IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 06-2233

RICHARD LYNCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Mr. Lynch's motion for post conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851, and denial of his Motion To Disqualify Judge.

Citations shall be as follows: The record on appeal concerning the 1999 trial proceedings shall be referred to as "TR ___" followed by the appropriate page numbers. The postconviction record on appeal will be referred to by the appropriate volume and page numbers. (ROA V. - P. -) All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Richard Lynch has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Richard Lynch, through counsel, respectfully requests this Court grant oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Procedural History

On March 5, 1999, Richard Lynch was arrested and subsequently charged by indictment, on March 23, 1999, with two counts of first degree murder, one count of armed burglary and one count of armed kidnapping in the shooting deaths of his former lover, Roseanna Morgan, and her daughter, Leah Caday. Public Defenders Jim Figgatt and Tim Caudill were assigned to Mr. Lynch's case.

On October 19, 2000, acting upon advice of counsel, Mr. Lynch entered a guilty plea as charged to all four counts in the Indictment and waived a penalty phase jury. ROA, Vol. I 285-86 and 366-393. This Court conducted a penalty phase bench trial January 8-12, 2001 and a *Spencer* hearing February 6, 2001. On April 3, 2001, the trial court sentenced Mr. Lynch to death for the murders of Ms. Morgan and Ms. Caday. The court found the following aggravators as to Roseanne Morgan: 1) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; 2) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to another person (contemporaneous crime involving Leah Caday); the capital felony was committed while the defendant was engaged in an armed burglary. The court found the following aggravators as to Leah

Caday: 1) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence (contemporaneous crime involving Roseanne Morgan); 2) the capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping; 3) the capital felony was especially heinous, atrocious or cruel. The trial court found the following mitigators to apply: 1) the defendant was under an emotional disturbance but it was not extreme (moderate weight); 2) the defendant's capacity to conform his conduct to the requirements of the law was impaired but not substantially impaired (moderate weight); 3) no significant history of prior criminal activity (little weight); 4) the defendant suffered from mental illness at the time of the offense (personality disorder) (little weight); 5) the defendant was emotionally and physically abused as a child by his father but no connection to murders (little weight); 6) the defendant has a history of alcohol abuse (little weight); 7) the defendant has adjusted well to incarceration (little weight); 8) when possible, the defendant has sought gainful employment; 9) the defendant cooperated with the police (moderate weight); 10) the defendant was a good father to his children (little weight).

Mr. Lynch timely filed a Notice of Appeal and challenged his sentence of death. This Court upheld his death sentence and found, inter alia, that the lower Court's finding that there was

insufficient evidence for the statutory mental health mitigators to apply was not error and Mr. Lynch's plea was voluntarily entered. Lynch v. State, 841 So.2d 362 (Fla. 2003). The United States Supreme Court denied certiorari on October 6, 2003. Lynch v. State, __ U.S.__, 124 S.Ct. 189, 157 L.Ed.2d 123 (2003).

On July 27, 2004, Mr. Lynch timely filed a 3.851 motion for postconviction relief. The lower court conducted an evidentiary hearing on July 25 through July 30, 2005 on all claims.[1] In addition, the court took judicial notice of the entire Circuit Court case file and the record on appeal. The lower court entered an Order denying Mr. Lynch's Motion on April 3, 2006 (ROA V. XI, p. 1852-1907. The State filed a Motion for Clarification of Order on April 6, 2006, asking the postconviction court to correct its Order Denying Relief because the court, in denying Mr. Lynch's claim of failure to present brain damage, made a clearly erroneous finding that Dr. Danziger had testified at the penalty phase when in fact he had not. ROA V. XI, p. 1908-09. The lower court promptly changed that language and issued its Amended Order denying Mr. Lynch's claim on April 10, 2006. ROA V. XI, p. 1910-62. On April 13, 2006, Mr. Lynch filed a Motion To Disqualify the Court based on facts first learned in the initial Order Denying Relief. ROA V, XI, p.

[1] Mr. Lynch withdrew Claims I(G) and VII (Destruction of Evidence)prior to the start of the evidentiary hearing.

1965-72. Mr. Lynch also filed an Amended Motion For Rehearing on April 21, 2006, addressing the Amended Order, as his original Motion for Rehearing and the Amended Order crossed in the mail. ROA V. XI, p. 1999-2017. On the same day, the lower court denied Mr. Lynch's Motion To Disqualify, ROA V. XI, p. 1997-98. On April 26, 2006, Mr. Lynch filed an Emergency Writ of Prohibition asking this Court to disqualify the lower court. FSC Case No. SC06-721. On July 11, 2006, this Court denied the Writ without prejudice to raise the issue on appeal. On October 29, 2006, the lower court entered its Second Amended Order Denying Mr. Lynch's Motion for Postconviction Relief. ROA V. XII, p. 2027-2092. This appeal follows.

STATEMENT OF FACTS

TRIAL ATTORNEY TESTIMONY

During the course of representing Richard Lynch, Mr. Figgatt was lead counsel and had primary responsibility for the guilt and penalty phase. ROA V. XIII, p. 51. Mr. Caudill was second chair. Mr. Figgat was responsible for investigating the case and developing mitigation evidence. ROA V. XIII, p. 51; XVIII, p. 1102. Mr. Figgatt is not sure when he first saw Mr. Lynch but it was sometime after July, 1999, although Mr. Lynch had been seen by another assistant public defender, approximately 3 weeks after Lynch's arrest. ROA V. XIII, p. 35-36. He met with Mr. Lynch approximately 6 to 8 times over the course of two

years. ROA V. XIII, p.- 256. During the time frame when he represented Mr. Lynch, he also had approximately 25 other cases, including other death penalty cases, first degree murder cases where the state was not seeking death and some capital sexual batteries. Id at 45. The cases involved complex evidentiary issues including DNA, blood splatter and footprint analysis. In addition, the John Buzia case, which he handled at the same time as he represented Mr. Lynch, involved approximately 140 witnesses and was very time consuming. Id. at 49. Mr. Caudill was also responsible for 10 to 20 murder cases when he represented Mr. Lynch. ROA V. XVII, p. 1123.

Mr. Figgatt failed to retain a mitigation specialist or use an investigator in Mr. Lynch's case, other than for ministerial duties. ROA V. XIII, p. - 85. The attorneys did not use their investigator for anything substantive in preparation for the guilt stage or in investigating mitigation or preparing for the penalty phase. ROA V. XVIII, p. 1130-1131. Mr Figgatt said it was likely he took only one deposition in the case, the medical examiner, in preparation for the guilt phase. ROA V. XIII, p. 87-88. Other than reading the discovery documents, the only other guilt phase investigation he did was drive by the apartment complex where the crime occurred. ROA V. XIII, p. 89

The attorneys both said that they did not identify any defenses in Mr. Lynch's case and essentially advised Mr. Lynch

of this at the time he entered his plea. ROA V. XVIII, p. 1126; ROA V. XIII, p. 57-58.

Mr. Figgat was aware that Mr. Lynch had said the gun misfired and the shooting was accidental on the 911 tape and in his recorded statement to law enforcement. ROA V. XIII, p. 90. He did not investigate anything as to whether or not Mr. Lynch's claim was true and did not consult an expert or do any research on Glocks. ROA V. XIII, p. 90-94. Mr. Caudill said that they did not consider consulting a firearms expert. ROA V. XIII, p. 1110-11. Mr. Figgat also said if they had found out the gun was used or had been modified that would have been significant. ROA V. XV, p. 409.

Mr. Figgatt said the murder-suicide letter was "huge for the state . . . It was a big piece of CCP." ROA V. XIII, p. 95. Mr. Caudill also agreed that the letter was a "significant piece of evidence." ROA V. XVIII, p.1109. Mr. Figgatt didn't file a motion to exclude it because he couldn't come up with a theory to keep it out under spousal privilege. ROA V. XIII, p. 95-102.

Mr. Caudill said they thought they had no argument under spousal privilege to keep the letter out and could not say they reviewed any case law on the issue. ROA V. XVIII, p. 1124-25. Mr. Figgatt conceded at the hearing that he could have argued that the letter was a privileged communication and that the "principles of *Bolin* could apply to this letter." ROA V. XIII,

p. 106. Mr. Figgatt and Mr. Caudill both said they never advised Mr. Lynch of his right to claim spousal privilege. ROA V. XIII p. 107; ROA V. XVIII, p. 1126. Mr. Figgatt also conceded that he disclosed the letter to his expert without Lynch's knowing consent. Id.

The attorneys did not file any pretrial motions to suppress. Mr. Figgatt stated he never spoke to Virginia Lynch and assumed she willingly "delivered the [murder-suicide] letter to law enforcement," so there was no issue of lack of consent. ROA V. XIII, p. 115, 125. However, when shown Ms. Lynch's March 6, 1999 and March 16, 1999 sworn statements, (Def. Exhibits 18 and 19; ROA V. V, p. 796-839), Mr. Figgatt agreed that the letter was seized without her consent and he could have filed a motion to suppress the warrantees seizure of the letter. ROA V. XIII, p. 115-33. He agreed that general warrants are prohibited but admitted he was not familiar with the Green decision by this Court prohibiting general warrants. ROA V. XIII, p. 121.

Mr. Figgatt conceded that Mr. Lynch received no benefit for his plea and waiving a sentencing phase jury. ROA V. XIII, p. 72-76 He also said there was no advantage in pleading guilty and waiving a jury. Id. He agreed the prevailing standard establishes that entering a guilty plea and waiving a jury should only be done in the rarest of circumstances. Id.

Mr. Figgatt's penalty phase theory was that Lynch "was a

nice guy who had a really bad day." ROA V. XIII, p. 80-81. Mr. Figgatt never asked anyone on the defense team to prepare a biological history or a psychosocial history of Mr. Lynch. ROA V. XIII, p. 133. He did not obtain any records on Mr. Lynch's background and never saw, prior to the evidentiary hearing, Mr. Lynch's school records, credit card records, birth certificates or marriage certificates. Id. at 65. Mr. Figgatt conceded that he does not remember ever having Mr. Lynch sign a release to obtain confidential records or any other documentary information. He never visited Mr. Lynch's home in Sanford, nor did he ever travel to Brooklyn where Mr. Lynch had lived until he was 35. ROA V. XIII, p. -149. Mr. Figgatt had traveled to places such as Puerto Rico and California on behalf of other capital clients and funds were available to travel to Brooklyn. Id. at 149. He also agreed Mr. Lynch sent him a letter early on in the case asking him to contact "character witnesses," and listing their full names and addresses, including zip codes and phone numbers. Id. at 135-39; Def. Ex. 20, p. 840-41. He only spoke to a few of those witnesses yet didn't do that until about one month prior to trial, which was almost two years after the crime, and two months after advising Mr. Lynch to plea guilty and waive his right to a jury trial. Id. at 147. Mr. Figgatt had no recollection of the content of any of his phone conversations with these witnesses. Id. at 143.

One of the witnesses he didn't speak to was Gene Cody, Mr. Lynch's barber *and* Mr. Figgatt's barber. Mr. Figgatt said that he regularly saw and spoke to Mr. Cody at the barber shop while the case was pending, but never asked him about Mr. Lynch because he assumed Mr. Cody would not have much to say. Id. at 138-50.

Mr. Caudill said the mitigation investigation was Mr. Figgatt's responsibility, ROA V. XVIII, p. 1102, and that he (Caudill) had no contact with the lay witnesses. Id. at 1106. Mr. Caudill said they never obtained school records, never looked at the evidence in the custody of the Sanford Police Department, and they made the choice not to call the lay witnesses without ever speaking to them. Id at 1123-124, 1130. Mr. Caudill also said that mitigation investigation takes on greater importance when there is not much chance in the guilt phase. Id. at 1106.

Mr. Figgatt also said they neglected to look at the evidence, even though the evidence room was minutes from their office. Id. at 157. Mr. Figgatt agreed that the marriage certificates, birth certificates, death certificates, letters from Helen Lynch to her son, and handwritten notes about his birth, all contained in the evidence room, could have been helpful in establishing or corroborating mitigation. Id at 160-161. Mr. Figgatt said that Mr. Lynch's childhood confirmation

photograph, where he is holding a bible and a rosary and has his hands in prayer, was a powerful piece of humanizing evidence. Id at 161. He agreed that it is important to humanize a capital defendant and that "If I did anything severely badly on his behalf, its failure to humanize him." Id. at 150.

Mr. Figgatt also conceded that the credit card receipts from the evidence room, (Ex. 35 and 12-14) would have corroborated Lynch's claim of financial stress due to spending thousands on the victim. Id. at 190-192. "[C]ooking . . . over five thousand dollars inside of thirty days" was spiraling debt. Id. at 198.

As to the items in the State Attorney's file not disclosed to the defense, Mr. Figgatt confirmed he never saw Mr. Lynch's high school records. They would have been extremely helpful in terms of his grades and SAT scores, Id. at 199, because they all predate the crime and can't be "skewed." Id. at 210. Figgatt conceded that he never gave the school records to his expert because he didn't have them, and that, had he had them, he would have given them to Dr. Olander. Id. at 215. Mr. Figgatt also said that the certificates, demonstrating that Lynch had thwarted an assault and assisted in capturing a robbery suspect, would have been helpful non-statutory mitigation which would "bear a great deal on how this matter was presented." Id at -196 Mr. Caudill also said the State did not disclose those documents. ROA V XVIII, p. 1139.

As to the mental health testimony, Mr. Figgatt said he retained Dr. Cox but was disappointed with him because he thought his report (Ex. 36) was “extremely amateurish.” ROA V. XIV, p. 225. After speaking to Dr. Cox, Mr. Figgatt thought he would have to teach him a great deal about forensic psychology and that he didn’t “have the time nor the luxury for that” ROA Vol. XIV, p. 225. Mr. Figgatt conceded that he failed to discuss certain significant terms with Dr. Cox which Dr. Cox had used in his report, including, “right cerebral hemisphere dysfunction,” and “Cognitive Disorder N.O.S.” Id. at p. 227-32.

The attorneys decided to retain a second expert, Dr. Olander. Mr. Figgatt said he hired Dr. Olander to do neuropsych testing, Id. at 233. When asked if he specifically directed Dr. Olander to check for brain damage, Mr. Figgatt said. “If I didn’t say brain damage in those words, everything I was communicating with her indicated my expressed concern for an explanation for his conduct that had some basis in her field. So did I specifically say brain damage? I can’t say I said it in those words.” Id at 235. Mr. Figgatt had never retained a neuropsychologist before. Id. at 411. He also said he never asked Dr. Olander what right cerebral dysfunction means or what is the significance of a diagnosis of Cognitive Disorder NOS. Id at 434-435. Mr. Figgatt agreed Florida capital attorneys are taught the difference between psychology and neuropsychology at

seminars such as Life Over Death and that he had no reason not to present brain damage. Id. at 245-46. Mr. Figgatt said his office had the funds to hire a neurologist, a neuropsychiatrist like Dr. Wu and obtain a PET scan. Id at 246-47. Other attorneys in his office had retained Dr. Wu in the past. Id.

Mr. Caudill was not aware of any neuropsych testing Dr. Olander did on Lynch, and that, in spite of the fact that he believed brain damage to be a weighty mitigator, he never asked Dr. Olander, even after he got her report, to do neuropsych testing. ROA V. XVIII, p. 1135-36. Mr. Caudill agreed that they had failed to ensure that Dr. Olander test for brain damage in spite of the fact they knew Dr. Cox had found brain damage. Id. at 1136. Mr. Caudill also said money would have been available to hire a neurologist and a PET scan expert such as Dr. Wu. Id.

TESTIMONY ON PREVAILING STANDARDS AND MITIGATION INVESTIGATION

Defense counsel offered the testimony of Robert Norgard, a capital defense attorney with 25 years of experience defending capital cases in Florida, to testify to the prevailing norms among capital defense attorneys from 1999 to 2001. The state objected on the grounds that Mr. Norgard was being offered as a *Strickland* expert and that the lower court did not need assistance in interpreting *Strickland*. The defense explained that Mr. Norgard was being offered to give context and establish

a “baseline” of what would have been expected of capital attorneys during the relevant time frame, not to testify about the *Strickland* standard. ROA V. XV, p. 548-52. The lower court sustained the State’s objection and the defense proffered Mr. Norgard’s testimony. Id. pp. 568-88.

Cessie Alfonso, a capital mitigation specialist, testified on behalf of Mr. Lynch at the hearing. She was accepted as an expert in forensic capital mitigation investigation. ROA V. XIV, p. 286. A mitigation specialist investigates the case and assists the attorneys in identifying areas of mitigation and obtaining mental health experts. ROA V. XIV, p. 293 Part of her role is to obtain a biopsychosocial history on a defendant which identifies psychosocial dynamics in an individual’s life that an attorney can present during the penalty phase. Id at 290-92. She is trained to look “at the individual’s human condition, the forces in that life journey and to give some perspective on how I think they have shaped this individual, and, what, in my opinion, the attorney should look at further.” Id at 293.

In this case, she found evidence of mitigation that should have been presented that was not, including Mr. Lynch’s low birth weight as noted by the mother’s handwritten note held in the evidence locker,[2] the fact that his father was 50 years old

[2]She tried to obtain his birth records but was unable to as the records were destroyed in a fire. Id. at 290.

when he was born, that he slept in the same bedroom with his parents until he was seventeen and continued to share a bedroom with his mother after his father died. Id. at 294-304. She obtained his elementary school records, went to Brooklyn and explained that Mr. Lynch grew up in a nice neighborhood. Id. 305-07. She also found out about the father's bigotry, Mr. Lynch's lifelong history of weird habits and presentation and his extreme difficulty in making friends and establishing relationships. Id. 307-18. She explained the social dynamics of the bigoted father, who hated everybody, stopped working and was probably mentally ill himself. Id at 308-10. She also discovered Helen Lynch and Mr. Lynch's excessive nail biting, also suggestive of emotional or mental problems. Id.

She also discovered by speaking to Lynch and investigating his background, that he had a delusional belief that he had a long standing affair with a beautiful co-worker.[3] She explained how Lynch described a woman by the name of Vesna Lovsin, as the "love of his life." Ms. Alfonso tracked down Ms. Lovsin who know

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[3] Ms. Pepe confirmed Lynch briefly knew Ms. Lovsin. She remembered he once brought a "Russian" woman to a holiday meal. She had "dark hair, a lot of make up, dark dramatic red lips, a fox stole, which I had never before seen in my life, you know, big fox collar type of thing, very, ... almost like a cocktail dress, you know, very, very, beautiful. Strikingly beautiful woman." Id. at 496.

lives in Long Island, and found she didn't even remember Mr. Lynch. When Mr. Lynch was confronted with this fact, he continued to insist that he had a long standing affair with her, that they lived together, that they had sex on his boss's desk and that she left him because he had an affair with a Jamaican woman. Id. at 334-38. Ms. Alfonso believed this was evidence of a delusional thought process and was important to have an expert consider. Id. at 339. Based on her interviews she would have strongly recommended a neuropsychological evaluation of Mr. Lynch. Id. at 347.

FIREARMS EXPERT

The defense offered Roy Ruel to testify about the Glock pistol used in the crime. He was accepted as an expert in firearms and ballistics without objection. He examined the Glock prior to the hearing and found that it had a light trigger pull, consistent with the FDLE person's testimony at trial. However, he opined that because of the nature of the gun and that it was very worn or used, it was possible that Mr. Lynch could have fired more shots than he intended and that the initial shot may have also been accidental.

LAY WITNESSES

Gene Cody, Mr. Lynch's barber testified that Mr. Lynch had been his customer for many years and he saw him every 6 to 8 weeks. ROA V. XV, p. 541. Mr. Lynch confided in him about his

marital problems. Id. at 541. Mr. Cody saw Lynch four days before the crime. Id. at 541.

> "I hadn't seen him in about 6 or 7 weeks and he looked very sick when he came in, and that was the first time I had seen him since he had broken up this relationship. Because as I said, there were 6 or 7 weeks, you know, since I had seen him and he didn't get a haircut that day, he had just one, one son that came in, and he says I'll be back later in the week to tell you about it, and I never saw him again. . . . [He looked sick like he had] been in the hospital or something like that."

Id. at 542. He added, Mr. Lynch "looked terrible." Id. He was shocked when he heard about the crimes, it was "completely out of character." Id. at 544. Mr. Cody said no one from the defense contacted him prior to trial, although some police officers did, and he would have testified had he been asked. Id. at 546.

Eddie Corso, Mr. Lynch's cousin by marriage, also testified. He lives in New Jersey in the summer and Deerfield Beach, Florida, in January through April. Id. at 443. He was in Florida at the time of Mr. Lynch's penalty phase in 2001. Id. at 444. He stated no one contacted him, but he would have been willing to testify. Id. at 444-45. He has known Mr. Lynch since he was a little boy; he was a geeky, weird kid, a "Little Lord Fauntleroy." Id. at 446-47. He explained that the way Lynch dressed and the manner in which he presented himself was not "normal" for a kid his age. Id. He also said he never saw Lynch with friends. Id. at 457. Lynch never had a girlfriend, as far

as he knew, until he met Virginia Lynch, his wife. Id. at 457-58. Mr. Lynch as an adult was still “weird, odd, strange, not normal.” Id. at 475. Lynch’s father hated every ethnic group except the Irish. Id. at 449-450 He never let Lynch go out and play even though that part of Brooklyn was very nice and safe, with “tree-lined streets” and lots of kids playing out doors. Id. at 447. Mr. Corso also said his kids “loved Richard,” and that Richard “was good with little kids.” Id at 450.

Danelle Pepe, Lynch’s cousin, was the relative who was closest to Lynch and his mother, Helen Lynch. Ms. Pepe was contacted by phone but not asked to testify. She would have testified if she had been asked. Id at 482.

Pepe said an attorney called her in December of 2000 and “chuckled” when she told him how upset she was. Id. at 479-80. She said the attorney told her, “We all feel that Richard Lynch is a really nice guy who had a really bad day and kind of laughed about it.” Id. at 480. She remembered being taken aback that an attorney could be so lax about something like this. Id at 481. The attorney also told her that Lynch was not having a trial and that the judge would lessen his sentence if he didn’t have a jury trial. Id. at 481. She got a phone call later from a female psychologist. At the time of the phone call, she had four children who were 2, 4, 6 and 8. Id at 481-82. Her husband was not home when the phone rang but she felt it was an important

call, so she locked herself in the bathroom but it was difficult to talk because the children knew the bath was drawn and “I had nowhere to run.” Id. The phone call lasted 10 minutes “tops.” Id. at 482.

Ms. Pepe said Mr. Lynch was nice but “quirky.” Quirky was “code” in their family for crazy. Id. at 483. She described the “hallmark” type letters he would send describing the happy holidays they had spent together and his admiration for her father and, the non-sequitur switch in the letters to admiring her father’s security system. Id. at 485 She found it “odd and disturbing” that Lynch and his mother had no fingernails, “skin almost completely over the top because they would chew down so low.” Id. at 486. She said it was scary as a kid to see fingernails like that. Id.

Ms. Pepe described Lynch’s presentation as rigid, always wearing the same shirt and always carrying a camera, they called it “his uniform.” Id. at p. 492. She provided photos to Ms. Alfonso, all of which showed Lynch in his button down plaid shirt. (Def. Ex. 38; ROA V VIII, p. 1469-75)

Ms. Pepe also described Mr. Lynch’s mother’s death and his reaction to it. His mother died a week after spending a month in Florida with Lynch, his wife who is a nurse, and their two children. Ms. Pepe testified that when Helen Lynch stepped off the plane she was obviously very, seriously ill. “[She] looked

terrible. She could barely walk off the plane. Her coloring was . . . she was like a walking ghost, she was so frail and so weak that when she took a couple of steps, she couldn't breathe. She like had to stop. She was very, very sick, and I knew it when she got off the plane." Id. at 498. The next day, Ms. Pepe's sister had Helen admitted to a hospital near them in New Jersey. Ms. Pepe called Mr. Lynch repeatedly about his mother's situation and he didn't seem to "get it", he didn't understand his mother was dying. Id. at 497-500. She finally had to scream at him to get him to come from Florida to New York. By then, Helen was in a coma and died the very next day. After she dies, Mr. Lynch took a tissue, dabbed the blood from his mother's hand and held the blood-soaked tissue next to his face like a "snuggly." Id. at 501 Both Pepe and her mother thought this behavior was very strange.

Vesna Lovsin testified that she didn't know Lynch and when first contacted had no idea what this was all about. Id. at 510. She did work at the Dime Savings Bank at the same time Lynch did, and always wore eye makeup, high heels and lipstick. Id at 511, 514. She made her own clothes, as Mr. Lynch described to Ms. Alfonso, and she did at one time own a fox collar/shawl as described by Ms. Pepe. Id at 514-15. She said that during a time that she was estranged from her parents she may have gone with Mr. Lynch to the holiday dinner in New Jersey, but does not

remember as it was many, many years ago. Id. at 514, 531. If she had had sex with him at the Dime Savings Bank, or lived with him for three years, she would have remembered and she would have admitted to it. Id at 514-15. She is of Yugoslavian descent and speaks fluent Yugoslavian. She has no interest in how the case turns out and no memory of Mr. Lynch. Id at 515.

Joseph Joyce saw Mr. Lynch everyday for many years as he was his landlord. Id. at 534 He was not contacted but would have testified if asked. Id. at 537. Mr. Lynch was a strange man who was always alone or with his mother. Id. at 536. He was overly fastidious and appeared to be on edge. Id. at 535.

George Kabbaz, Jr. also knew Mr. Lynch from Brooklyn. He was never contacted but would have testified if asked. Id. at 528-29. George Kabbaz confirmed that Mr. Lynch used to talk about having sex with his girlfriend, a Russian woman, on his boss's desk. Id. at 525. He said Mr. Lynch was "peculiar" and "very consistent in his appearance and routine and always carried a lot of cameras." Id at 521. He lived with his mother and he never saw him with any friends or girlfriends. Id. at 523.

MENTAL HEALTH EXPERTS

Dr. Cox, the first expert retained by the trial attorneys, examined Mr. Lynch on Nov. 4, 1999 and in early 2000, and suspected brain damage. ROA V. XV, p. 596-97, 609. In his report,(Def. Ex. 36; ROA V. VIII, p. 1456-62) Dr. Cox diagnosed

Mr. Lynch with “Cognitive Disorder NOS”, ROA V. XV, p. 610, and recommended further neuropsychological testing. Id. at 614. He did not testify at trial and does not know why he was not asked. He testified at the hearing that he believed that Mr. Lynch met the statutory mental mitigators.

Dr. Olander, who testified on behalf of Mr. Lynch at trial, said at the evidentiary hearing that neither attorney told her that Mr. Lynch had brain damage nor did they specifically ask her to test for brain damage. ROA V. XVI, p. 646-47. Dr. Olander said the attorneys told her that they were not satisfied with Dr. Cox and, because Dr. Cox is a highly respected neuropsychologist, she assumed he had tested Mr. Lynch and had found no evidence of brain damage. Id at 646. Dr. Olander admitted that at trial in 2001 she said Lynch did not have brain damage. She explained the better answer was she didn’t know, because she had not administered any neuropsych tests. Id at 647, 671. Dr. Olander conceded that she saw signs of brain damage in Lynch when she evaluated him but thought those symptoms could be accounted for by the psychotic process. Id. at 674-75. At the haering she said that based on the new evidence of Dr. Sesta’s testing, Dr. Cox’s report and data she now believed Mr. Lynch has brain damage and it would have been significant testimony that she could have provided to the finder of fact.

Dr. Olander said she had never seen Mr. Lynch's elementary or high school records. After reviewing the records at the evidentiary hearing, she opined that had she seen the records, she would have suspected brain damage and would have tested Lynch for brain damage. Id. at 664-66. The only background information she received on Lynch was a verbal report from the attorneys and information from Lynch himself. Id at 671.

Dr. Olander clarified that she was asked to do psychological testing by the attorneys and not neuropsychological testing. Id at 669-670. Her report corroborated this claim and showed she was referred for mitigation regarding "psychological functioning." (Def. Ex. 40; ROA V. VIII, p. 1482-91). Dr. Olander said Mr. Lynch's brain damage would have added to the weight of the two statutory mitigators of extreme emotional distress at the time of the offense and ability to conform conduct to the requirements of the law. Id. at 672-73.

Dr. McCraney examined Mr. Lynch at the request of postconviction counsel. Dr. McCraney was accepted as an expert in Neurology and Behavioral Neurology. ROA V. XVI, p. 710-12 Dr. McCraney explained the neurological basis of emotion and behavior and the relationship between the brain and violence. Violence is a reflex response to information the brain receives from the perceptual systems and the signals the amygdala sends to other parts of the brain. Id. at 718-19. Pathological

violence can be caused by perceptual difficulties and frontal lobe difficulties. Id at 720-22.

Dr. McCraney agreed with Dr. Olander that the frontal lobe is responsible for source memory or the distinction between remembering something because you experienced it personally, you dreamed it, or you read about it. Id. at 730. A disorder of the frontal lobe memory process may be the basis for psychosis. Id. at 730. “There is a general agreement that psychosis is a brain condition that’s caused by an abnormality in the frontal lobe and has something to do with . . . frontal lobe type memory problems.” Id. This is the link between frontal lobe memory problems and delusional behavior. Id.

Dr. McCraney performed a neurological examination of Lynch and immediately “felt that there was something not quite right.” Id at 728. On physical examination, Dr. McCraney found indications of frontal lobe damage including “alterations in his muscle tone, difficulties with cognitive motor control and problems with generativity which is an aspect of intent formulation. “ Id at 728-29. Dr. McCraney also agreed with Dr. Olander that the high school and elementary school records showed a “marked distinction between . . . left hemisphere function and . . . right hemisphere function.” Id at 735.

Dr. McCraney said that Mr. Lynch’s brain damage substantially impaired his ability to conform his conduct to the

law. Id at 739. When you have frontal lobe impairment which makes it difficult to control your behavior, combined with psychosis or perceptual problems, you have an inability to distinguish right from wrong and the statutory mitigator applies. Id. at 740. Dr. McCraney explained that the combination of emotional stressors that Lynch was experiencing at the time, suicidal thoughts, anniversary of the death of his mother, spiraling credit card debt, and a failing marriage and potential loss of his children, created the "perfect storm." Id. at 742. Lynch's situation "was an unbelievable amount of stress affecting a person who has a tendency to be psychotic . . . and [who] lacks full control of his behavior." Id. In addition, Lynch was decompensating, as evidenced by the testimony of Gene Cody, the barber. Id. at 743-44.

Dr. McCraney said this developmental defect of his brain has been with Mr. Lynch "pretty much his entire life" and might have occurred before he was born. Id. at 756. His brain damage is an "actual physical derangement of the brain as opposed to some sort of vague, nebulous, psycho semantic. There's something physically going on in this guy's brain," and because of this, Mr. Lynch has been a "walking time bomb his entire life." Id at 759, 768.

Dr. Wu, an expert in brain PET Scans and biological psychiatry, testified on behalf of Lynch. Dr. Wu is clinical

director of the University of California Irvine Brain Imaging Center which specializes in the acquisition and interpretation of brain PET scans with neurological or psychiatric conditions. ROA V. XVII, p. 853. Prior to that he completed a two-year fellowship studying neurological and psychiatric illnesses with brain PET scans. Id. at 855-56. He has published over 50 peer reviewed articles on brain PET scans in the areas of neurological and psychiatric conditions and has been awarded over $1 million in research grants to study psychiatric illnesses. Id at 854-55. Dr. Wu explained the role of PET scans in diagnosing or confirming brain damage and psychiatric disorders. “If neuropsych testing shows that there are problems with executive function or frontal lobe relative to other parts of the brain, PET gives the neuropsychologist greater confidence that there really is some type of frontal lobe defect.” Id. at 874. The same is true with right hemisphere dysfunction. Id. PET is not a stand alone diagnostic tool but rather a “corroborative tool to be used in conjunction with other tests and clinical history.” Id. at 875. Dr. Wu scanned Mr. Lynch’s brain and found an “abnormality in the distribution of activity in the frontal lobe of the brain relative to the back of the brain which is a common pattern in patients with psychiatric disorders.” Id. at 879.

Dr. Sesta was accepted as an expert in forensic

neuropsychology. Id. at 945-50. He examined Mr. Lynch, gave him standardized tests in a standardized manner, including the Halsted-Reitan neuropsych battery and the MMPI-II, and found that Mr. Lynch suffers from clinically significant frontal lobe and right hemisphere brain damage that has likely existed all his life. Id. at 966. Dr. Sesta explained that the Halsted Reitan is 90 percent accurate when administered in a standardized manner. Id. at 958. Dr. Sesta also opined that the school records were helpful in establishing the existence of the brain damage as early as Lynch's childhood, if not earlier, Id. at 966. The etiology of the brain damage is unknown but was most likely caused by abnormal neural development either as a child or in utero. Id. at 969. Mr. Lynch's brain dysfunction existed at the time of the offense to such an extent that Mr. Lynch's ability to conform his conduct to the law was substantially impaired. Id. at 1015-16.

Dr. Reibsame, a psychologist, evaluated Mr. Lynch in December of 2000 and testified for the State at Mr. Lynch's penalty phase. At that time he said Mr. Lynch had a depressive disorder and a personality disorder N.O.S. ROA V. XVI, p. 1037. He reevaluated Mr. Lynch prior to the post conviction hearing. ROA Vol. XVI, p. 1027-30. Dr. Reibsame opined that he had reviewed the new information and it did not change his opinion; the only difference is that he might add as a diagnosis "a

learning disorder to reflect his mild impairment." Id. at 1039. He said Mr. Lynch did not meet the statutory mental mitigators although he was under an emotional disturbance. Id. at 1040. On cross examination, Dr. Reibsame conceded that most, if not all, of his test data was invalid because it was not administered in a standardized fashion. Id at 1080-81. He apologized to the lower court many times for this failure, stating, "we should not consider those items in our understanding of Mr. Lynch." Id. at 1155-58; 1169; 1173; 1175. Dr. Danziger, a psychiatrist, was retained by the State to evaluate Mr. Lynch for postconviction.

Dr. Danziger interviewed Mr. Lynch but did not conduct any testing other than the 5 to 8 minute Mini Mental Status Exam which consists of asking the subject, what day it is, what year it is and things of that nature. Id. at 1232. Dr. Danziger said Mr. Lynch told him he felt the presence of evil or Satan in the room, "smelled something evil" at the time of the crime and blacked out or felt "disassociation." Id. at 1208-09; 1245-49. Because he did not *see or hear* the devil, he considered that there was no evidence of psychosis. Id. at 1208-09. He admitted, though, that a reasonable psychiatrist could point to that and say it was an indication of psychosis. Id at 1247. He ruled out the statutory mental mitigators.

Dr. Holder, who was accepted as an expert in radiology, ROA V. XVI, p. 789, testified that Mr. Lynch's PET scan images were

normal. He said he was not disputing whether Mr. Lynch had brain damage, merely saying that he looked at the screens and the screens were normal. Id. at 840-41. He also admitted he had no experience in looking at PET scans of neuropsychiatric disorders, had never administered a visual vigilance PET although he had knew about them as a "scientific reader," and was not a trained psychiatrist or neurologist. Id. at 780, 833-35. He also did not realize he was testifying in a criminal case. Id. at 834.

SUMMARY OF ARGUMENT

1. The lower court erred in denying Mr. Lynch's claim of ineffective assistance of counsel in investigating his case and advising him to enter a guilty plea. Trial counsel failed to: (a)adequately and accurately advise Mr. Lynch of the elements and legal defenses to the crimes charged in the indictment, including armed burglary, kidnapping and first degree murder; (b) adequately and accurately advise him of spousal privilege as it applied to his murder-suicide letter and phone conversations with his wife; (c)object or move to suppress the illegal search and seizure of items in his home; (d)conduct a reasonable investigation and consult a firearms expert so as to advise Mr. Lynch of the legal significance and corroboration of his claim of accidental shooting. Counsel's deficient performance unconstitutionally deprived Mr. Lynch of his Sixth Amendment

right to effective assistance of counsel. The lower court's rulings are an erroneous application of this Court's and United States Supreme Court precedent and its findings are not supported by competent, substantial evidence.

2. The lower court erred in denying Mr. Lynch's claim of ineffective assistance of penalty phase counsel. Counsel failed to: (a)properly advise Mr. Lynch of mitigation and defenses prior to waiving a penalty phase jury; (b)conduct a reasonably competent mitigation investigation and present evidence of brain damage; (c) ensure that a reasonably competent mental health evaluation was completed; (d)object to or move to suppress the letter to his wife on spousal privilege or as an illegal seizure; (e)present the defense of accidental discharge and effectively cross examine the State's gun expert. Counsel's sentencing preparation and presentation prejudiced Mr. Lynch to such a degree that his Fifth Amendment right to due process, his Sixth Amendment right to effective assistance of counsel, and his Eighth Amendment right to an individualized sentencing was violated. The court's finding that Mr. Lynch has not proven that counsel was ineffective is an erroneous application of the law and is not supported by competent, substantial evidence.

3. Mr. Lynch was denied due process when his postconviction proceedings were heard and ruled upon by a judge who had made himself a material witness and demonstrated bias.

4. Mr. Lynch was denied due process when the lower court prohibited him from introducing testimony as to the prevailing norms among capital defense counsel in support of his claim of ineffective assistance of counsel.

5. The lower court erred in denying Mr. Lynch's claims that his due process rights under Brady and Giglio were violated when the prosecutor withheld mitigating evidence and allowed Dr. Reibsame to testify falsely.

STANDARD OF REVIEW

The standard of review is de *novo*. Stephens v.State, 748 So.2d 1028, 1032 (Fla. 2000). Under *Strickland*, ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. Sochor v.State, 883 So.2d 766, 772 (Fla. 2004).

CLAIM I

THE LOWER COURT ERRED WHEN IT DENIED MR. LYNCH'S CLAIM THAT COUNSEL RENDERED DEFICIENT PERFORMANCE IN INVESTIGATING HIS CASE AND ADVISING HIM TO ENTER A GUILTY PLEA,IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION AND COMMON LAW.

Trial counsel rendered deficient performance during the pretrial and guilt phase of his capital proceedings by failing to conduct a reasonably competent investigation and failing to

advise or misadvising Mr. Lynch of the law, defenses to the crimes charged, constitutional rights which he could have asserted, and other rights based on statutory and common law. Trial counsel's performance prejudiced Mr. Lynch, and but for counsel's errors, there exists a reasonable probability that Mr. Lynch would have asserted his right to trial.

When a defendant enters a guilty plea to an offense, he is waiving several fundamental constitutional rights; a guilty plea is more than just an admission of conduct, it is a conviction. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary **unless the defendant possesses an understanding of the law in relation to the facts**. Id at 243, 1713 (citing McCarthy v. United States, 394 U.S. 459,466, 89 S.Ct. 1166, 1171 (1969)(emphasis added). The Boykin court recognized that "a number of important federal rights are implicated in the plea process," including "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." Id at 243, 1712.

When a defendant challenges a guilty plea under an

ineffective assistance of counsel claim, the two part Strickland standard applies. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). To show deficient performance in the context of a guilty plea, a defendant "must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases." Id. at 58, 370 (relying on the standard set forth in Tollett v. Henderson, 411 U.S. 258, 266, 93 S.Ct. 1602,1608 (1973)and McMann v. Richardson, 397 U.S. 759,771, 90 S.Ct. 1441,1449 (1970)).

This Court clearly explained the ***Hill*** standard in Grosvenor v. State, 874 So.2d 1176 (Fla. 2004). The first prong is the same as the deficient performance prong of ***Strickland***; the second prong requires a 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." ***Grosvenor v. State***, 874 So.2d 1176, 1179 (Fla. 2004) (citing ***Hill v. Lockhart***, 474 U.S. at 59). The viability of the defense is relevant but not dispositive in determining whether counsel performed deficiently and also "informs the credibility of the assertion that the defendant would have gone to trial if told of the defense." ***Grosvenor,*** 874 So.2d at 1182.

In determining whether a reasonable probability exists that Mr. Lynch would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea.

Grosvenor at 1181, 1182. The factors include:

> "[W]hether 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 trial. As the Supreme Court emphasized in ***Hill***, these predictions should be made objectively, without regard for the idiosyncracies of the particular decisionmaker."

Id.(internal quotations omitted.) The proper inquiry is whether counsel's deficient performance "affected the plea process" and but for that performance, the defendant "would not have pleaded guilty and would have insisted on going to trial." Id at 1180.(citing Hill v. Lockhart, 474 U.S. 52,59, 106 S.Ct. 366, 371 (1985).

Mr. Lynch demonstrated that but for his trial counsel's erroneous advice, he would not have pled guilty to the charges in the indictment. In denying this claim, the postconviction court failed to follow the standard as set out by this Court in *Grosvenor,* failed to address decisional law of this Court on defenses and privileges, and in some subclaims failed to cite to competent, substantial evidence in the record. As such, this Court should substitute its own judgement and finding of fact. Sochor v. Florida, 883 So. 2d 766 (Fla. 2004).

A. Failure to Adequately and Accurately Advise Mr. Lynch of the Elements and Legal Defenses to the Crimes Charged in the Indictment

Mr. Lynch alleged trial counsel rendered deficient performance by failing to advise him of legal and factual defenses and lesser included offenses to the crimes charged. In denying this claim, the lower court said that this claim is "refuted by the record," the trial court read the charges in the indictment during the plea, and counsel discussed the charges with Mr. Lynch. [ROA] 54-58." ROA V. XII, p. 2030.

However, what Mr. Figgatt said in the pages cited to by the lower court, was that he was aware of lesser included crimes but "didn't see them in this case" and so did not discuss any lessers with Mr. Lynch in "great detail. I certainly didn't suggest that armed trespass would somehow substitute for a burglary under the facts of this case. " ROA V. XIII, p. 57-58. Mr. Figgatt saw no defense to kidnapping; the "only defense he identified as to burglary" was Mr. Lynch entered without intent to commit murder. Id at 57. The defenses were not "realistically marketable." Id. at 55.

Mr. Caudill said at the hearing that there were *no possible defenses* to the charges and that was the advice given Mr. Lynch when he entered his plea. ROA V. XVIII, p. 1126. We told Mr. Lynch that it was in his best interest to plea guilty because he was in front of Judge Eaton. Id. at 1127. [4]

[4] "One of the justifications for entering a 'trial' plea (or

While Mr. Figgatt did review the police reports and discovery documents in the case, he did essentially no independent investigation of the case, did not talk to any of the crime scene witnesses, did not consult an independent firearms expert, and only deposed the medical examiner. He agreed that the Florida Public Defender's Association Manual, Defending Capital Cases in Florida, strongly discourages advising a client to enter a guilty plea and waive a sentencing jury. ROA V. XIII, p. 98-99. [5] When asked what he told Mr. Lynch were the benefits to entering a plea, he said, "I don't know. It was a tactical decision." Id. at 75. Trial counsel's performance

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going non-jury trial) is the lawyer's perception that he or she 'knows the judge,' and that based on this knowledge of the judge, the 'trial' plea or non-jury trial is the best thing to do. *Unfortunately, in reality it all too often turns out that counsel does not 'know the judge.' At best, a decision based on this type of purported knowledge of the judge is guesswork.* Too much is given up by pleading or going non-jury based on a guess. *Well-reasoned strategy and tactics should be utilized in a capital case, not guesswork*." Defending a Capital Case in Florida 1992-2003, (5th Ed. 1999), Ch.6, p. 10.

[5] *Defending a Capital Case in Florida 1992-2003, (5th Ed. 1999)* Chapter 6, Guilt Phase Strategy, recommends an aggressive, attacking defense in spite of the fact that most capital cases present with overwhelming evidence of guilt. Ch. 6, p. 4. When counsel may be considering having their client enter a plea to the charges and proceed to trial on the penalty phase, experienced Florida capital litigators "*strongly recommended that this rarely if ever should be done. This type of 'trial plea' can be as bad, if not worse, than adopting a strategy of a passive defense.* It is very important that before such a plea is entered, that you thoroughly discuss this strategy with as many experienced capital attorneys as possible." Ch. 6, p. 10.

was below prevailing professional norms.

In denying relief, the lower court said, "even if the attorney overlooked a defense urged by Collateral Counsel . . . Lynch suffered no prejudice." ROA V. XIII, p. 2030. The "defenses presented by Lynch in the instant motion *are all refuted by the record, refuted by the facts of the case*, and would not have been submitted to the jury had there been a jury trial."Id. at 2031. This finding is clearly erroneous. The lower court did not cite to portions of the record in support of this finding other than attaching the plea colloquy and the Indictment which do not refute the defenses. The lower court also failed to address law from this court which establishes Mr. Lynch's defenses. And, the lower court did not follow the prejudice analysis set out in *Grosvenor.*

1. Mr. Lynch would not have pled guilty to the armed burglary charge but for counsel's erroneous advice.

The statute in place at the time of Mr. Lynch's crime defined Burglary as "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed to or invited to enter or remain." Fl. Stat. 810.02(1) (1997). In February of 2000, after the crime, but 8 months prior to the plea, this Court decided Delgado v. State, 776 So.2d 233 (Fla. 2000). Delgado held that

the phrase "remaining in" applied only in situations where the remaining in was done surreptitiously. This Court further stated "if a defendant can establish . . . that the defendant was an invitee or licensee, the defendant has a complete defense to the charge of burglary." Id at 236. The reasoning behind Delgado applies to Mr. Lynch's case.

> Thus, the essence of Delgado is that evidence of a crime committed inside the dwelling, structure, or conveyance of another cannot, in and of itself, establish the crime of burglary. Stated differently, the State cannot use the criminal act to prove both intent and revocation of the consent to enter.

Ruiz v. State, 863 So.2d 1205 (Fla. 2003)(internal citations omitted). This Court in Ruiz consolidated two cases, that of Ruiz and State v. Braggs, 815 So.2d 657 (Fla. 3d DCA 2002). The facts in Braggs are analogous. Mr. Braggs went to the home of an elderly relative who had lent him money in the past. There was no forced entry and all of the physical evidence indicated that the victim had voluntarily let Mr. Braggs into the home. This Court found,

> As in Ruiz, the only evidence that Braggs committed a burglary in this case was his commission of other crimes inside the victim's home, specifically second-degree murder and armed robbery.

Ruiz v. State, 863 So.2d 1205, 1208 (Fla. 2003).

Florida courts have looked to the relationship between the accused and the victim to determine whether or not there was

consent to enter. In Otero v. State, 807 So.2d 666 (Fla. 2d DCA 2002), a former client went to visit his former attorney. The court found that "the lawyer's readiness to have the defendant into his interior office grew out of their prior relationship as lawyer and client." Id at 667. The Otero court followed the reasoning in Delgado stating that the crime of burglary was "not intended to cover the situation where an invited guest turns criminal or violent." Id. at 669.

Therefore, at the time of Mr. Lynch's plea, his actions did not support a conviction for burglary. Mr. Lynch told police Ms. Caday let him in the apartment and nothing in the record contradicts this fact. During the plea colloquy, counsel described the burglary, *"he gained entry voluntarily into the home* at that point in time. Subsequent removed from a bag that he had, one of two or three firearms. And at that point in time the kidnapping ensues, *as well as what we contend or what the State contends and we admit was, in essence, a burglary, because whatever consent he had to be there was gone*." ROA V. XII, p. 2076. (emphasis added). It is undisputed that he was given consent to enter and his "remaining in" was not done surreptitiously. Delgado v. State, 776 So.2d 233, 236 (Fla. 2000). Mr. Figgatt's description of the crime was a misstatement of the law in effect at the time of Mr. Lynch's plea. A tactical or strategic decision is unreasonable if it is

based on a failure to understand the law. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991).

In its Second Amended Order Denying Relief, the post-conviction court stated as to this subclaim, "Lynch again asserts that his entry into Roseanna Morgan's apartment was 'consensual,' and not burglary. Lynch contends he was not advised of the defense of consensual entry. This issue was thoroughly discussed above in Claim 1A and is refuted by the evidence." ROA V. XII, p. 2032. However, in Claim 1A, the court fails to address this claim directly. The court does not address Delgado, or cite to the record, and merely states, "entry was gained by trick or fraud." (ROA PCR Vol. 12, p. 2029). There is no competent, substantial evidence of entry by fraud or trick in the record.

2. Mr. Lynch would not have pled guilty to the kidnapping charge but for counsel's erroneous advice.

Mr. Lynch had a viable defense to the charge of Kidnapping and there is a reasonable probability, had counsel not rendered deficient performance, that Mr. Lynch would have asserted his right to trial. The Indictment charged kidnapping in the alternative, and one of the alternatives was that the kidnapping was "done to facilitate the commission of a felony, which was murder."[6]

[6] Mr. Lynch was also charged with the intent to terrorize or inflict bodily harm. On direct appeal, this Court found that

In denying this subclaim, the lower court stated that Leah Caday was "thoroughly terrorized" and 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)." ROA V. XII, p. 2032.

In *Faison*, this Court held that in order to uphold a conviction for kidnapping to facilitate the commission of a crime, the movement or confinement:

> (a)Must not be slight, inconsequential and merely incidental to the other crime;
> (b)Must not be of the kind inherent in the nature of the other crime; and
> (c)Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection

Faison v. State, 426 So. 2d 963 (Fla. 1983).

This Court applied the Faison test in Berry v. State, 668 So.2d 967 (Fla. 1996). In Berry, this Court hypothesized that if during the commission of a robbery a defendant "confined the victims by simply holding them at gunpoint" or "moved the victims to a different room in the apartment, closed the door,

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the HAC aggravator was properly applied because Leah Caday was "thoroughly terrorized," by witnessing her mother's death and being held at gunpoint for thirty to forty minutes. Lynch v. State, 841 So.2d 362, 371. However, the evidence suggests that Mr. Lynch did not threaten Ms. Caday, did not point any weapon at her, nor did he physically touch or harm her in any way prior to Ms. Morgan entering the apartment.

and ordered them not to come out, the kidnapping conviction could not stand. In both hypotheticals, any confinement accompanying the robbery would naturally cease with the robbery." Berry, 668 So.2d at 969.

Mr. Lynch's actions are analogous to the hypotheticals in Berry. While in the apartment with Ms. Caday waiting for Ms. Morgan to arrive home, Mr. Lynch removed a gun from his bag. He did not point it at Ms. Caday or threaten her in any way. He did not tie her up, nor did he move her to any other room in the apartment. The indictment charges that the felony Mr. Lynch was committing was murder, but does not specify whether it is the murder of Ms. Morgan or Ms. Caday. If it was for Ms. Caday, then as in Berry, the confinement would have ceased with the murder. If the murder was referring to Ms. Morgan, then the confinement did not make the murder of Ms. Morgan easier to commit or substantially lessen the risk of detection.

3. Mr. Lynch would not have pled guilty to the premeditated first degree murder charges but for counsel's erroneous advice.

In the factual basis, counsel for Mr. Lynch stated that Mr. Lynch and Ms. Morgan were "having a heated discussion" when she was shot and that Ms. Caday, "got in the way of the shooting and she was shot one time and she died." (TR ROA V. II, p. 378-79). Neither of those scenarios are sufficient to support a finding of premeditation.

With respect to Ms. Caday, the evidence is equally

consistent with Second Degree Murder or even consistent with Aggravated Manslaughter of a Child. Fl. Stat. 782.04(2); 782.07(3). The description in the factual basis was:

> And during one of those times, and I'm not sure if it was two or three times, that they were still having this heated exchange back and forth, Ms. Caday either went to her mother or attempted to leave **and got in the way of the shooting and she was shot one time and she died**.

(TR ROA Vol. 2, p. 379). Moreover, in Mr. Lynch's 911 call and subsequent statement to the police, he maintains that the death of Ms. Caday was an unintentional accident and he also said he did not intend to kill Ms. Morgan. In its Sentencing Order, the trial court found that "but for the felony-murder rule, [the killing of Ms. Caday] would be second degree murder." ROA V. I, p. 120. Counsel's failure to consider these defenses and challenge the State's case, or articulate a specific, *reasoned* tactic for urging Mr. Lynch to plea guilty was deficient performance below prevailing norms.

In denying this subclaim, the lower court only addresses the heat of passion defense and finds that it was not viable. ROA V. XII, p. 2032. It also does not address the Grosvenor standard.

B. Failure to Adequately and Accurately Advise Mr. Lynch of the Spousal Privilege as it Related to his Letter to His Wife and His Phone Conversations with his Wife

Mr. Lynch's attorneys rendered deficient performance by failing to advise him that his letter to his wife was inadmissible under Florida Statute 90.507 due to husband-wife

privilege. Further, defense counsel provided the murder-suicide letter to the defense expert without advising Mr. Lynch of his spousal privilege and without discussing with Mr. Lynch that release of the letter to the expert could be interpreted as a waiver. ROA V. XIII, p. 107-08. Mr. Lynch's attorneys also failed to advise him that his phone conversation with his wife after the victims were dead were privileged, and that he alone could waive that privilege. Mr. Lynch's attorneys also failed to object to Mrs. Lynch's testimony and the introduction of the letter in evidence.

At the hearing, Mr. Figggatt admitted that the letter was a very damaging piece of evidence and huge in establishing CCP. ROA V. XIII, p. 95. He could not come up with a viable theory to keep the letter out as a spousal privilege. Id. When shown the relevant portions of the letter at the hearing, he agreed he had misread the letter because he thought that Mr. Lynch said in the letter itself to send the actual letter to Ms. Morgan's family. Id. at 100-104. He also agreed that under the principles set out in the Bolin trilogy he could have raised spousal privilege. Mr. Caudill said they thought about spousal privilege and the letter but did not review any law on spousal privilege and agreed there was no caselaw on privilege in their file. ROA V. XVIII, P. 1124.

In the Bolin trilogy, this Court reaffirmed its holding in

Koon v. State, 463 So.2d 201 (Fla. 1985), of the importance of the spousal privilege and held that taking a spouse's discovery deposition does not waive the spousal privilege. This Court also said that the contents of Bolin's suicide letter could constitute a waiver if the circumstances show Bolin voluntarily consented to disclosure by his spouse. Bolin v. State, 650 So.2d 19, 21 (Fla. 1995); Bolin v. State, 642 So.2d 540 (Fla. 1994) In Bolin v. State, 793 So.2d 894 (Fla. 2001), the trial court decided that Bolin's suicide letter constituted a waiver of the spousal privilege because Bolin wrote in his letter that if anybody wanted to know about his murders, they would have to ask his wife because she knew about three of the murders. Id. at 896-97. In reversing, this Court held that under a totality of the circumstances analysis, Bolin was acting under the belief that he did not have the privilege to waive,(citing Harrison v. United States, 392 U.S. 219, 225-26 (1968)), and that because Bolin never voluntarily delivered the letter to an agent of the State the facts do not establish a voluntary waiver.

The facts in this case are analogous. Mr. Lynch never voluntarily delivered the letter to the State, never told his wife to give the letter to anyone else, and it was seized from his wife without a valid warrant and without her consent. Lynch's failure to object to the introduction of his wife's testimony should not be held against him in this analysis

because counsel was deficient in failing to tell him about his spousal privilege.

The lower court in its Sentencing Order appeared to rely on the same misperception as trial counsel that Mr. Lynch said to send the letter to the victim's parents. ROA V. I, p. 112. The part of the letter relevant to a finding that Mr. Lynch was not referring to his own letter states: [7]

> In blue stacked crates in garage by door, on my side you will see computer gaming magazines on top shelf, left side top one says "50 best games". *On bottom most magazine of pile you will find copy of a letter she gave me Jan. 11, and a card she gave me Feb. 2, a week before it ended. You can see how serious we were and how animalistic she was sexually in card*. She loves Steven too, also fed him bottle, changed his diaper gave him bananas. *Make copies of the letter and card for me and copies of pics on drive, just print them out on printer, don't have to be full page just 4 x 6 or so. I want you to send copies of letter + card and pictures to her family* . . . I want them to have a sense of why it happened.

ROA V., I, p. 178. (emphasis added) Clearly, Mr. Lynch is directing his wife to "send" the nude pictures, the January 11th letter (Def. Ex. 25, p.1435-36) and the February 2nd card (Def. Ex. 24, 1431-34).

In denying this claim, the lower court found that even if he was referring to the other letter and card, Mr. Lynch waived the spousal privilege. ROA V. XII, p. 2041. The lower court does not

[7] The lower court in its Order denying this claim, includes a quote from the letter but *leaves out* the crucial language referencing the January 11th letter and February 2d card.

address this Court's holdings in the Bolin trilogy. It cites to Florida Statute 90.507 for the proposition that a person waives the privilege if he "consented to [disclosure of] any significant part of the matter or communication." Id. at 2042. The lower court finds that Mr. Lynch consented to disclosure of the contents of the letter to his wife because the "Feb 2" card and "Jan 11" letter do not provide a reason and understanding of why it happened because they merely show "expressions of affection" and a sense of frustration. Id. at 2042. This is erroneous and inconsistent with Bolin. The exhibits do support Mr. Lynch's explanation of why it happened: Mr. Lynch was jilted in love, Ms. Morgan had expressed romantic and sexual desire for Mr. Lynch and then had withdrawn that desire. Consistent with Dr. Olander's explanation at trial, Mr. Lynch, in his delusional and psychotic state, wanted the letter, card *and the naked pictures* sent to *shame* her. [8]

The lower court also finds that because Mr. Lynch confessed to Joyce Fagan, the privilege against disclosure of the contents of the second phone call is waived. Id. at 2043. However, this

[8] The Feb 2 card, by way of example, includes a closing by Ms. Morgan to Mr. Lynch, where she states, "no matter what, I like to suck off that sweet cream of yours!!!" (ROA V. VIII, p. 1431-32). On the Jan. 11 letter, Mr. Lynch has written next to Ms. Morgan's writing a statement about how her letter was the most beautiful letter he had ever received and how angry he was that she had, shortly after sending the letter, cut off her feelings for him.

court has held that a defendant does not waive his spousal privilege by also confessing to his mother-in-law and son. Koon at 204.

The court, in finding no prejudice concludes that counsel's failure in this regard did not prejudice Mr. Lynch because the information was cumulative. Not only is this factually inaccurate (the letter was perhaps the most significant piece of evidence for the State in establishing CCP), the lower court has failed to apply the proper analysis under Grosvenor. Had counsel not rendered deficient performance by failing to advise Mr. Lynch that he could have objected to the disclosure of the letter and conversations with his wife, he would have asserted his right to trial and would have objected at trial to the testimony.

C. Failure to Object and/or File A Motion To Suppress the Illegal Search and Seizure of items in Mr. Lynch's Home

Counsel's failure to file a motion to suppress the illegal search and seizure of the suicide letter and failure to advise Mr. Lynch of his Fourth Amendment rights and his right to object to the introduction of this evidence at a trial was deficient performance which prejudiced Mr. Lynch. Had Mr. Lynch been properly advised and had counsel moved to suppress the illegally obtained evidence, there exists a reasonable probability he would not have entered his guilty plea and would have exercised

his right to trial.

The Sanford police department searched Mr. Lynch's home without a warrant on March 5, 1999, the day of the crime, and again on March 9, 1999 after obtaining an invalid, overbroad search warrant. ROA V. I, pp. 170-74. During the initial search, law enforcement seized the letter from Mr. Lynch's wife, without her consent, or, if her consent was given, it was a mere acquiescence to authority. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971).[9] The warrantless seizure of the letter violated Mr. Lynch's reasonable expectation of privacy against unreasonable search and seizure.

Likewise, the seizure of numerous items from Mr. Lynch's home on March 9th was unreasonable as it was based on an invalid warrant. The items seized included personal papers, birth certificates, death certificates, his computer, commendations for past good deeds, letters from the victim to Mr. Lynch, a large collection of guns, adult erotic material, and other items.[10] The warrant was invalid under the Fourth Amendment, the corresponding

[9] The facts of Mr. Lynch's case are opposite those in Coolidge. Ms. Lynch did not volunteer the letter to police, the police took the letter out of her hand without consent.

[10] While the State did not attempt to introduce the guns and erotic material, it brought the guns and gun case to the trial, where it remained in the courtroom throughout the proceedings.

provisions of the Florida Constitution, and Florida Statute 933.05(1998).

"General searches have long been deemed to violate fundamental rights." Marron v. United States, 275 U.S. 192, 195 (1972)(quoting Boyd v. United States, 116 U.S. 616, 6S.Ct. 524, 29 L.Ed. 746 (1886)). The provisions against general searches is particularly so when involving a person's private papers. Andresen v. Maryland, 427 U.S. 463, 482 n. 11 (1976). The particularity requirement of Florida Statute 933.05 also makes generalized searches illegal and limits law enforcement discretion; for a warrant to be valid it must set forth with particularity the property to be seized. Green v. State, 688 So.2d 301, 306 (Fla. 1996); Ingraham v. State, 811 So.2d 770 (Fla. 2d DCA 2002).

In Green v. State, this Court reversed a death sentence finding that a search warrant which authorized a search for "the clothing Joseph Nahune Green, Jr. was wearing the evening of the 8th day of December, 1992, the weapon used in the murder of Judith Miscalley and other evidence relating to the fatal shooting" was overbroad. The Court noted that it was "not a case in which a broad description is permissible because the items to be seized are unique or otherwise distinguishable." Green, at 306 - 307. Counsel was not familiar with this Court's holding in *Green*. ROA V. XIII, p. 121.

The warrant in Mr. Lynch's case was equally overbroad:

> " ... Evidence ... include [sic], but is not limited to the following: answering machine and or answering machine tape, photographs and photograph 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 the homicide Roseanna Morgan and Leah Caday, and any papers, receipts, or other documents that pertain to, or may pertain to the crime referenced above."

ROA V. I, p. 173. Any evidence obtained as a result of this warrant was the result of an unreasonable search in violation of Mr. Lynch's Fourth Amendment rights.

Counsel also rendered deficient performance in failing to move to suppress the letter because he mistakenly believed, and in fact said at a pre-trial hearing, that Virginia Lynch consented to giving the letter to law enforcement so there were no grounds to file a motion to suppress. ROA V. XIII, p. 115. When asked why he thought Virginia Lynch "delivered the letter itself to law enforcement," he said he did not know the basis of that belief. Id. at 125. He conceded that if the evidence showed that police took the letter out of Virginia Lynch's hands and she did not want to give the letter to law enforcement that would not be valid consent. Id. at 126.

The evidence shows Virgina Lynch did not give valid consent. Ms. Lynch gave statements on March 6, 1999, and March 16, 1999. She was specifically asked about the circumstances of the police

obtaining the letter. (Def. Ex. 18 & 19; ROA V. V, pp. 796-839).

On March 6th, she told law enforcement that an officer whose name she could not remember, "took the letter," before she could finish reading it. ROA V. V, 797-98. On March 16th Ms. Lynch told ASA Feliciani that Mr. Lynch did *not* tell her to give the letter to anybody. ROA V. XIX, p. 833. Then, after explaining how upset she was and how she never read the whole letter, she was asked how did the police get the letter:

> A: Well, I think when [the police officer] arrived, I was already I had the note in my hand.
> Q: Ok, so what did you do with the note when he arrived?
> A: I'm trying to look for more information on the note.
> Q: Ok, how did he get in possession of the note?
> A: He took it away from me.
> Q: He took it from you?
> A: Yes.
> Q: Ok, you didn't give it, did you give it to him or did he just take it?
> A: No, he said, you know, I want to hold on to that note.
>
> . . .
>
> Q: Ok, and were you willing to give it to him?
> A: Not, not at that point. I was like.
> Q: You wanted to read it, you wanted to look at it?
> A: Yes, yeah, I wanted to read it but I thought you know, I should do what he says. So before I could finish the whole thing, he asked for it.

ROA V. XIX, p. 834-36.

In order to prevail on an ineffective assistance of counsel claim on a Fourth Amendment issue, "the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have

been different absent the excludable evidence in order to demonstrate actual prejudice." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Counsel's failure to move to suppress the illegally obtained evidence was deficient performance because reasonably competent counsel would have recognized that there was a basis to suppress both the items seized pursuant to the overbroad warrant and the illegal seizure of the letter. Counsel's failure to file a motion to suppress was based on a misunderstanding of the facts surrounding law enforcement's seizure of the letter and a failure to be aware of the law on overbroad warrants.

Prejudice is established because both the trial court and this Court based a finding of the Cold, Calculated and Premeditated aggravator in the death of Ms. Morgan on the contents of the letter. ROA V. I, p. 113-14; Lynch v. State, 841 So.2d 362, 372 (Fla. 2003) Further, because this is a guilty plea, the Grosvenor prejudice inquiry applies.

In denying this subclaim, the lower court stated that "assuming the warrant was overbroad . . . partial overbreadth will not render the remainder of the warrant inadmissible." Id. at 2035. The lower court then states that "the letter was *generally described in the warrant* and was obtained by law enforcement when Mrs. Lynch surrendered it upon request," and cites to page 95 of the transcript. However, page 95 (ROA V.

XIII, p. 95) does not support this finding. The court further finds that "the letter, having been properly delivered to Lynch's wife was her property and was lawfully obtained by law enforcement since Lynch had no ownership interest in it." ROA V. XII, p. 2036. However, the question is not whether a defendant has a possessory interest in the item seized but whether he has an expectation of privacy in the area searched. United States v. Salvucci, 448 U.S. 83 (1980). Mr. Lynch had a reasonable expectation of privacy in his home as to a private written communication to his spouse. The lower court's denial of this subclaim is erroneous and fails to apply the proper prejudice analysis. Had counsel advised Mr. Lynch that these items could have been suppressed, there exists a reasonable probability that he would have asserted his right to trial.

D. Failure to Consult Firearms Expert and Thereby Adequately and Accurately Advise Mr. Lynch of Corroboration to his Claim of Accidental Shooting

Trial counsel for Mr. Lynch failed to conduct any type of investigation into Mr. Lynch's numerous claims that the gun accidentally discharged.[11] Mr. Figgatt admitted he never investigated anything about Glocks and did not look for or consult a firearms expert. ROA XIII, p.91, 92. This was based upon his belief that there was not a problem with the gun. Id.

[11] Mr. Lynch's written closing argument to the lower court lists, in detail, Mr. Lynch's numerous accounts of the incident as an accidental shooting. (ROA V. XI, pp.1585-86, 1616-18)

at 93. However, he knew nothing about the gun in question, a Glock. ROA V.XIV, p.433. Mr. Caudill said they never considered hiring a firearms expert. ROA V. XIX, p.1110. He mistakenly believed that Mr. Lynch said the shooting of Leah Caday was the result of an intentional shooting of Ms. Morgan. Id. at 1111-12. Mr. Figgatt admitted he accepted all of the testimony of the State's expert, at face value, because, if "she didn't report [something]…it didn't happen in my mind." ROA V. XIV, p.409)

At the post conviction hearing, Mr. Lynch presented the testimony of Roy Ruel, who was accepted without objection as an expert in firearms and short range ballistics. ROA V. XIV, p.358-59. Mr. Ruel testified that after examining the firearm in question and other evidence in the case, he concluded that many of the shots fired could have been unintentional. Id at 368. This was based upon his examination of the Glock itself, his background and expertise with that particular firearm, and his knowledge of other accidental firings of that same gun[12]. Id at 367-68.

Had Mr. Lynch's attorneys properly consulted a firearms expert and advised him that there was expert corroboration of his claim of accidental discharge, Mr. Lynch would not have

[12] The most famous example of these accidental shootings, which was referenced in the hearing, is the DEA agent in Orlando, Florida who was giving a talk at a school about gun safety and accidentally shot himself in the foot, a scene captured on video and widely played on the internet and television.

entered his plea and would have insisted on going to trial. Since he was never given this information by his attorneys, his plea was not fully informed and knowing.

The failure to investigate this claim was an objectively unreasonable decision and any strategy based upon this failure to investigate was itself unreasonable. Wiggins v. Smith, 539 U.S. 510 (2003); Florida v. Lewis, 838 So.2d 1102 (Fla. 2003). Counsel's decision to forgo any investigation into Mr. Lynch's claim of an accidental shooting based upon counsel's limited knowledge of guns, the unchallenged belief in the correctness of the State's expert, and the mistaken belief as to the version of events provided by the client, was unreasonable and is inconsistent with the ABA Guidelines requirement that counsel conduct an *independent forensic* investigation regardless of the evidence against the accused.

In its denial of this claim, the lower court failed to apply the Grosvenor prejudice analysis and cited to facts outside-the-record in finding Mr. Ruel to be one of the "least credible experts the court had ever heard." ROA V. XII, p.2037. In its prejudice analysis the court simply states, that "calling a ballistics expert to testify about the murder weapon would not have benefitted the defendant at trial." Id. at 2041. This is simply the wrong standard. As to its credibility determination, while a court is certainly entitled, and obligated, to weigh a

witness' credibility, a credibility finding by the lower court must be based on competent, substantial evidence *in the record*. Way v. State, 760 So.2d 903, 911 (Fla. 2000).

The outside-of-the-record reasons include the lower court's out-of-court testing of the weapon, discussed *supra*, and other "facts", such as the effect on the shooter of the noise from firing the weapon, the recoil "kick" of the weapon and its effect, and the fact that discharging the gun would create a certain noise, recoil, smoke and smell that would have a certain effect on a shooter. ROA V. XII, p. 2037-38.

In response to Mr. Lynch's Motion for Rehearing, the lower court defended its reliance on out-of-court evidence stating that "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." ROA V. XII, p. 2040. The lower court cites, in support of this contention, Edelstein v. Roskin, 356 So.2d 38 (Fla. 3rd DCA 1978). While that case is instructive on the issue, it actually supports a different conclusion than what the lower court reached. In that case, the 3rd District *overturned* a jury verdict on the basis that a juror informed other jurors of his personal knowledge about the intersection where the accident at issue occurred. Edelstein, 356 So. 2d at 38-39. The court held that the jury must confine its consideration to the facts in evidence as weighed and

interpreted in the light of common knowledge. Id. at 39. Jurors must not act on special or independent facts which were not received in evidence. Id. citing Russ v. State, 95 So.2d 594 (Fla. 1957).

In this case, the lower court relied on "special and independent facts" not in the record or in evidence in reaching its conclusions on this issue rather than any common knowledge. Common knowledge is defined as "a fact so widely known that a court may accept it as true without proof." Black's Law Dictionary, Eighth Ed. Florida courts have found that facts far more commonly known than those related to the firing effects of a particular model of handgun were not common knowledge. See, e.g., Keller v. State, 849 So.2d 385 (Fla. 2nd DCA 2003)(rejection of argument that jury instruction not necessary regarding traffic regulations because they are common knowledge); Acree v. Hartford South Inc., 724 So. 2d 183 (Fla. 5th DCA 1999)(testimony about effect cluttered background and glare from lights has on driver's ability to see pedestrians not common knowledge).

This lack of record evidence for the credibility determination, when combined with the failure by the State to call any witness to counter Mr. Ruel's methodology or conclusions, means the lower court's assessment of witness credibility must be rejected as not based on competent,

substantial evidence.

Consulting with a firearms expert would also have been useful for an effective cross examination of Ms. Rudolph, the State's expert witness at sentencing. When Mr. Ruel testified at the post conviction hearing, he was able to point out that Ms. Rudolph was mistaken that each shot from the Glock required a full trigger pull and that she did not use the correct ammunition in doing her powder dispersion testing. (TR.376-77)

Counsel's failure to consult a firearms expert constituted ineffective assistance of counsel and but for counsel's errors, there exists a reasonable probability that Mr. Lynch would have insisted on going to trial.

Conclusion

Throughout its Order on this claim, the court repeatedly failed to conduct the proper totality of circumstances analysis dictated by the United States Supreme Court and thoroughly explained by this Court in *Grosvenor*, even though Mr. Lynch relied on *Grosvenor* in his pleadings and the lower court cited *Grosvenor*. ROA V. XII, p. 2630. Under the totality of the circumstances analysis, objective facts this Court has said should be considered support a finding of deficient performance and prejudice and corroborate the credibility of Mr. Lynch's claim. Specifically, Mr. Lynch received no benefit to his plea and subjected himself to the maximum penalty under Florida law;

during the plea colloquy trial counsel expressly misstated the law of burglary and neither the trial court nor the State corrected the misstatement; counsel said they did not discuss defenses in any great detail with Mr. Lynch, including lesser included offenses, and did not identify the affirmative defense of consent to burglary; and the Indictment did not allege entry without consent. Counsel also failed to state facts which establish a kidnapping under the law. In addition, counsel rendered deficient performance as to knowledge of the law and facts of Fourth Amendment issues and spousal privilege as to the letter. Counsel's strategy was not based on informed judgement, but on the attorneys' guess work that they knew the judge. Trial counsel's performance was below prevailing norms.

Even if each individual subclaim is not sufficient to set aside Mr. Lynch's guilty plea, cumulative error renders his guilty pleas unreliable. In considering all aspects of defense counsel's deficient performance as part of a totality of the circumstances analysis, Mr. Lynch's guilty pleas and convictions should be set aside because they were not knowing and voluntary due to defense counsels' deficient performance. Absent counsel's deficient performance there exists a reasonable probability that Mr. Lynch would have insisted on going to trial.

CLAIM II

THE LOWER COURT ERRED WHEN IT DENIED MR. LYNCH'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND FLORIDA COMMON LAW.

The lower court erred when it denied Mr. Lynch's claim that he received ineffective assistance of counsel at the penalty phase of his capital trial. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Id. at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. Id. at 690. "An ineffective assistance of counsel claim has two components: A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (internal citations omitted).

This Court has said:

> Trial counsel's obligation to zealously advocate for their clients is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the

> sentencing arena than the decision concerning whether a person will live or die. When an attorney takes on the task of defending a person charged with a capital offense, the attorney must be committed to dedicate both time and resources to thoroughly investigate the background and history, including family, school, health and criminal history of the defendant for the kind of information that could justify a sentence less than death. I believe that the constitution and the case law from this court and the United States Supreme Court requires no less.

Coday v. State, 946 So. 2d 988, 1015-16 (Fla. 2006) (*Quince, J., concurring*).

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 80 L.Ed. 2d 674 (2003), the United States Supreme Court held "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy. " Id. at 2538.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Wiggins at 2535.

In making this assessment, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to

investigate further." Id. at 2538. In finding that counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association . . . standards to which we have long referred as 'guides to determining what is reasonable,'"the Court held the ABA Guidelines set the standards for counsel in investigating mitigating evidence. Id. at 2537.

The Eleventh Circuit has held "[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudices [a petitioner's] ability to receive an individualized sentence." Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir.1991) Effective representation, consistent with the Sixth Amendment, also "involves the independent duty to investigate and prepare." House v. Balkcom, 725 F.2d 608, 618 (11th Cir.1984).

> "[C]ounsel's duty of inquiry in the death penalty sentencing phase is somewhat unique. First, the preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on *the production of evidence to make a case for life*. *The purpose of investigation is to find witnesses to help humanize the defendant*, given that a jury has found him guilty of a capital offense."

Hardwick v. Crosby, 320 F.3d 1127, at 1162-63 (11th Cir.

2003)(emphasis added).

This Court has held trial counsel renders deficient performance when his investigation involves limited contact with a few family members and he fails to provide his experts with background information. Sochor v. Florida, 883 So.2d 766, 772 (Fla. 2004). *See also* State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002)("[T]he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated-this is an integral part of a capital case."); Ragsdale v. State, 798 So.2d 713, 718-19 (Fla. 2001) (Inexperienced counsel rendered deficient performance when his entire investigation consisted of a few calls made to family members); (Rose v. State, 675 So.2d 567, 571 (Fla. 1996) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." (*quoting* Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)).

Because the right to effective assistance of counsel is so fundamental, the standard for proving prejudice is low:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.*
>
> * * * *

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. . . . When a defendant challenges a death sentence . . . the question is whether there is *a reasonable probability* that, absent the errors, the sentencer -including an appellate court to the extent it independently reweighs the evidence- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim, must consider the totality of the evidence before the judge and jury.

Strickland v. Washington, at 694-96 (emphasis added). Prejudice is proved if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

> Citing to Strickland, the Fourth Circuit Court of Appeals . . . explained the [prejudice] standard: . . . The level of certainty is something less than a preponderance; it need not be proved that counsel's performance more likely than not affected the outcome. Instead, the petitioner need only demonstrate 'a probability sufficient to undermine confidence in the outcome.'" Young v. Catoe, 205 F.3d 750, 759 (4th Cir. 2000)

Cherry v. State, 781 So. 2d 1040, 1057-1058 (Fla. 2001) (Anstead, J. dissenting).

The lower court, in its analysis, failed to follow established precedent of the Supreme Court when, "it failed to evaluate the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the

[postconviction] proceeding in reweighing it against the evidence in aggravation. See Clemons v. Mississippi, 494 U.S. 738, 751-52 . . . (1990)." *(Terry)* Williams v. Taylor, 529 U.S. 362, 397 (2000).

To the extent that the court's Order rejects claims, it often "fails to point to any evidence from the trial or [postconviction proceedings] that actually controverts [Mr. Lynch's claims.]" Coday v. State, 946 So. 2d 988, 1020 (Fla. 2006) (Bell, J., concurring). The lower court's findings are also not based on competent, substantial evidence. As such, this Court should substitute its own findings of fact and weigh the credibility of the witnesses. Sochor v. Florida, 883 So. 2d 766 (Fla. 2004).

A. Failure to Advise of Mitigation Prior to Jury Waiver

Mr. Lynch's attorneys rendered deficient performance when they failed to investigate, discover and advise him of extensive mitigation available in his case and the right to object to the introduction of the letter prior to his waiving his right to a sentencing jury. The Sixth Amendment provides that a defendant has a fundamental right to a jury trial. Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); Duncan v. Louisiana, 391 U.S. 145(1968). Fundamental constitutional rights can be waived, Boykin v. Alabama, 395 U.S. 238(1969), but an effective waiver of a constitutional right

must be knowing, and intelligent. Brady v. United States, 397 U.S. 742 (1970).

In an ineffective assistance claim based on counsel's misadvice or lack of advice in the context of entering a guilty plea, this Court has held that the proper prejudice inquiry is a totality of the circumstances analysis which asks, but for counsel's deficient performance is there a reasonable probability that the defendant would have insisted on proceeding to trial. Grosvenor v. State, 874 So.2d 1176, 1179 (Fla. 2004) (citing *Hill v. Lockhart*, 474 U.S. at 59). *See* Deaton v. Dugger, 635 So.2d 4, 8-9 (Fla. 1993) However, regardless of whether it is the classic Strickland prejudice analysis or the Hill v. Lockhart analysis, the lower court failed to conduct the proper inquiry and failed to consider mitigation developed at the evidentiary hearing.

Mr. Lynch's waiver of his right to a sentencing jury could not have been knowing because counsel rendered deficient performance in investigating his case and failed to advise or misadvised him as to mitigation evidence and Fourth Amendment and spousal privilege. Further. Counsel's advice to have a non-jury trial in front of Judge Eaton was little more than guesswork. Defending a Capital Case in Florida 1992-2003, (5th Ed. 1999), Ch.6, p. 10.

When asked to articulate what mitigation evidence he had

uncovered at the time of Mr. Lynch's jury waiver, Mr. Figgatt said he did not know but it was not more than presented and probably less. ROA V. XIII, p. 79-80. Counsel said at the evidentiary hearing that all he did to investigate mitigation was, talk to Mr. Lynch, call two or three family members on the phone one month prior to the penalty phase and two months after Mr. Lynch's waiver of a sentencing jury, and retain two mental health experts, one of whom he didn't call in spite of a finding of brain damage.

Mr. Lynch was not aware of weighty mitigation in his case such as the brain damage, high school records, lay witness testimony and other documentary evidence as presented at the hearing.

In denying this claim, the lower court stated that the record establishes that Mr. Lynch "freely and voluntarily" waived his right to a jury. ROA V. XII, p. 2045. The lower court merely cites to the plea colloquy in support of this finding. This is insufficient. The court fails to address the testimony at the hearing, including trial counsel's admission that if he had known of the brain damage, he would have advised Mr. Lynch to have a jury trial. ROA V. XIII, p. 81.

The court also states that there is *no advantage* to a penalty phase jury other than "the possibility that the jury may

recommend a life sentence." Id. At 2046.[13] In its dimunition of the role of the jury, the lower court ignores a bedrock principle of our judicial system.

> "Community participation is as critical in life or death sentencing decisions as in those decisions explicitly governed by the constitutional guarantee of a jury trial. The 'higher authority' to whom present-day capital judges may be 'too responsive' is a political climate in which judges who covet higher office — or who merely wish to remain judges– must constantly profess their fealty to the death penalty."

Harris v. Alabama, 513 U.S. 504, 519 (1994)(Stevens, J.,dissenting)

The lower court also ignores historical data which shows that Florida judges are just as likely as juries, if not more so, to impose death and tend to override juries' life recommendations.[14]

The lower court, in finding that counsel rendered reasonably competent performance, stated:

> [C]ounsel cannot be faulted for avoiding the inevitable and advising the defendant to waive a penalty phase jury. *See Bolander v. State*, 503 So. 2d 1247, 1250 (Fla. 1987)(Strategic decisions by counsel do not constitute ineffective assistance if alternative courses of action have been considered and rejected.)

ROA V. XII, p. 2047.

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[13] The additional concern under the facts of this particular case is that the lower court evidenced bias and became a material witness in the postconviction proceeding as argued *supra*.

[14] *See* Radelet and Mello*, Death-To-Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 Fla.St.U.L.Rev.195, 196 (1992).

The court further found that counsel's decision to advise Mr. Lynch to waive a jury was reasonable because the mitigation presented "was not the sort 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" Id. at 2047.

The lower court's analysis is flawed in three respects. First, as to a finding that counsel rendered reasonably competent performance within established norms, the court fails to point to any evidence in the record. This "deficiency necessarily flows from the fact that there is no competent, substantial evidence," to support this finding. Coday v. State, 946 So. 2d 988, 1019 (Fla. 2006) (Bell, J. concurring). In fact, the record, the ABA Guidelines, the Florida Public Defender Manual *and* the decisional laws of this Court and the United States Supreme Court are to the contrary. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000); Rompilla v. Beard, 545 U.S. 374 (2005); Orme v. State, 896 So.2d 725 (Fla. 2005). Strategic decisions are reasonable only to the extent they are based on a reasonable investigation. Wiggins, 539 U.S. at 521. It is beyond cavil, that counsel's investigation in this case was deficient. Second, to say that a death sentence in this case "was inevitable," ignores trial

counsel's testimony that he had had success in the past with child death cases, ignores the wealth of mitigation evidence, including the weighty evidence of frontal lobe brain damage, and is simply an incorrect prejudice analysis. Kyles v. Whitley, 514 U.S. 419, 434 (1995); Nix v. Whiteside, 475 U.S. 157, 175 (1986); McLin v. State, 827 So. 2d 948, 958 (Fla. 2002).

Third, the lower court's rejection of Mr. Lynch's claim because jurors don't readily accept certain types of mitigation is also flawed. In listing mitigation jurors view as "excuses," the Court again doesn't address the weighty mitigation of frontal lobe brain damage and the PET scan. Also, the Eighth Amendment requires that a death sentence must be rendered by an objectively fair and impartial juror who will follow the instructions and the law. To deny a claim based on the idiosyncracies of a prospective juror is not proper under Federal law. This court should substitute its own findings of fact and credibility of the witnesses in determining that Mr. Lynch's waiver of his right to a sentencing jury was not knowing. Coday v. State, 946 So. 2d 988 (Fla. 2006)

B. Failure to Conduct a Reasonably Competent Mitigation Investigation and Failure to Present Mitigation

Trial counsel rendered deficient performance in failing to investigate and present mitigating evidence. Trial counsel's

mitigation investigation as noted throughout this brief was minimal and below prevailing norms. Counsel simply talked to Mr. Lynch, hired two experts and talked to a few relatives on the phone. Evidence defense counsel failed to find and present included right frontal lobe brain damage, a lifelong history of symptoms of mental illness, such as a rigid presentation and style of dress, evidence of psychotic decompensation four days prior to the crime as described by his barber, a delusional belief of a longstanding relationship with a beautiful woman, lifelong difficulty in establishing and maintaining relationships, details of his relationship with his mother, including the fact that he shared a bedroom with her until early adulthood and the circumstances of her death, commendations for good deeds in the past, evidence of low birth weight and premature birth, difficulty in school despite near perfect attendance, PET scan demonstrating brain damage and psychosis, neuropsychological testing supporting brain damage, psychological testing supporting psychosis, documents corroborating spiraling credit card debt and the fact that the anniversary date of the death of his mother was the same day the victim ended their affair, sporadic employment in New York until he became a bus driver, desire to be a police officer but only able to become a security guard, his love of children and his younger cousins' love for him, and childhood and adult photos

which humanized him, including his confirmation photo where he is holding a rosary.

In denying this subclaim, the court states, "the gist of the claim is that trial counsel failed to hire a mitigation specialist who would have uncovered additional mitigation." ROA V. XII, p. 2048. The lower court misapprehends Mr. Lynch's claim. His claim as outlined above is much broader and does not hinge on the failure to hire a mitigation specialist, although that was one of many deficiencies alleged and proven.

The lower court phrases the prejudice inquiry as:

> "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?"

Id at. 2050. The lower court then cites the proper prejudice inquiry *but* follows that with its conclusion based on an incorrect standard:

> "The Court has carefully considered each of the new mitigating circumstances presented and *finds that there is no reasonable probability 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 mitigation did not undermine confidence in the outcome."

ROA V. XII, p. 2050-51. As noted above, the *Strickland* prejudice inquiry is not outcome determinative. Further, the lower court

did not address all the mitigation presented as required by Strickland, Wiggins, and Williams, in spite of its conclusory claim to the contrary. And, even if the lower court did apply the correct prejudice analysis, it wrongly dismisses the weight of the additional mitigating evidence as "cumulative," of "minimal value," "remote in time and not mitigating in the case at hand," Id. at 2049, without citing to the record. [15] A trial court can reject a claim that a mitigating circumstance has been proved as long as the record provides "competent, substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So. 2d 922, 933 (Fla. 1987) A court improperly rejects uncontroverted mitigating evidence proven through a reasonable quantum of evidence. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). Such is the case here. None of Mr. Lynch's lay witness testimony and documentary evidence was refuted by competent, substantial evidence or by any evidence for that matter. The lower court concludes its denial of this claim by listing the mitigating factors it found and then simply stating "extensive" mitigation was presented. ROA V. XII, p. 2049. However, the lower court fails to note it did not find the statutory mental mitigators and that it gave

[15] The lower court wholly fails to identify what evidence it believes is of minimal value, remote in time and not mitigating in the case at hand. This is inadequate for meaningful review. As to the evidence presented at the hearing that the court found to be cumulative, most of it was presented at trial *not at the*

little weight to most of the nonstatutory mitigators it found.

The lower court lists as cumulative Mr. Lynch's mental problems but offers no further elucidation as to why it believes the testimony at the hearing was cumulative on this issue.[16] At trial in 2001, counsel presented only *one* witness, Dr. Olander. She had very little to corroborate her diagnosis of schizo affective disorder and psychosis other than Mr. Lynch's self-report, video of Mr. Lynch's arrest, his statements to law enforcement and her test data.

She briefly summarized Mr. Lynch's life: Mr. Lynch's father was overly strict, Mr. Lynch left public school because he was afraid, he had no positive interaction with his father, he washed his hands and his car excessively, Mr. Lynch was "overall" strange and peculiar, he had difficulty with work in Florida so became a Mr. Mom, had a close relationship with his mother and lived with her until 35, and did not have a normal understanding of friendships. TR ROA V. VII, p.761 -774. Dr. Olander also said Mr. Lynch was experiencing a psychotic episode at the time of the crime and told her he felt the presence of Satan. Id. at 809-16. She said Mr. Lynch described Mr. Morgan's control over the victim as an "alien abduction." Id. at 875.

On cross, the State, in trying to diminish support for a

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evidentiary hearing.

[16] The lower court addresses the brain damage in another subclaim, however, it was expressly raised in this claim and Mr.

finding of a psychotic break, pointed out that Dr. Olander spoke to Mr. Lynch's wife but did not ask her questions about Mr. Lynch's appearance or hairstyle prior to the crime. TR ROA V. VIII, p. 867. Dr. Olander further said she did not know of any prior history of delusions, Id. at 873-74, and that Mr. Lynch did *not* have organic brain damage. Id. at 829. The State further suggested that since Dr. Olander had not seen Mr. Lynch's employment records that it appeared he had consistent and stable employment in New York and that it was reasonable for Mr. Lynch's father to be protective because Dr. Olander had not been to Brooklyn. Id. at 808.

The evidence presented at the hearing, both expert witness testimony, lay witness testimony and exhibits demonstrates that trial counsel presented a skeletal presentation of Mr. Lynch's life, some of which was inaccurate. The Eighth Amendment requires a reasoned *and accurate* sentencing determination. Gregg v. Georgia, 428 U.S. 153, 190(1976)(plurality opinion). Failure to present friends and family who humanized Mr. Lynch and described his life was deficient performance which deprived Mr. Lynch of an individualized sentencing proceeding.

Counsel's most egregious failure was the failure to present brain damage. This court has recognized that failure to present expert testimony of brain damage, and evidence supporting that

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Lynch raises it on his appeal in this claim.

finding such as school records and descriptions of decompensation, is deficient performance. Ragsdale v. State, 798 So. 2d 713, 718-19 (Fla. 2001); Rose v. State, 675 So.2d 567, 571 (Fla. 1996) (*citing* Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)).

In denying the brain damage issue, the lower court states, "this mitigating circumstance was given 'moderate weight' after the penalty phase." ROA V. XII p. 2054. The court then acknowledges that because brain damage falls within the mental mitigator of extreme emotional disturbance, it must be given appropriate weight even if there is no nexus to the crime. But, the court then says:

> 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 . . . and the post conviction ... hearing, concludes that this mitigating circumstance was appropriately weighed after the penalty phase hearing and deserves no further weight than it was originally given.

ROA V. XII, P. 2054. The lower court's finding is inconsistent with the law in that the court *essentially gives no weight to the brain damage*. Coday v. State, 946 So. 2d 988 (Fla. 2006) Further, the lower court rejects or ignores testimony as to the statutory mental mitigator of ability to conform conduct to the law which all the defense experts agreed applied, mischaracterizes Dr. Sesta's testimony and wholly fails to

conduct a prejudice or deficient performance inquiry. ROA V. XII, p. 2051-2053. As such, the court's findings are not supported by substantial, competent evidence and the court should apply its own determination of the facts, weigh the credibility of the experts in determining that counsel's deficient performance prejudiced Mr. Lynch.

It is unrefuted that Dr. Cox wrote a report before the trial and recommended further neuropsychological testing to determine the extent of Mr. Lynch's brain damage. Dr. Cox also wrote that Mr. Lynch might misperceive the world around him due to the suspected brain damage, which could also contribute to delusional thinking. Id. at 612. Mr. Lynch's MMPI results evidence psychotic thought patterns, showing him to be one of the most "seriously disturbed type of inmate." Id at 610.

Dr. Olander admitted that she was mistaken when she told the court at the trial that Mr. Lynch did not have brain damage. Aty the hearing she said that she had reviewed both Dr. Sesta's neuropsych test data and report and Dr. Cox's data and report. Based on the 27-point discrepancy Dr. Cox found in Lynch's verbal and performance IQ, Id. at 650-656, and Dr. Sesta's Halsted-Reitan, she now believes Mr. Lynch suffers from frontal lobe and right hemisphere brain damage. Id at 657, 667. Dr. Olander said Dr. Sesta's test results would "have opened up a whole realm of valuable information I could have provided to the

court about trying to make sense of Mr. Lynch's world and how he perceived it, behavior choices he made and the actions that he completed." Id at 657. Dr. Olander also testified that "the interaction of [psychotic thought processes and frontal lobe brain damage] can be incredibly disabling." Id. at 657. The interaction of psychosis and brain damage "doesn't double" in effect but impacts the individual in an "exponential type of manner." Id. It is "absolutely widely accepted that frontal lobe impairment is linked to violence and impulse control." Id. at 667. Lynch's frontal lobe abnormalities affect his ability to process emotion and control impulses and he's had this problem most of his life. Id. 693.

Dr. Olander also said that had she had Mr. Lynch's high school records at the time of trial she would have suspected brain damage and tested for brain damage. The significance of Lynch's high school and elementary school records is "found by recognizing the role that the right brain plays in reading . . . as a student works his way up the curriculum, so to speak, the right brain plays even a greater role. For example, the left brain helps you recognize the details . . . but without an active right brain working efficiently [the person] doesn't understand the meaning of things and can't put it together in an organized, consistent way." Id at 665. Other scores on his high school records are also indicative of right cerebral damage,

including his poor grade in mechanical drawing which is an "extremely right brain task." Id at 665.

Dr. McCraney concurred with Dr. Cox and Dr. Olander in finding that Mr. Lynch had frontal lobe and right hemisphere brain damage. The diminished capacity statutory mitigator "speaks to problems in perception and diminished inhibition in frontal lobe function." Id. at 724. He explained the frontal lobe acts as a control mechanism allowing the individual to take into account the context and severity of the threat. Id. The executive function or frontal lobe affects an individual's ability to formulate intent to do something and the ability to formulate the intent not to do something, also known as "modulating the violence reflex." Id at 719. Pathological violence is violence where the brain lacks the capacity to either determine when violent response is called for, when it's appropriate, or lacks the capacity to exhibit this reflex. Id. at 720.

Dr. McCraney explained Mr. Lynch's frontal lobe dysfunction existed prior to the time of the crime because Lynch was "always perceived as odd, eccentric . . . symptoms seen in psychosis which are frontal lobe problems, social impairment in terms of inability to hold down a job, inability or significant difficulty forming relationships, loner as a kid, a lot of problems with adult relationships, all could be indicative of

frontal lobe problems." Id at 739. In addition, Lynch's school records and IQ scores also support a finding of brain damage from early childhood. Id.

Dr. Wu explained the location and significance of Mr. Lynch's brain dysfunction and the significance of it. The cingulate is part of the frontal lobe, and along with the orbital frontal lobe, are two of the most important sections of the brain in keeping aggressive impulses in check. " Id. at 892. Mr. Lynch's brain shows decreased functioning in the cingulate and orbital frontal lobe. Id. Dr. Wu also found abnormalities in the right hemisphere of Lynch's brain and agreed with the other experts that people with right hemisphere damage are "geeky and have trouble responding to social clues." Id. at 894-895.

Like the other experts, Dr. Sesta noted Lynch's "schizo flavor" since childhood and the school records and neuropsychological testing and neurological exam are a convergence of evidence of brain damage not presented at trial. Id. at 983.

Dr. Sesta unequivocally stated that Mr. Lynch's brain dysfunction existed at the time of the offense to such an extent that Mr. Lynch's ability to conform his conduct to the law was substantially impaired. Id. at 1015-16. Dr. Sesta further stated that right anterior hemisphere (frontal lobe) brain

damage is so mitigating that some neuropsychologists might have even opined Lynch was insane at the time of the crime although he would not. Id. at 984. The lower court takes this statement out of context in finding that the brain damage did not "directly contribute" to the murders, by writing in its Order, "Dr Sesta testified that Lynch was not legally insane, he knew what he was doing, and he knew what he was doing was wrong." ROA V. XII, p. 2053.

Dr. Sesta also agreed with Dr. McCraney that there was significant evidence to support psychosis, including the test data from his MMPI and Dr. Cox's MMPI, the erotomanic delusion, the grandiosity, and the convergence of a diagnosis between Dr. Wu, Dr. Olander, Dr. Cox and Dr. McCraney, all finding Lynch to be within the psychotic spectrum. Id. at 986-987. Dr. Sesta also agreed that the combination of emotional stressors, psychosis and brain impairment equal disaster. "The greater the impact of the stressor, the more rapidly and severely these individuals decompensate." Id. at 988.

Dr. Reibsame was thoroughly discredited and should not be relied on by this Court in upholding the lower court's rejection of brain damage by finding it warrants no additional weight to oeither statutory mitigator. On cross-examination, Dr. Reibsame admitted that he used a controversial scoring technique on the MMPI to suggest Mr. Lynch may have been faking his symptoms

which is no longer published or valid. Id. at 1075-77. Prior to trial in 2001, he also administered the MMPI in a manner which would have falsely lowered Mr. Lynch's psychosis and paranoia scales, could have raised his Scale 4, and then misleadingly said at trial he discounted psychosis because the psychosis and paranoia scales were not high enough. Id. at 1053-57. He discounted or minimized Dr. Sesta's data and findings or claimed they were similar to his data but conceded he was not qualified to interpret Dr. Sesta's data. Id. at 1071; 1149; 1158-59. Both Dr. Sesta and Dr. Olander said Dr. Reibsame's data was invalid. Dr. Olander also said prior to the 2001 trial, he left out of his report mention of his own data which provided "confirmatory data that [Mr. Lynch] had experienced a significant psychotic episode." ROA V. XVI, p. 702-04. Dr. Sesta said Dr. Reibsame's "screw ups" "were major, significant and would result in diagnostic error." ROA V. XIX, p. 1280 and his data and Dr. Reibsame's data was not similar but "distinctly different. Id.

The lower court in its Second Amended Order Denying Post Conviction relief found Dr. Reibsame to be "somewhat discredited," ROA V. XII, p. 1927, but found his "basic opinion did not change" and that he still believes Mr. Lynch has the ability to control his behavior. Id. at 1928.[17] Presumably, then

[17] In 2001, the court found, "Dr. Reibsame's testimony [on psychosis and the statutory mitigator] is the most credible,"and therefore Mr. Lynch's mental illness does not meet the

the lower court continued to rely on Dr. Reibsame's testimony. Further, this suggests the trial court misunderstood the statutory mitigator as this standard seems "more appropriate in the insanity context." Coday, at 1003, fn. 4.

The lower court expressly relied on Dr. Danziger in essentially giving the brain damage no weight. Dr. Danziger did *not testify* at the penalty phase proceeding. The lower court, in its initial Order Denying Relief, however, found Mr. Lynch's brain damage does not change the weight given to mental health mitigation, in part, because, "Dr. Danziger, a psychiatrist *who testified at the original penalty phase hearing*, testified that a diagnosis of brain damage would not change his opinion that at the time of the crime, Lynch did not suffer from psychosis or dementia." ROA V. XI, p. 1870.[18]

In ruling out the statutory mental mitigators, Dr. Danziger said, "As I put all of this together, we have a man with no significant prior psychiatric history, no evidence of psychosis, no evidence of dementia, *functioning perfectly unremarkably in his life*." Id. at 1215. This cannot be squared with the uncontroverted lay witness testimony in this case and any reliance on Dr. Danziger is not based on substantial, competent

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requirements of the statutory mitigators, although he gave it moderate weight as a non-statutory mitigator. ROA V. I, p. 123.

[18] The court removed this language from its Amended Order after the State filed a Motion To Clarify. Id. at 1908-09; 1928.

evidence. Coday at 1003

By way of example, Dr. Danziger admitted he was unaware of the lay witness testimony describing Mr. Lynch's lifelong symptoms consistent with mental illness. Id. at 1221. He also was unaware of the location and extent of the brain dysfunction found by Dr. Sesta, or of Dr. Olander's agreement with Dr. Sesta's findings, or of Dr. Cox's opinion that Mr. Lynch met the statutory mental mitigators. Id at 1260-61. Dr. Danziger also agreed that an olfactory hallucination is where a person smells something that isn't there (Lynch told Dr. Danziger he smelled "evil")Id. at 1243; that a false, fixed belief about an affair with a woman more attractive and of higher stature is a delusion, Id at 1238, 1241-42; that Dr. Cox's and Dr. Sesta's MMPI results are indicative of psychosis, Id. at 1223; that a psychotic person can plan events and act in a goal oriented fashion, Id. at 1244; frontal lobe damage can cause psychosis, Id. at 1251, and mental illness can impair a person's ability to cope with emotional and situational stressors such as the anniversary of the death of a parent, spiraling credit card debt and the break up of a marriage. Id. at 1255-56.

Based on the powerful and uncontroverted testimony of brain damage (both Dr. Reibsame and Dr. Danziger admitted Lynch had brain damage although they characterized it as a learning disability) confidence in the outcome is undermined. The lower

court's analysis fails to address all of the substantial mitigation presented at the hearing and compare it to the mitigation at trial. This is erroneous under clearly established Federal law and this Court should reverse the lower court.

C. Failure to Ensure a Reasonable Competent Mental Health Evaluation

Much of this argument is addressed above in the portion about failure to identify brain damage and is incorporated herein. It is counsel's obligation to ensure that their client receives a meaningful and effective mental health evaluation. Counsel should provide background information in the form of school records, medical records and any other information that may be helpful to a mental health examination in a capital case.

Mr. Figgatt and Mr. Caudill conceded that they did not give Dr. Olander any background information other than that relayed by Mr. Lynch himself and Mr. Figgatt's brief information from his phone contact with two relatives, Danelle Pepe and Maureen Aiossa. They also failed to provide school records. And, as argued above, they failed to ensure that Dr. Olander examined Lynch for brain damage in spite of the fact that their other expert, Dr. Cox, had written a report diagnosing Mr. Lynch with cognitive disorder NOS and had recommended further neuropsychological testing. In Glenn v. Tate, 71 F.3d 1204, 1206-08 (6th Cir.1995), the Sixth Circuit set aside the death verdict on grounds of ineffective assistance of counsel at the

penalty phase. The Court held that counsel must perform a full and complete investigation of mitigating evidence including the defendant's 'history, background and organic brain damage.' 71 F.3d at 1207. The Court also held that this investigation should be conducted before the guilt phase of the case. It said that the 'time consuming task of assembling mitigating witnesses [should not wait] until after the jury's verdict . . .' Id. (quoting *Blanco v. Singletary,* 943 F.2d 1477, 1501-02 (11th Cir.1991)). The Court faulted the lawyers because they 'made no systematic effort to acquaint themselves with their client's social history'--for example, they 'never spoke to any of his numerous brothers and sisters,' and 'never examined school records' or 'medical records' or 'records of mental health counseling.' Id. at 1208.

Counsel's failure to provide Dr. Olander with even minimal background information was deficient performance and the prejudice is Lynch's death sentence.

D Failure to Object and/or File A Motion To Suppress the Illegal Seizure of the murder-suicide letter and/or assert spousal privilege was deficient performance which prejudiced Mr. Lynch

The facts supporting this claim are the same as those set out in Claim 1. Counsel mistakenly believed that Virginia Lynch had delivered the murder-suicide letter to law enforcement and so believed he had no grounds to file a Motion to Suppress. However, Ms. Lynch had given two statements, both of which were

transcribed and provided to trial counsel in discovery, which supported a finding that the letter was seized without a warrant from the Lynch's home and without consent. Further, counsel misread the murder-suicide letter and mistakenly believed Mr. Lynch authorized MS. Lynch to send the letter to the victim. Counsel thought this was a waiver of the spousal privilege. Mr. Caudill said they did not consult any law on spousal privilege, Mr. Figgatt said he spoke to an appellate attorney about it.

Counsel's performance was deficient in failing to identify these legal issues and failing to object to or move to exclude the murder-suicide letter on Fourth Amendment or spousal privilege grounds. The murder-suicide letter was very damaging and used to support a finding of CCP by both the trial court and this Court.

In denying this claim, the court stated that the claim was fully discussed in the corresponding part of Claim I. In Claim I, the lower court denied the claim of the illegal seizure by stating that the letter was "generally described in the warrant," and that Mr. Lynch had abandoned the letter so he had no possessory interest in the letter. These findings are erroneous and not supported by the record.

As to the issue of spousal consent, the lower court also states the issue was discussed in Claim I. In denying this portion of Claim I, the lower court said that Mr. Lynch waived

the contents of the letter and his communication with his wife by confessing to third parties and by the contents of the letter which state that Mr. Lynch wants Ms. Morgan's family to know why it happened. These findings are not supported by the record and case law of this Court.

Had Mr. Lynch's attorney moved to suppress the letter or objected to its introduction on the grounds of spousal privilege, there would have been less or no support for a finding of CCP. As such, the balance of the aggravators and mitigators would have been different, and, coupled with the additional mitigation testimony presented at the hearing, there exists a reasonable probability that the results of the proceeding would have been different and confidence in the outcome is undermined.

E. Failure to present the defense of Accidental Discharge of Firearm and Effectively Cross examine the State Gun Expert

Mr. Lynch repeatedly stated that the firing of the gun was accidental and that he did not intend to shoot Roseanna or Leah. Trial counsel failed to consult a firearms expert, failed to present expert testimony in support of his claim and failed to effectively cross-examine the officer from FDLE who testified that the gun was functioning normally. The lower court denied this Claim be referencing its ruling in Claim I in which it found that the firearms expert was not credible. However, the lower court pointed to out-of-record evidence and conducted its

own testing of the gun, ex parte, after the evidentiary hearing. The lower court's conduct in regards to this claim was the basis for a Motion To Disqualify raised in Claim V of this brief. The lower court's ruling denying this claim was not supported by competent, substantial evidence in the record.

The presentation of expert testimony supporting accidental discharge and effective cross examination of the State's expert would have given would have undermined or lessened the finding of CCP and provided additional non-statutory mitigation. The failure to investigate this claim was objectively unreasonable and any trial strategy based upon this failure to investigate was itself unreasonable. Wiggins v. Smith, 539 U.S. 510 (2003); Florida v. Lewis, 838 So. 2d 1102 (Fla. 2003).

CLAIM III

MR. LYNCH WAS DENIED DUE PROCESS WHEN HIS POSTCONVICTION PROCEEDINGS WERE HEARD AND RULED UPON BY A JUDGE WHO MADE HIMSELF A MATERIAL WITNESS AND DEMONSTRATED BIAS

Mr. Lynch had a constitutional right to a fair hearing in front of the lower court on his Motion for Post Conviction Relief. Mr. Lynch's Due Process rights were violated when the lower court demonstrated bias in making itself a material witness to the proceeding when it took a Glock pistol into chambers at an unknown point in time after the evidentiary hearing had concluded, tested the trigger pull and made an assessment of the functioning of the gun, and used those

findings as part of its basis to deny Mr. Lynch's claim of ineffective assistance of counsel in failing to consult and present a firearms expert. This error was compounded when the lower court in its Second Amended Order Denying Post Conviction Relief commented on and rebutted the factual allegations in the Motion to Disqualify.

A fair trial in a fair tribunal is a basic requirement of due process. In Re Murchison, 349 U.S. 133, 136 (1955). Fairness requires an absence of actual bias in the trial of cases, but in addition our system of law has always endeavored to prevent even the probability of unfairness. Id. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally, but justice must satisfy the appearance of justice. Id.

The proper inquiry on a motion to disqualify is whether the fact alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993). The appearance of bias created in such a situation taints the entire matter and requires recusal of the presiding judge. Id. at 516.

This Court has held that a judge who is presented with a motion for disqualification shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.

Bundy v. Rudd, 366 So.2d 440, 442 (Fla. 1978). "When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification." Id. The disqualification rule is expressly designed to prevent the creation of an intolerable adversary atmosphere between the trial judge and litigant. Id.[19]

Independent marshaling of evidence and facts by a trial court is a proper basis for a motion to disqualify. Chillingworth v. State, 846 So. 2d 674, 676 (Fla. 4th DCA 2003).[20] When the judge enters into the proceedings and becomes a participant, a shadow is cast upon judicial neutrality so that

[19] Any comment about the grounds for a motion to dismiss places the judge in an adversarial role and requires dismissal. See, e.g., Dominguez v. State, 944 So.2d 1052 (Fla. 4th DCA 2006)(automatic disqualification where trial court stated "appropriate" prior action was not basis to disqualify); Hewitt v. State, 839 So. 2d 763 (Fla. 4th DCA 2003)(comment by court that it did not remember that it represented a party required disqualification); Brinson v. State, 789 So. 2d 1125 (Fla. 2d DCA 2001)(sworn allegation that trial judge refuted factual claims sufficient for disqualification).

[20] Courts have held that out-of-court experiments and independent investigation by the fact finder are improper. See, e.g., State v. Dorsey, 701 N.W.2d 238 (Minn. 2005)(finding judge's independent investigation into correctness of witnesses testimony deprived defendant of his right to a fair trial and impartial finder of fact); People v. Andrew, 156 A.D.2d 978 (N.Y. App. Div. 1989)(finding Fifth and Sixth Amendment violations where jurors test fired a gun outside presence of parties); Jennings v. Oku, 677 F.Supp. 1061 (D. Haw. 1988)(finding jury's experiment about fingerprints during deliberations violated Fifth and Sixth Amendments).

disqualification is required. Asbury v. State, 765 So.2d 965, 966 (Fla. 4th DCA 2000). This neutrality is that much more impaired when the trial court actively seeks out the presentation of additional evidence. Id.

Counsel for Mr. Lynch filed a timely Motion to Disqualify Judge Eaton. (ROA.1965-72) The basis for the motion was that, in its Order denying relief, the court stated, in addressing Mr. Lynch's claim that his trial counsel was ineffective for failing to consult a firearms expert: "**[T]he Court took the time to inspect the weapon in chambers, and the trigger pull is not even close to being a 'hair trigger.'"** (R.1861)(emphasis added)

In the Motion to Disqualify, Mr. Lynch stated that the testing of the gun by the lower court, post-hearing and *ex parte*, evidenced bias and made the court a material witness for the State. ROA p. 1967 The Court's conduct would create a fear in a reasonably prudent person because the issue related to the firing of the gun was material to Mr. Lynch's ineffective assistance claim. The court's *ex parte* testing made it a material witness. ROA.1967-68)

In his Motion, Mr. Lynch expressed special concern about the fact that the gun could not be located at the time of the post conviction hearing. (ROA V. XIV, p.351, 363) The only court order in the record authorizing inspection of the weapon is the Order allowing Mr. Ruel to inspect the gun. Id. at 442. There

are no other court orders in the record allowing the release of the weapon. There is no way to determine when or what gun the lower court tested (there were multiple handguns in evidence in this case), whether the gun had been modified since the defense expert tested it, how the lower court conducted its test of the trigger, the court's knowledge and expertise, and how the court reached its conclusions about the trigger. ROA, V, XI, pp. 1966-67.

Mr. Lynch's due process right to a fair trial in front of a fair tribunal under the Fifth and Sixth Amendments was violated in this case based upon both apparent and actual bias. The lower court in this case independently marshaled facts and evidence and used them as the basis for rejecting a claim of ineffective assistance of counsel. This included evidence about the effects of firing a gun of this type, which was not testified to by any witness, and more importantly, the testing of the trigger of the gun outside the presence of Mr. Lynch and his counsel and without their prior knowledge. *Ex parte* testing of the gun conducted by the lower court transformed the court into a material witness and created a reasonable fear in Mr. Lynch that he was not receiving a fair and impartial hearing. The lower court went beyond the evidence presented in open court and actively sought out and created additional evidence in this case, casting a shadow on its judicial neutrality and requiring

disqualification. It does not matter what Judge Eaton's motivation was but rather whether his conduct would raise a fear in a reasonably prudent person. The Motion to Disqualify was legally sufficient and the lower court erred in denying the motion.

In addition, the lower court evidenced further bias and erred when it commented on the grounds for disqualification in its Second Amended Order Denying Relief. These comments automatically created grounds for dismissal. In the Second Amended Order, the lower court disputes the allegations in the Motion to Disqualify by stating the testing of the gun was not *ex parte*, but rather a proper *in camera* inspection of an item of evidence[21] in which the court made general observations "within the common knowledge of the adult population." (P.2039-40). Under Bundy, when the judge "look[s] beyond the mere legal

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[21] The lower court argued that in order for the examination to have been *ex parte*, the State Attorney would have had to be present. (R.2039) However, the definition of an *ex parte* proceeding is broader than that – it includes any proceeding "in which not all parties are present or given the opportunity to be heard." Black's Law Dictionary, Eighth Ed. This is consistent with Florida cases where courts have held a communication or examination to be *ex parte* when neither of the parties was present. See, e.g., State v. Merricks, 831 So.2d 156 (Fla. 2002)(defining the communication between a bailiff and the jury outside the presence of either party as "*ex parte*"); Lebron v. State, 799 So.2d 997 (Fla. 2001)(defining the *in camera* meeting between a judge and juror as "*ex parte*"); Mills v. State, 462 So.2d 1075 (Fla. 1985)(referring to information of prospective jurors prior to jury selection as "*ex parte* knowledge").

sufficiency of a suggestion of prejudice and attempt[s] to refute the charges of partiality," he has created grounds for dismissal on that basis alone.

The lower court's attempt to dispute the reasons for the Motion to Disqualify evidences the basis for the constitutional rules on this issue – to avoid an adversary atmosphere between the trial judge and litigant. The lower court's language suggests it may have been harboring ill feelings about the allegations in the Motion to Disqualify. In describing the allegations, the court said: "Lynch takes the Court to task"; "Lynch takes the opportunity to chastise the Court"; "[Lynch] also questions the ability of the court to examine a semi-automatic pistol and make general observations." ROA V. XII p. 2039-40 The lower court, in opening its discussion of the allegations, also wrote: "Both of these allegations require, **but do not deserve,** discussion." Id.(emphasis added) This language evidences actual bias on the part of the court and would place a reasonably prudent person in fear of not receiving a fair trial.

The lower court also found in its Second Amended Order that the finder of fact is specifically authorized to examine items of evidence prior to rendering a ruling, citing Fla.R.Crim.P. 3.400.(ROA V. XI, P. 2040). The two cases cited by the post conviction court in support of its position do not actually address this issue. In Santiago v. State, 909 So.2d 710 (Fla. 3d

DCA 2005), there was no evidence that the jury examined the weapon in any way during deliberations. Rather, that court held that where a gun is introduced at trial and the jury has an opportunity to examine it, it can be found to be a deadly weapon even where there is no testimony as to that fact. In Mitchell v. Ahitow, 1993 WL 86809 (N.D. Ill. 1993)(Not Reported), the merits of the issue of the examination of a gun by the judge was not addressed because the issue was not properly preserved.

To examine something means "to inspect or scrutinize carefully."[22] A test is defined as "the means by which the presence, quality, or genuineness of anything is determined; a means of trial."[23] The procedure employed by the court in this case clearly was a test as opposed to an examination. While there is no evidence of what the court actually did in reaching its conclusion, some sort of test firing must have been conducted.

A judge must immediately grant a legally sufficient motion to disqualify and take no further action in the matter. Berry v. Berry, 765 So. 2d 855, 857 (Fla. 5th DCA 2000); Fla.R.Jud.Admin.P. 2.330(f). Prior factual or legal rulings by the disqualified judge may be reconsidered, vacated or amended by a successor judge upon motion. Chillingworth, 846 So.2d at 677; Fla.R.Jud.Admin.P. 2.330(h). It is proper for a lower

[22] Webster's Unabridged Dictionary, 1996 ed.

court conducting a post-conviction hearing to vacate an earlier ruling on that motion when a motion to disqualify is granted. Brown v. State, 885 So.2d 391 (Fla. 5th DCA 2004). In post-conviction capital cases where this Court overturned on appeal the denial by the lower court of a motion to disqualify, the case was remanded for a new hearing before a different judge. Rogers, 630 So. 2d at 516.

The apparent and actual bias of the lower court in this case required disqualification. The failure of the court to grant the Motion to Disqualify violated Mr. Lynch's due process rights under the Fifth and Sixth Amendments and the rules of procedure in Florida to a fair and tribunal. The court further erred when it commented on and disputed the facts contained in the Motion to Disqualify. Based upon this violation of Mr. Lynch's fundamental constitutional rights, and the rulings in Rogers, Brown, and Chillingworth, the matter should be remanded for the appointment of a new judge and rehearing of the prior rulings of the lower court. This remand, in light of both the apparent and actual bias displayed by the lower court, should include all prior rulings, including the acceptance of the plea, sentencing hearing, post conviction hearing, and the orders denying post conviction relief.

CLAIM IV

[23] Webster's Unabridged Dictionary, 1996 ed.

MR. LYNCH WAS DENIED DUE PROCESS WHEN THE POSTCONVICTION COURT PROHIBITED HIM FROM INTRODUCING TESTIMONY AS TO THE PREVAILING NORMS AMONG CAPITAL DEFENSE COUNSEL IN SUPPORT OF HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

The lower court erred when it sustained the state's objection to the introduction of expert testimony as to prevailing norms among Florida capital defense attorneys in the time frame leading up to and during Mr. Lynch's trial. Florida Statute 90. 702 governs the admissibility of expert testimony. Before an expert may testify in the form of an opinion, two preliminary factual determinations must be made, first, will it assist the trier of fact in understanding the evidence or determining a fact in issue, and two, is the expert qualified. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) These factors were met and the lower court erred when it denied Mr. Lynch his due process right to present expert testimony of prevailing norms in support of his claim of ineffective assistance of counsel.

Mr. Lynch offered the expert testimony of Robert Norgard. ROA V. XIV, p. 547. The state objected on the grounds that the witness was being called to explain the *Strickland* standard and because of the court's experience and expertise, Mr. Norgard's testimony would not assist the court. Id. Defense counsel explained that Mr. Norgard would not be testifying to the Strickland standard but would be testifying to the standard of practice and prevailing norms of a capital defense attorney in

Florida during 1999-2001. Id. at 548. Counsel also explained, through Mr. Norgard's testimony, that under Wiggins, the Supreme Court of the United States has said that a reviewing court must determine whether counsel rendered reasonably competent performance based on prevailing norms. While some of that can be determined through case law and the ABA Guidelines, an expert can speak as to hypotheticals or about facts relevant to a particular case. Id. at 556-57.

Mr. Norgard explained that he would testify about what has been taught at Life Over Death and Death is Different because what has been taught can be used to establish a particular standard of care. "Things change over time in terms of what lawyers are expected to do." Id at 553. Mr. Norgard also explained that "Regardless of the [the judge's} extensive knowledge of capital cases, because of his experience from the end of being a judicial officer, he would not be qualified to . . . be lead counsel in a capital case, he would not meet the minimum qualifications to be a defense attorney in a capital case." Id. at 554. Also, counsel must make a record, not just for the particular judge at postconviction who has extensive knowledge, but for other judges who might not have the same intimate familiarity with the Florida death penalty. While the cases on deficient performance stand for general propositions, they do not really describe the nuts and bolts and day-to-day

activities of a defense lawyer in how to use resources, investigators and how to use mental health experts and strategy and tactics in types of mental health experts needed. Id. at 556.

After the lower court sustained the objection, defense counsel proferred additional testimony. Mr. Norgard has over 25 years of capital trial experience, has argued before this Court, written chapters in *Defending Capital Cases in Florida*, has been chairman since 1992 of the FACDL Death Penalty Committee, has lectured at death penalty seminars for many years and has written and published articles on defending capital cases. Id at 568.

Mr. Norgard explained that the decision to plea guilty is the client's; the attorney's role is to advise. Id at 573. In most capital cases there is very strong evidence of guilt, but counsel must look for viable defenses. Premeditation for example is an operation of the mind and the client's mental state can be a debatable point. Id. at 574. To just enter a plea in the abstract because the State has a strong case is below the standard of care. Counsel must investigate facts and law as it relates to privileges, evidentiary issues, Fourth Amendment and technical and factual defenses. Id at 574-75. Unless an attorney has evaluated these types of issues, he cannot fully evaluate the strength of his case. The same is true about waiving a jury.

It is a multi-faceted analysis. Id at 576.

Prevailing norms establish general guidelines for advising a client to enter a plea which require counsel to “articulate and identify” a specific reason or reasons and relay those to the client. Id. at 577-78. Further, reasonably competent defense counsel is expected to file pre-trial motions raising evidentiary privileges, Fourth Amendment issues and other issues. Id. Also, counsel cannot just accept what the State presents, counsel must conduct their own independent investigation and consult independent forensic experts, including firearms experts. Reasonably competent counsel would look to see if an expert can help. Id. at 580.

Basic mitigation investigation takes a long time. If a client gives an attorney a list of potential witnesses, counsel is obliged to make at least some contact with these people. Id. at 583. Counsel should also be familiar with the difference between psychological and neuropsychological testing, neurology, psychiatry, PET scans and “things of that nature.” Id. at 584-85.

“The prevalence of brain damage in people who commit violent crimes was well recognized during that time frame,” so developing evidence of brain damage would be very important and Florida capital attorneys were trained in the different areas of psychology, neurology, neuropsychology and how to use these

disciplines to develop testimony of brain damage. Id. at 587-88. A reasonably competent attorney would ask an expert to explain a term such as right cerebral dysfunction. Id.

The lower court's ruling excluding Mr. Norgard's testimony was an abuse of discretion and deprived Mr. Lynch of Due Process because he was unable to prevent relevant evidence to support his claim of ineffective assistance of counsel. The lower court's finding that trial counsel rendered reasonably competent performance evidences the prejudice which resulted from the exclusion of this evidence. The State cannot demonstrate that error was harmless beyond a reasonable doubt. Chapman v. California, 368 U.S. 18 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973).

CLAIM V

THE LOWER COURT ERRED WHEN IT DENIED MR. LYNCH'S CLAIMS THAT HIS DUE PROCESS RIGHTS UNDER BRADY AND GIGLIO WERE VIOLATED WHEN THE PROSECUTOR WITHHELD MITIGATING EVIDENCE AND ALLOWED DR. REIBSAME TO TESTIFY FALSELY

In order to establish a *Brady* violation, a defendant must prove 1) the evidence is favorable to the accused because it is exculpatory in guilt or sentencing, 2) it was suppressed by the State willfully or inadvertently, and, 3) prejudice ensued. Carroll v. State, 818 So. 2d 601, 619 (Fla. 2002). A court should consider the evidence in the context of the entire record. *Id*. at 619. "A criminal defendant alleging a *Brady*

violation bears the burden to show prejudice, i.e. to show a reasonable probability that the undisclosed evidence would have produced a different verdict. Guzman v. State, 868 So.2d 498, 506 (Fla. 2004).

In order to establish a ***Giglio*** violation, a defendant must demonstrate that 1) a state witness gave false testimony, 2) the prosecutor knew the testimony was false, and 3) the statement was material. ***Id.*** Where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgement of [the finder of fact]." ***Id***. The ***Giglio*** standard has also been explained as a "materiality standard under which the fact that the testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." United States v. Bagley, 473 U.S. at 679-80. The State bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. ***Id*** at 680, n. 9.

In Mr. Lynch's case, the State withheld exculpatory mitigating evidence that was not listed in discovery and held either in the Sanford Police Department Evidence Room or within the State Attorney's files. The evidence withheld included Mr. Lynch's high school records which were suggestive of brain

damage; two commendations for thwarting a robbery and assault from a file of an employer of Mr. Lynch; notes by Mr. Lynch's mother regarding his premature underweight birth; letters from Mr. Lynch's mother to Mr. Lynch evidencing the excessive closeness of their relationship; a childhood photo of Lynch at his confirmation holding a rosary and a bible; a death certificate corroborating Lynch's claim that he was dumped on the anniversary of his mother's death; marriage certificates, showing Lynch's justice of the peace marriage to his wife, and Lynch's parents' marriage certificate showing their considerable age difference.

All the defense experts agreed that the high school records were pivotal in demonstrating that Mr. Lynch had brain damage prior to the time of the crime. Dr. Olander also testified that had she seen Lynch's high school records prior to trial she would have been suspicious of brain damage and would have tested him for brain damage. All of the experts, including the state experts, agreed that low birth weight and premature birth can be indicators of or cause brain damage, and, that emotional stressors such as spiraling debt or the anniversary of the death of a loved one can trigger mental illness or instability. The above cited evidence is material to the sentencer's decision as to the appropriateness of a death sentence, the finding of statutory mitigators and the finding of heightened premeditation

in the penalty phase.

In denying the Brady claim the lower court stated that it is refuted by the evidence because the defense and the state had equal access to the high school records. ROA V. XII, p.2057. However, the lower court does not address the other items.

As to the Giglio claim, Dr. Reibsame said he did not have Mr. Lynch's high school records at the time of his evaluation in 2000 but the state attorney may have presented the records to him after the evaluation. Id. at 1062. At trial he said Lynch was a pretty bright guy who did well in school, except for some problems in math, and left school in the 11th grade because he transferred to a public where he was afraid of violence. Id at 1063. At the hearing he 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. Id. at 1064-67. The State Attorney did not tell him his testimony about Mr. Lynch's high school years was inaccurate and he assumes the State gave the court accurate information. Id. 1067-68.

In denying this claim, the lower court cites Ventura v. State, 794 So. 2d 553 (Fla. 2001) for the proposition that, assuming the false evidence is material, "there must be a reasonable probability that the false evidence may have affected the outcome." ROA V. XII, p. 2058. However, in Guzman, this

Court explained that the proper inquiry "may be easily stated as a materiality standard under which the fact that the testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." Guzman at 506 (citing United States v. Agurs, 427 U.S. 97 (1976))

The lower court also makes a factual finding that the State did not make the records available to Dr. Reibsame but this is not supported by the record. ROA V. XVI, p. 1062. The lower court also finds that Dr. Reibsame based his opinion on what he knew so his statement wasn't false. ROA XII, p. 2058. However, a Giglio violation occurs not when the witness knows their testimony is false but when the prosecutor knew it was false. In this case, the state attorney knew, or should have known, Dr. Reibsame's description of Lynch's high school years was false because Lynch's high school records were sitting in his file. Further, Dr. Reibsame's false testimony benefitted the State because it undermined Lynch's claim of brain damage and mental illness.

The lower court's ruling is not based on competent, substantial evidence and applies the wrong standard of law. Mr. Lynch respectfully requests that this Court substitute its own findings of fact and apply the correct legal standard and grant relief.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Morton relief on his 3.851 motion. This Court should order that his sentences be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to all counsel of record on this _____ day of July, 2007.

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I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Courier New 12 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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