantially impaired, and an expert would have to have all the documentation to make this

assessment. (V19, EH1219). Furthermore, testing in 2005 to determine a psychosis in 1999 is not reliable. (V19, EH1221). A diagnosis of schizophrenia is not appropriate based solely on the MMPI-II. (V19, EH1222). The situation regarding Vesna Lovsin has no relevance to the murders. (V19, EH1223).

Cessie Alfonso, clinical social worker and mitigation specialist, prepared a biopsychosocial history of Lynch. (V14, EH287). She interviewed Lynch, reviewed records, and interviewed people in New York. (V14, EH287). She was unable to obtain Lynch's birth records because the hospital burned down. (V14, EH290). However, she was able to glean the following about Lynch from records, Lynch, and other interviews:

-his father was 50 years old when he was born (V14, EH301);
-his mother was 32 years old when he was born. (V14, EH301);
-he had low birth weight and was in the hospital 8-9 days (V14, EH302);
-he slept in the same room as his parents until he was 17 years old; had no friends, and had no girlfriend (V14, EH303);
-his father was very rigid and punitive (V14, EH303);
-he was a loner in school and was picked on by friends (V14, EH304);
-school records show he has an IQ of 90 (V14, EH305);
-he was not part of the top ten in his class in school and did not do very well in math (V14, EH305);
-his father did not like "Jews, he didn't like blacks, he didn't particularly care for Italians" (V14, EH307);
-he was confirmed in the Catholic church on April 28, 1964 (V14, EH308);
-both he and his mother, Helen, bit their nails (V14, EH310, 315);
-in high school he did well in Religion, but not in Math (V14, EH311);
-he received a failing mark in every subject in the 11th grade (V14, EH312);

-Danelle Pepe had infrequent contact with Lynch, but when they did have contact, he was "peculiar, he was weird" (V14, EH315);
-Pepe remembered Lynch locking himself in the bathroom and her father commenting about the water bill (V14, EH316);
-he would go to George Kabbez's gas station to hang out (V14, EH317);
-Eddie Corso, a police officer, said when Lynch was 8-9 years old, he liked to read his gun magazines and was curious about being a police officer (V14, EH317-18);
-Lynch helped two officers make an arrest and received a commendation award in 1981 (V14, EH319);
-Lynch liked to go to Bert Nelson's gun shop and would talk about guns in a "very, very detailed manner" (V14, EH326);

-Lynch moved to Florida because he was very "law and order" and Florida has the death penalty (V14, EH327);
-he considered Vesna Lovsin, a teller at the Dime Savings Bank, the "love of his life" (V14, EH334);
-when Alphonso found Vesna, Vesna did not remember Lynch. (V14, EH337).

When Alphonso tried to talk to Virginia, she slammed the door in her face and said she did not want to talk to her. (V14, EH325). Alphonso did not know when Lynch started calling Vesna the love of his life, and did not know if it was a recent fabrication. (V14, EH339-40). Lynch told Alphonso he withdrew from school in the 11th grade. (V14, EH343). One of the reasons was that his friends were working and making good money, so he wanted to make money. (V14, EH344).

Firearms expert. Roy Ruel, firearms examiner, examined the firearms in evidence at the sheriff's office in Sanford. He "received the guns, examined them and returned them to the sheriff's office" pursuant to an order from the trial court.

(V14, EH351). The firearms were not in the courtroom at the evidentiary hearing, and the clerk was trying to find out where they were. (V14, EH351). Mr. Ruel wanted to use the Glock as a demonstrative aid, but had to leave town that night, so his testimony was presented without the Glock, which was State Exhibit 39. (V14, EH351-52). Ruel was qualified as an expert in firearms and short-range ballistics. (V14, EH358-59). Ruel had examined "the Glock Model thirty, the Smith and Wesson Model Thirty-nine, and a Smith and Wesson revolver" at the Sheriff's office in Seminole County several months before the evidentiary hearing. (V14, EH361). He dissembled the Glock by "field stripping" it. (V14, EH362). There was considerable wear on the barrel of the Glock from the slide going back and forth. (V14, EH362). A Glock has what is called a "safe action" trigger which is different from a "double action" trigger. (V14, EH365). The Glock has a much lighter trigger pull than an ordinary double-action gun. The trigger pull on the Glock is 5.5 pounds. (V14, EH366).

In Ruel's opinion, Lynch's shooting of the Glock could have been unintentional due to the very light trigger pull and the fact that unintentional discharges have been quite numerous with the Glock pistol. (V14, EH368). He had read newspaper articles in which a police officer shot 17 rounds and only thought he shot 3-4. (V14, EH369-370). Ruel believed that Roseanne was shot four times. (V14, EH368). The shots were "extremely inconsistent." Ruel believed the first

shot hit Roseanne's hand then entered the back of the neck and went out her eye. There were then three shots to the torso. (V14, EH373). The shot to the head was a difficult one, considering Lynch would have been 5+ feet away and the victim may have been moving. (V14, EH373). The three shots to the torso were upward through the body but downward through space; therefore, the shots were made as the victim bent backwards. These were all "very difficult shots, very accurate and well placed." (V14, EH373). There were three more shots: one in Leah's back, one in the door frame, and one that was not found. (V14, EH373). In Ruel's opinion, the accuracy of the first set of shots was inconsistent with the "complete wild three shots that followed." Therefore "either one of them is intentional or they're all unintentional." (V14, EH374). Lynch then got the Smith and Wesson, fired one shot, and that gun jammed. (V14, EH375).

Ruel had reviewed the testimony of the FDLE agent at the penalty phase who testified that the Glock is a "double-action pistol" which it is in a way. (V14, EH376). However, in his opinion, after you fire the first shot, you only have to release the trigger about one-tenth of an inch for it to fire again. The Glock can be fired very quickly with a very light trigger pull. Ruel also disputed the FDLE agent's measurements with regard to powder dispersion. (V14, EH376).

Every case in which Ruel had testified about accidental discharge involved a single discharge. (V14, EH382). A "vast number" of police agencies use the

Glock. Lynch's Glock had the standard trigger pull. (V14, EH383). There were 7 shots fired. (V14, EH387). Ruel conceded that the bullet to Roseanne's brain with the .38 was intentional. (V14, EH389). Ruel rejected the testimony of the neighbor across the hall regarding her observations. (V14, EH391). In conclusion, Ruel opined that Lynch accidentally shot Roseanne four times while she was outside, he then accidentally shot three more times: one into the door frame, one into Leah's back, and one that was never discovered; he then dragged Roseanne inside. (V14, EH391-93).

Family and Friends. Eddie Corso is a cousin-in-law of Richard Lynch. (V15, EH443). He was a New York City policeman from 1962 to 1982. He then owned an extermination company (V15, EH444). Corso had known Lynch when he was 7-8 years old. They called Lynch "Little Lord Fauntleroy" because he always dressed well. (V15, EH446). Corso was rarely near Lynch's home, but when he was, he did not see Lynch playing in the street like other children. (V15, EH448). Corso "grew up on the streets" and did not think it was normal that a child be so "sheltered or whatever." (V15, EH454). When Lynch was born, his father stayed home with him and his mother worked. Corso thought that was unusual because "mothers didn't work, they stayed home with the children." (V15, EH456). Corso recognized it was logical for the retired, older father to stay home with Lynch while the mother continued in the job she kept for 40 years. (V15,

EH469).

Lynch's father did not like Italians, Blacks, Spanish, Oriental, Jews, and "mostly everything but the Irish." (V15, EH448-49). Corso and Lynch's father did not get along, and Corso avoided the father. Corso got along well with Lynch, though. (V15, EH465). Corso's children "loved Richard," and he would give them a lot of attention. (V15, EH450). Lynch and his mother would visit with Corso and the family, but his father never came with them. (V15, EH432). Corso felt that Lynch's father was "overpowering" because Lynch had to do exactly what his father said. Lynch was never alone; he was always with his parents. (V15, EH454). Corso never knew of any physical abuse toward Lynch. (V15, EH464).

Lynch loved gun magazines and had a stack of magazines about 1½ to 2 feet high. (V15, EH475). He would go into the bathroom for two hours at a time. (V15, EH452). Corso recognized the bathroom is a quiet place, where a person can close the door and read. (V15, EH476). He liked talking to Corso about being a policeman. Corso felt Lynch would definitely become a police officer. (V15, EH453). It was normal for a teenage boy to want to be a policeman. (V15, EH468). At eleven years old, Lynch knew more about guns than Corso, a police officer. (V15, EH468).

After Lynch's father died, Lynch was with his mother all the time. Corso thought that was unusual: that a 20-year old would be with his mother. Lynch's

mother could not drive. (V15, EH457). Corso identified Lynch from family photos, and said Lynch was always wearing the same type shirt, even though some had long sleeves and some short sleeves. (V15, EH462).

Lynch was a security guard for awhile, but he left after working in housing projects that were "kind of rough." (V15, EH454). Lynch then became a bus driver for quite a few years. (V15, EH459). After Lynch moved to Florida, "he became his father," staying home with the children. (V15, EH460). Corso was not aware Lynch's wife, who had a very good job as a nurse, asked Lynch to stay with the children after they had difficulty finding child care. (V15, EH469-70).

Danelle Pepe is Lynch's cousin and daughter of Fred Aiossa. (V15, EH478). She was 12 years younger than Lynch and first met him after his father died. (V15, EH484, 488). Pepe thought Lynch and his mother, Helen, were "great." Helen brought them things and Lynch would drive them to 7-11 in his car. He would let them eat candy and Slurpees in his car and throw water balloons at people. (V15, EH488). Lynch really liked her father, a dentist. (V15, EH485).

When Lynch would visit, he sometimes went into the bathroom for 45 minutes. (V15, EH487). There were a lot of people at family gatherings. (V15, EH505). Pepe thought that, and the fact Lynch and Helen had no fingernails, was odd. (V15, EH486, 487).

Lynch had his own bedroom when he lived with Helen. It was more of a closet-type room off a hallway. Helen's was the only real bedroom in the house. (V15, EH490; Defense Exhibit 38). Lynch had magazines stacked 4 feet high in another closet. (V15, EH495).

One Christmas Eve, a beautiful woman named Vesna came with Lynch to the family gathering. She was wearing high heels and a fox collar. (V15, EH496).[8] Helen died in 1996 after returning from an extended stay with Lynch and his family in Florida. (V15, EH497-98). Pepe picked her up at the airport in New York, and she went to the hospital the next day. (V15, EH499). Pepe kept calling Lynch to tell him his mother was sick. He seemed to be in denial. Pepe finally yelled at Lynch that his mother was dying and he needed to come to New York. Lynch flew up, but Helen was in a coma. (V15, EH500). When the nurses removed the IV from Helen's body, there was a bit of blood on her arm that Lynch removed with a tissue. He had the tissue near his face, then put it in his pocket. Pepe thought this was odd. (V15, EH501).

Lynch's defense attorney called her around Christmas 2000. (V15, EH 479). A female psychologist also called her, but Pepe could only talk about 10 minutes

[8] Vesna Lovsin testified she did not know Lynch and had never been to Christmas dinner with Lynch and his mother. (V15, EH510, 513). She worked at Dime Savings Bank as a teller in 1997. She owned a fox collar. (V15, EH511, 514). After collateral counsel asked her to testify for Lynch, she went on the DOC website and found Lynch on Death Row. (V15, EH517). She was very upset. (V15, EH516).

because she has 4 children. (V15, EH481, 482). Pepe did not recall making arrangements to call the psychologist back. (V15, EH503).

George Kabbez, Jr., knew Lynch from the mid '80s when he worked with his father at a gas station. Lynch was a customer and parked his car at the station. (V15, EH519). After Kabbez graduated from college, he would hang out with Lynch at the gas station or go across the street to the bar. (V15, EH520). Lynch was obsessed with guns. (V15, EH520). He would bring bullet shells to the garage and leave them on Kabbez's took box. (V15, EH520). Lynch had military stickers on his cars and hats. (V15, EH526). He also liked cameras. (V15, EH521).

Kabbez met Lynch's wife, Gigi, before they moved to Florida. (V15, EH523). Besides Gigi, Lynch did not have a girlfriend, even though he mentioned a "Russian woman." (V15, EH524). Kabbez and Lynch used to tease each other a lot, "we had fun with it." They teased each other on a daily basis and "it was good outlet for both of us." (V15, EH525). Lynch sent Christmas cards to Kabbez's father in 1995, 1996, and 1997. (V15, EH527).

Helen and Richard Lynch rented an apartment from Joseph Joyce for 10 years. (V15, EH533). Their apartment was considered a two bedroom. (V15, EH533). In Joyce's opinion, Lynch was too old to be living with his mother. (V15, EH534). Lynch was also "too fastidious for me." He appeared to be in some form of law enforcement. (V15, EH535).

Gene Cody was Lynch's barber and had known him for at least 8 years. (V15, EH538-39). He would see Lynch every 3-4 weeks. He gave both Lynch's sons their first haircut. They became very good friends. They talked about a lot of things: "sports and different events." (V15, EH539). Lynch confided in Cody that his wife and he were not getting along and she spent a lot of time on the computer. Lynch met someone else and wanted to move to Hawaii. (V15, EH541).

Cody saw Lynch 4 days before he killed Leah and Roseanne. (V15, EH541). He hadn't seen Lynch in 6-7 weeks, and he looked "very sick." Lynch's son got a haircut, and Lynch said he would be back later in the week to talk to Cody about breaking up with the lady with whom he was having an affair. (V15, EH542).

SUMMARY OF ARGUMENT

CLAIM I. Counsel was not ineffective at the guilt phase. Lynch fails in his burden to show either deficient performance or prejudice. The evidence supported all crimes to which Lynch pled. This Court held on direct appeal the plea was voluntary. Counsel discussed all strategies with Lynch. There was no basis to suppress evidence. The evidence of guilt was overwhelming. The SWAT team found Lynch in the apartment with three guns, two of which were used to shoot the victims. He made detailed admissions to the 911 operator and a full confession to police.

CLAIM II. Counsel was not ineffective at the penalty phase. Lynch fails in his burden to show either deficient performance or prejudice. The decision to waive the jury was strategic and discussed extensively with Lynch. Due to the double homicide, death of a child, the sordid relationship with the victim, pornography, and other inflammatory aspects of the case, the decision to waive the jury was reasonable. The attorneys investigated mitigation and hired a mental health expert. They made a strategic decision to present the background testimony through the expert. The trial judge's determination of credibility of the State's expert is entitled to deference.

CLAIM III. Lynch has failed to demonstrate the trial judge was biased simply because he reviewed the evidence. The Glock was admitted at the penalty

phase and was an issue at the postconviction evidentiary hearing. The judge took judicial notice of the penalty phase record during which Nanette Rudolph testified about the trigger pull, condition of the gun, and discharge patterns around the wounds. The trial judge did not conduct an independent investigation, but merely examined the evidence. It is appropriate for the finder of fact to examine the evidence.

CLAIM IV. The trial court did not abuse its discretion in excluding the testimony of Robert Norgard. "Expert" testimony is not required for an experienced trial judge to understand the *Strickland* standard.

CLAIM V. The State did not violate *Brady* by failing to deliver Lynch's 1967-69 school record to defense counsel. These records were equally available to Lynch. Further, the information was not material or "exculpatory" within the meaning of *Brady.* The State did not violate Giglio by failing to correct false testimony. Dr. Riebsame did not present false testimony: he repeated exactly what Lynch told him. The State had no duty to impeach their own witness with Lynch's school records to show that Lynch lied to the expert. This information was not material under *Giglio.*

CLAIM I

COUNSEL WAS NOT INEFFECTIVE AT THE GUILT PHASE OF TRIAL

Lynch argues trial counsel was deficient during the guilt phase, and Lynch would not have entered a plea absent counsel's deficient performance. More specifically:

> (1) Lynch would not have pled to the armed burglary charge "but for" counsel's erroneous advice (Initial Brief at 34-37);
>
> (2) Lynch would not have pled to the kidnapping charge "but for" counsel's erroneous advice (Initial Brief at 37-39);
>
> (3) Lynch would not have pled guilty to premeditated murder charge "but for" counsel's erroneous advice (Initial Brief at 39-40);
>
> (4) Counsel failed to adequately and accurately advise Lynch of the spousal privilege as it related to the note left for Virginia (Initial Brief at 40-45);
>
> (5) Counsel failed to object and/or file a motion to suppress items seized in the search at Lynch's home (Initial Brief at 45-55).

The trial judge made detailed findings on this claim which are supported by substantial competent evidence:[9]

> 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

[9] Several claims that were raised in the postconviction motion are not raised on appeal and are abandoned. The judge's complete order is cited here for completeness.

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)[10] 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)[11] The indictment fully sets forth the

[10] The trial court's Exhibit A is attached to the order and is in the record on appeal at Volume 12, pages 2062-2063. This document is the written plea and waiver form.

[11] The trial court's Exhibit B is attached to the order and is in the record on appeal at Volume 12, pages 2064-2090. This document is the transcript of the plea

elements of each of the offenses, so Lynch was aware of them before his plea was accepted. (See, attached Exhibit C)[12]

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." *Grosvenor 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:

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hearing on October 19, 2000.

[12] The trial court's Exhibit C is attached to the order and is in the record on appeal at Volume 12, pages 2091-2092. This document is the Indictment presented March 23, 1999.

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 bourne 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).[13] He wrote lengthy letters to his lawyers discussing

[13] These letters were admitted as State Exhibit 1, and are in the record on appeal at Volume 4, pages 583-604.

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 addresses 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 *Grosvenor 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."[FN1] 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.

> [FN1] Evidence 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.

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).

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 semiautomatic 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 semiautomatic, 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,[FN2] that the Court somehow erred in examining the Glock pistol.[FN3] 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,[*FN4] not *exparte*. An "*exparte*" examination would have required the State Attorney to have been present. [FN5] 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, 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.[FN6]

> [FN2] The 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.
>
> [FN3]Lynch'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 trail as State's Exhibit 39, and it received substantial attention at that time.
>
> [FN4]*Black's Law Dictionary*, Revised Fourth Ed.
>
> [FN5] *Id*.
>
> [FN6] Rule 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

> private document which, in the opinion of the court, ought not be taken from the person having it in custody, a copy shall be taken or sent instead of the original.

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 Glocks 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).

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

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.

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:[FN7]

> [FN7]Exhibit 11 introduced during the penalty phase hearing.

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.[FN8] 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.

> [FN8]Exhibits 24 and 25, introduced on July 25, 2005 at the hearing on the instant motion.

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 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.

(V12, R2028-2044).

The circuit court's factual determinations are supported by competent, substantial evidence and should be given deference. *Bell v.* State, 32 Fla. L. Weekly S307 (Fla. June 7, 2007). The judge even included supporting record cites and exhibit numbers. Insofar as Judge Eaton made credibility determinations, these findings are also entitled to deference. *Archer v. State*, 934 So. 2d 1187, 1196 (Fla. 2006) ("This Court is highly deferential to a trial court's judgment on the issue of credibility.").

There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland v. Washington*, 466 U.S. 668 (1984). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. (*quoting Michel v. Louisiana*, 350 U.S. 91 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id*. In *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000), this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."

As the trial judge found, this Court has already found the plea voluntary and Lynch has presented nothing that would change that finding. *Lynch*, 841 So. 2d at 375-377.

Lynch presented no evidence at the hearing that he entered the plea based on the misadvice of counsel or wanted to withdraw the plea. This claim fails for lack of proof. *Booker v. State*, 32 Fla. L. Weekly S537 (Fla. Aug. 30, 2007). Lynch cites *Grovesnor v. State*, 874 So.2d 1176, 1182 (Fla. 2004), as supporting his position. However, that case merely holds that alleging he would not have pled had counsel advised him of defenses, goes to the prejudice prong of *Strickland.* The viability of the defenses goes to the consideration whether trial counsel was deficient. In this case, trial counsel had extensive conversations with Lynch regarding the facts of his crimes, the aggravating and mitigating circumstances, and whether to plea. They made a strategic decision, joined by Lynch, to proceed by plea and judge-alone sentencing. As stated in *Grovesnor*, in determining whether a reasonable probability exists that the defendant would have insisted on going to trial a court should 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 possible sentence the defendant faced at a trial.

Grovesnor, 874 So.2d at 1181-82.

As to the burglary charge, Lynch also claimed he entered the apartment consensually and the State failed to prove he did not enter consensually. Consent is an affirmative defense which is not required to be charged in an indictment. *See State v. Hicks*, 421 So. 2d 510 (Fla. 1982). Thus, the burden is on the defendant to establish that there was consent. *See id*. The defendant can establish that: (1) the premises were open to the public, (2) the defendant was a licensee, or (3) the defendant was an invitee. *Delgado v. State*, 776 So. 2d 233, 236 (Fla. 2000). Lynch alleges Leah invited him inside. There is no evidence to support this allegation. To the contrary, the facts show Leah was afraid of Lynch, was aware he had been stalking her mother and acting irrationally, and that he carried guns. After Lynch stalked Rosa, Rosa told Leah that Lynch was "dangerous." (TT 412). Leah was scared of Lynch. (TT 412, 413). Greg Morgan talked to Leah and Kelly Lawson about Lynch. (TT413). One night Lynch kept calling the Morgan house, and Kelly and Leah watched out the window because they were afraid he was going to come to the house. (TT 414). Leah was not allowed to speak to Lynch on the phone or let him into the apartment because Lynch was threatening them. (TT414). Greg Morgan knew that Lynch was unstable. He told Leah not to answer the door for anyone or go out unless he knew about it. (TT428). Greg told Leah that Lynch was not to be near the apartment. (TT428). The Morgans even changed the locks on the doors. (TT451).

The facts as found by the Florida Supreme Court show that Lynch held Leah at gunpoint until Rosa arrived. Then he shot Rosa and talked Leah into letting him back into the house because Rosa was injured. The facts belie the argument Lynch entered consensually either the first time or the second time. Lynch took three guns to the apartment hidden in a bag. Lynch had the intent to kill Rosa from the time he wrote the murder/suicide note two days before the murders. As this Court found, he cajoled or forced his way in and held Leah at gunpoint until Rosa arrived. He shot Rosa in the leg, then talked Leah into letting him back into the house because Rosa was hurt. He then proceeded to shoot both Leah and Rosa, the latter to "put her out of her misery."

As to the kidnap, Section 787.01(1)(a) defines "kidnapping" to mean:

> Forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to...
>
> 2. Commit or facilitate commission of any felony;
>
> 3. Inflict bodily harm upon or to terrorize the victim or another person...

The indictment charged Lynch with burglary with the intent to commit a murder and/or inflict bodily harm upon or terrorize the victim. Lynch did all three. This issue can be decided solely on the "terrorize" component. Lynch terrorized Leah over an extended period as he held her at gunpoint while waiting for Rosa to arrive. Lynch told Virginia that Leah was terrified. Virginia could hear her

screaming in the background. *See Sutton v. State*, 834 So. 2d 332 (Fla. 5th DCA 2003).

As to the movement aspect, the movement of Leah was not slight or merely incidental the murder of Rosa. The movement and confinement was not of the sort inherent in the crime of murdering another victim. Lynch could have been convicted of Rosa's murder even in the absence of evidence that he held Leah at gunpoint, forced her into the apartment, forced to her to open the door, and forced her to her knees on the floor. Finally, holding Leah at gunpoint and ordering her around and holding her hostage made the murder of Rosa substantially easier to commit or lessened the risk of detection.

As to premeditation, Lynch stated he dealt the "coup de grace" to Rosa to put her out of her misery. He now argues there was no premeditation. He took three guns to the crime scene, shot Rosa three times outside, dragged her inside, changed guns for the fatal shot to her head. As to Leah's murder, a neighbor heard one set of three gunshots, then silence, then three more. The second three shots could have been the two to Rosa's head and neck and the one to Leah's back. Even if there was no evidence of premeditation as to Leah, the State still could pursue first-degree felony murder, so Lynch's argument on this issue is rhetorical. Further, if Lynch's version of events were believed, Leah was running to her

mother as Lynch was shooting at her. Even if Lynch were not intending to kill Leah, he was intending to kill Rosa, and the doctrine of transferred intent applies.

As to the spousal privilege, Lynch directed Virginia to send Rosa's photos and cards to her parents so they would understand the relationship. Thus, any privilege as to this portion of the letter was clearly waived. The photos and letters were a significant portion, and under Section 90.508 *Florida Statutes*, a party waives the privilege if he discloses any significant part of the communication. Further, the information gleaned from the letter was cumulative to the confession, statements to the dispatcher and hostage negotiator, and Virginia. Even if counsel was deficient, Lynch cannot show prejudice under *Strickland*.

There was no basis on which to suppress evidence seized from the house and Lynch presented no evidence at the evidentiary hearing to support this claim. There was ample probable cause for the warrant. Lynch murdered two people during which time he spoke to his wife continually on the phone. Lynch told his wife, and left a message on the answering machine, that there was a note in the garage. (TT 21). Lynch confessed to the murders and discussed credit card purchases, firearms he possessed and sold, and pornographic photos. (TT 21). The search warrant was properly issued for photographs, computer, CDs, credit card and bank statements, weapons, documents and letters, and any other documents relating to the crime. The warrant was not overbroad and the police did not exceed

the scope of the warrant. There is no merit to this claim, and counsel cannot be deficient for failing to raise a meritless claim. In any case, there is no prejudice because Lynch made a full confession and consented to the search of his van.

Lynch has failed to show that the strategic decisions made by defense counsel were deficient. The evidence presented at the evidentiary hearing revealed that trial counsel fully explored all aspects and strategies and concluded that, given the death of the child and the multiple confessions, entering a plea was strategically advantageous. Further, Lynch has failed to show prejudice. The evidence against Lynch was overwhelming. The SWAT team found Lynch in the apartment with the two victims and three guns which he brought to the scene. During the ordeal, he talked to the dispatcher in detail about the crime. When he was taken to the police station, he made a complete videotaped confession. He has failed to show that any of the alleged "shortcomings" of defense counsel have any merit. There was no prejudice.

CLAIM II

COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE OF TRIAL

Lynch next argues counsel was ineffective at the penalty phase for the following reasons.

(1) Failure to advise Lynch on mitigation prior to jury waiver (Initial Brief at 62-66);

(2) Failure to investigate and present mitigation (Initial Brief at 66-80);

(3) Failure to provide competent mental health evaluation (Initial Brief at 80-81);

(4) Failure to suppress murder-suicide letter or assert spousal privilege (Initial Brief at 81-82);

(5) Failure to present defense of accidental discharge of firearm and effectively cross-examine the State gun expert (Initial Brief at 83-84).

The trial court conducted a comprehensive analysis of these issues and held:

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 case law 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 therefore, 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 therefore, 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 therefore 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,[FN9] 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:

[FN9] The second Claim *5* in the 3.85 1 Motion and in the Motion for Rehearing was misnumbered, and is actually Claim 6.

> Court: Now the second thing that you have done is you have asked me to 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.[FN10] If that occurs, 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 Bolender 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.

> [FN10] There 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.*

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 5. 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,* 539U. S. 510, 123 5. Ct. 2527, 156 L. Ed**.** 2d 471 (2003) and *Rompilla v. Beard, 545* U. 5. 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. [FN11]

> [FN11]"Dr. 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.

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 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,* 539 U.S. 510 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. 0lander 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 Vesna Luvson. (PCRT-73 9). 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-l199; 1204-1207). He testified that Lynch was not suffering from any psychotic illness or dementia at the time of the murders. (PCRT-12l3-1214). 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. Reibsame 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. Reibsame 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. Reibsame'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. Danziger'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. (PCRT739). Dr. McCraney 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.

(V12, R2044-2056).

These findings are supported by competent substantial evidence. During the plea colloquy on October 19, 2000, Lynch filed a waiver of the advisory jury in the penalty phase (TT369). After a comprehensive plea colloquy (TT369-381), the trial judge addressed the jury waiver (TT381). Lynch answered that he understood the consequences of waiving a jury and repeated that was his desire (TT381-382). The judge advised Lynch of the rights he was waiving. (TT382-383). The State objected to the waiver because:

> [t]his particular strategy has been employed a number of times by the Public Defender=s office in this circuit. The track record so far is in

> every case it has been a successful strategy to avoid the imposition of death penalty.

(TT383). The State specifically requested the court impanel a jury. (TT384). The Court allowed the jury waiver. (TT384). The parties then discussed scheduling of the penalty phase and specifically mentioned the *Spencer* hearing. (TT385-389, 386). The record shows the trial judge advised Lynch as follows during the jury waiver colloquy:

> If the jury by a vote of at least six to six recommends that you be given a life sentence, I will not override that decision and will impose a life sentence upon you. Do you understand that?

(TT 382). The *Spencer* hearing was specifically mentioned at the plea colloquy (TT 386). The record shows Lynch was alert and understood the proceedings. The trial judge specifically advised Lynch that he had the Aright to have a jury of twelve persons hear matters in aggravation which are limited by statute, and any matters in mitigation that you wish to present.@ (TT 382).

Trial counsel made a strategic decision to present mitigation evidence through Dr. Olander. This is a reasonable decision because, as defense counsel stated, an expert can "synthesize" the evidence to the crime. Lynch was 45 years old when he murdered Rosa and Leah. Counsel was not ineffective in their investigation of mitigating evidence. They presented substantial mitigation. The trial judge found numerous mitigating circumstances in his sentencing order and

the "mitigating" evidence presented at the evidentiary hearing was cumulative to the evidence presented by trial counsel at the penalty phase.

For example, Cessie Alphonso, a capital mitigation expert, testified about Lynch's background. However, Lynch discussed that history with both Dr. Olander and Dr. Riebsame in 1999 and 2000, and trial counsel presented that history at the penalty phase. Dr. Olander relayed details of the relationship with Morgan and Lynch's family history. (TT760—762). Dr. Olander testified that Lynch's father was a security guard who was laid off on disability and became a stay—at—home dad. He was a very strict disciplinarian and required Lynch to report to him every 30 minutes. (TT761). If Lynch was out playing with friends, he would have to run inside to report to his father. (TT761). If the father was not there, Lynch would have to sign a sheet. The other kids would tease Lynch about having to report to his father. The father imposed significant emotional abuse. (TT762). Dr. Olander spoke to Lynch's aunt, two cousins, the next—door neighbor. Those people reported no positive interaction between Lynch and his father. (TT763). The family described Lynch as a caring individual, but "weird." Cousin Danielle described one instance in which Lynch was reading a magazine upside-down. (TT764). Lynch would wash his hands repeatedly. (TT764). He would spend hours cleaning his car. (TT765). Lynch had a very close relationship with his mother. When the mother tried to "run interference between" Lynch and

his father, she would get hit. (TT771). Lynch lived with his mother into his thirties, and even a short time after he was married. (TT771). When Lynch's father died, he switched from Catholic to public school because of finances. He was so afraid of school that he dropped out and did not finish. (TT774). Her report showed a thorough biopsychosocial assessment and trial counsel was aware of those aspects of Lynch's life. (V8, R1484-1487; Defense Exhibit 40).

Insofar as Lynch argues Dr. Olander's mental health evaluation was deficient because she failed to identify brain damage and conduct testing to reveal deficiencies, this a claim based on *Ake vs. Oklahoma,* 470 U.S.68 (1985), and is procedurally barred. *See Moore v. State,* 820 So. 2d 199, 202, n.3 & 4 (Fla. 2002).

The trial judge found Dr. Danziger's testimony credible, and that finding is supported by competent substantial evidence. Findings as to credibility are entitled to deference. The attorneys in this case went to two different experts with expertise in neuropsychology to obtain evidence to help establish mental health mitigation. They made a strategic decision to not use Dr. Cox as they explained in their testimony and then went to Dr. Olander for further testing. The most that the 2005 testing showed was a mild brain abnormality in the frontal lobe and right hemisphere which the trial judge held would not change the findings on extreme emotional disturbance and substantially impaired capacity. The opinions of the defense experts that Lynch met the criteria for statutory mental were made in a

vacuum because they did not question Lynch about the specifics of the crime. Dr. Wu's testimony is opposed by both Dr. Holder's and Dr. Danziger's opinions that the PET scan is not an appropriate diagnostic tool for personality disorders and mental illness. At the penalty phase Dr. Olander testified to the existence of cognitive impairment, and Dr. Riebsame did not disagree. Lynch has failed to show counsel was deficient or how any deficiency prejudiced him. Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire. *See Darling v.* State, 32 Fla. L. Weekly S486 (Fla. July 12, 2007); *State v. Sireci*, 502 So. 2d 1221, 1223 (Fla. 1987). This Court has repeatedly emphasized that a reasonable investigation into mental health mitigation "is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert." *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000); *see also Davis v. State*, 875 So. 2d 359, 371 (Fla. 2003) ("Trial counsel was not deficient where the defendant had been examined prior to trial by mental health experts and the defendant was simply able to secure a more favorable diagnosis in postconviction.")

CLAIM III

JUDGE EATON, AS THE FINDER OF FACT, DID NOT ABUSE HIS DISCRETION IN EXAMINING THE EVIDENCE

Lynch claims Judge Eaton demonstrated bias by examining the Glock about which Roy Ruel testified at the evidentiary hearing.[14] At the penalty phase (which was judge-alone) an FDLE expert testified about the Glock pistol used to shoot Roseanne, and the medical examiner testified about the entry and exit wounds. The Glock was admitted into evidence at the penalty phase as State Exhibit 39. (TT239). At the request of collateral counsel, Roy Ruel was allowed to examine the Glock in preparation for the evidentiary hearing. (V3, R424-26; 442-49). When Mr. Ruel testified at the evidentiary hearing, the Glock which had been admitted at the penalty phase was not brought over with the evidence. Collateral counsel proceeded with Mr. Ruel's testimony because he had a to leave town that night.[15]

The judge had taken judicial notice of the record on appeal from the original proceedings. (V13, EH10). Rudolph, FDLE firearms examiner, testified at the penalty phase in 2001. She examined seven fired .45 caliber cartridge cases. (TT286-87). She examined the Glock, State Exhibit 39, and tested it to determine

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[14] Lynch does not appeal the legal sufficiency of his motion to disqualify, and that issue is abandoned.

[15] Collateral counsel seems to insinuate that the Glock was mysteriously missing at the evidentiary hearing. (Initial Brief at 87). The record shows that Ruel examined the firearms in evidence at the sheriff's office in Sanford. He "received the guns, examined them and returned them to the sheriff's office" pursuant to an order from the trial court. (V14, EH351). The firearms were not in the courtroom at the evidentiary hearing, and the trial judge offered to wait until the exhibit was brought over. (V14, EH351). Mr. Ruel wanted to use the Glock as a demonstrative aid, but had to leave town that night, so his testimony was presented without the Glock, which was State Exhibit 39 at trial. (V14, EH351-52).

if it was operating correctly. (TT292-93). The trigger pull was within normal specifications at 5½ pounds. The gun had a double action trigger pull. (TT293). The Glock is a semiautomatic gun which means "you have to release the trigger each time before to shoot the next shot." (TT294). With an automatic, one can pull the trigger and the gun will continue to fire, but the Glock was a semiautomatic. Even a person tensed up with the Glock, it would only fire one shot. To fire a second shot, a person would have to "fully release the trigger," then pull the trigger again. (TT294). The Glock functioned properly and there was nothing unusual about it. (TT295). The Glock has an ejection port that goes to the right. (TT321). The barrel length is 3¾ inches. (TT323). When Rudolph examined Roseanne's clothing, she found powder particles around the bullet holes, but no burning of the fabric which would indicate a close-range shot. (TT324-25). When a bullet comes out of the gun's barrel, there is gas. Powder comes out in a cone shape. Different distances from the target produce different patterns of gunshot residue. (TT327). Smoke and gas come out of the end of the barrel of the gun. (TT328).

Judge Eaton was the finder of fact at both the penalty phase and the evidentiary hearing. Lynch has presented no case law which says the finder of fact may not examine exhibits which have been admitted and about which testimony has been presented. The facts in the order denying this claim are supported by the

record. (V12, R2037-2040). Not only was the majority of this evidence presented through the testimony at trial, but also the lower court, as the finder of fact, was permitted to draw a logical inference from the admitted evidence. *See Franqui v. State*, 804 So. 2d 1185, 1195 (Fla. 2001); *Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992). To the extent Lynch argues "*ex parte*" testing of the Glock, this is apparently a misnomer and the defense is not alleging the State had any improper, or *ex parte*, contact with the judge. If that is the inference, it is not supported by the record.

Lynch also claims that because Judge Eaton responded to arguments in the motion for rehearing (which mirrored those in the motion to disqualify) when he entered a combined order denying relief and rehearing, the judge address the merits of the motion to disqualify and this "automatically created grounds for dismissal." (Initial Brief at 88). This issue was not raised below and is not preserved for appeal. The argument has no merit.

After Judge Eaton denied relief on his 3.850 motion, Lynch moved to disqualify the judge because he had examined the evidence. The motion to disqualify was dated April 13, 2006. (V11, R1965-72). On April 18, 2006, Lynch filed a Motion for Rehearing. (V11, R1999-2017). The motion to disqualify was denied as legally insufficient on April 21, 2006, (V11, R1997-98) and Lynch filed an Emergency Writ of Prohibition in this Court. Florida Supreme Court Case No.

SC06-721. This Court denied the writ on July 11, 2006, "without prejudice for Lynch to raise this claim in his appeal from the trial court's order denying his motion for post conviction relief." On October 29, 2006, Judge Eaton entered a Second Amended Order Denying Motion for Post-Conviction Relief (Rule 3.851) and Order on Defendant's Motion for Rehearing. (V12, R2017-2092).

Lynch had argued in his motion for rehearing that the findings in the original order were not supported by the record, that the court's testing of the trigger pull of the gun was conducted *ex parte*, and repeated other arguments made in the motion to disqualify. (V11, R2008-09). The combined order denying relief and rehearing addressed the arguments raised in the motion for rehearing. Lynch has cited no case law to support his argument that the trial judge cannot address arguments in the motion for rehearing simply because they were also raised in a motion to disqualify.

CLAIM IV

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN EXCLUDING THE TESTIMONY OF AN "EXPERT" ON INEFFECTIVE ASSISTANCE OF COUNSEL

The State moved to exclude the testimony of Robert Norgard as an expert on ineffective assistance of counsel (V4, R550-555). The motion was argued before Norgard's testimony and was granted. (V15, EH547-550, 567). Collateral counsel argued that Norgard was not testifying as a "*Strickland* expert" but as an expert in

the standard of practice by a Florida capital defense attorney in the years 1999-2001. (V15, EH548). The purpose of Norgard's testimony was proffered. (V15, EH550-567). After he was excluded as an expert, his testimony was proffered. (V15, EH568-591).

Lynch claims he was denied Due Process by Norgard's exclusion, an argument he did not make to the trial court. The Due Process argument is not preserved. Counsel did object to the exclusion of the evidence, however, and the standard of review is whether the trial judge abused his discretion. *Alston v. State*, 723 So. 2d 148, 156 (Fla. 1998).

The first requirement for the admission of expert opinion testimony is that it must be helpful to the trier of fact. *Anderson v. State*, 863 So.2d 169, 180 (Fla. 2003); §90.702, Fla. Stat. A trial judge with years of experience does not need a defense attorney to explain *Strickland*. The trial judge is capable of making findings of fact and applying the law according to *Strickland*. There is no need for an expert to second-guess the actions of counsel, particularly when decisions are strategic. Expert testimony is inconsistent with the legal test for ineffectiveness. *Freund v. Butterworth*, 165 F.3d 839, 863 n.34 (11th Cir. 1999). In *Provenzano v. Singletary*, 148 F.3d 1327, 1331-32 (11th Cir. 1998), the court held that an affidavit from a "defense expert" was meaningless since no two defense attorneys would defend a client the same way. The reasonableness of a strategic choice is a

question of law to be decided by the court and is not a matter subject to factual inquiry and evidentiary proof. *Provenzano*, 148 F.3d at 1332. The trial judge did not abuse his discretion in excluding irrelevant testimony.

CLAIM V

THE LOWER COURT PROPERLY DENIED THE *BRADY* AND *GIGLIO* CLAIMS

Lynch next asserts that the lower court erred in denying his motion for post conviction relief regarding the alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Although Lynch does not clearly state this in his brief, the allegedly withheld documents were contained in a gray box seized from Lynch's home pursuant to a search warrant and held at the Sanford Police Department. During the evidentiary hearing, collateral counsel extracted items from this gray box to question Mr. Figgatt. (Defense Composite Exhibit 23; V6, R894-1092; V7, R1093-1290; V8, R1291-1430). It also became perfectly clear at the evidentiary hearing that this gray box was listed on the evidence receipt which was provided to Lynch in pre-trial discovery. The search warrant inventory lists "gray lock box recovered from side of night stand containing bank papers, birth certificates, lawyer paperwork, collectible coins." (TT19). Lynch even wrote the attorneys about locating personal items seized from the house by "either Sanford PD or SCSO." A few

lines later, he references "my mother's fireproof safe box containing cemetery deeds to graves, legal papers," "many irreplaceable items," and coins. (V4, R488).

Trial counsel's testimony shows he knew about the gray box at the police station. When questioned about the search warrant, Mr. Figgatt said there was a gray lock box seized from the nightstand. The box contained bank papers, birth certificates, legal paperwork and collectible coins. (V13, EH125). Figgatt did not go to the Sanford Police Department to look at this box. (V13, EH125). Lynch had written the attorneys asking them to retrieve items from the box regarding his mother's estate and Figgatt was aware the lock box was at the police department. (V14, EH270). Mr. Figgatt was also had the search warrant return listing the 63 items seized. (V14, EH270).

This evidence was not *Brady* evidence because Lynch and defense counsel knew about the evidence. As such, this claim was without merit and properly denied. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(no *Brady* violation, where defendant knew of evidence before trial).

The trial judge held:

> 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).

(V12, R2056-58).

The alleged *Giglio* violation was that Dr. Riebsame testified at trial that Lynch did well in school except math, and that he dropped out in the 11th grade to transfer to a public school. After reviewing the school records at the evidentiary hearing in 2005, Dr. Riebsame supposedly "admitted this testimony was inaccurate

because in fact Lynch failed almost all of his subjects, including mechanical drawing a right brained task, and never went to public school but stayed in Catholic school." (Initial Brief at 99). Lynch's reasoning on the *Giglio* issue is not clear, but it appears he is arguing the State knew Lynch did not do well in school and allowed Dr. Riebsame to testify falsely.

The defense summary of Dr. Riebame's testimony is inaccurate. Dr. Riebsame testified that **Lynch told him** he dropped out of public school in the 11th grade. (V18, EH1066). Dr. Riebsame also relied on Lynch's self-report on grades and noted that Lynch "exaggerated his academic abilities when he was talking to me." (V18, EH1066). Dr. Riebsame clearly stated at trial that Lynch "indicated that he had been in Catholic school and done well through the tenth grade." (TT926). Dr. Riebsame's next statement also indicated that all the information he was relaying came from Lynch. (TT927). This included the information that after his father passed away Lynch decided to leave school and go to work. Further, one of the reasons Lynch had to leave Catholic school was less income after the father passed away. (TT927).

It appears the basis for this claim is the school record from 1967-69 (V5, R795; Defense Exhibit 17). The State obtained copies of the Defendant's records from Nazareth High School and St. Francis of Assisi Elementary School in Brooklyn, N.Y. by virtue of subpoena, a copy of which is in the Court file as

sealed by the Clerk on December 10, 1999. These records show mixed grades, and that Lynch transferred to Erasmus Hall in 1970. The allegation is that the State had this record in its files and should have "corrected" Dr. Riebsame's testimony about what Lynch told him. To assert a *Giglio* claim properly, a defendant must assert that: A(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material.@ *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991).

First, Dr. Riebsame's testimony was not false. He stated precisely what Lynch told him. Ironically, Lynch told Dr. Olander the same information. (V8, R1484-1487; Defense Exhibit 40). Dr. Cox's report states that Lynch's father died in 1970, the same year Lynch transferred to public school. (Defense Exhibit 36). Second, there is no question Lynch told Dr. Riebsame exactly what Dr. Riebsame stated at trial because Lynch told Dr. Olander the same thing. Therefore, this testimony is not false. Third, the statement was not material. Whether Lynch made good grades in English and Religion and poor grades in Math and Algebra or he "did well in school" is not relevant to anything material. "Materiality" for *Giglio* means that "there is any reasonable possibility that it could have affected the jury's verdict." *Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006). In other words, Lynch might have received a life sentence if the trial judge had known he got bad grades in Math. The trial court found:

> 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. Riebsame 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.

(V12, R2056-58). These findings are supported competent substantial evidence and should be given deference. *Melton v. State*, 949 So.2d 994 (Fla. 2006).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Marie-Louise Samuels Parmer, Nathaniel Plucker, and Maria DeLiberato, Capital Collateral Regional Counsel, 3801 Corporex Park, Suite 210, Tampa, Florida 33619, this _____ day of October, 2007.

Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

Assistant Attorney General