IN THE SUPREME COURT OF FLORIDA

No. SC06-2233

RICHARD LYNCH,
Appellant

versus,

STATE OF FLORIDA,
***Appellee*.**

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Any claims not argued are not waived and Appellant relies on the merits of his initial brief.

STATEMENT OF THE CASE AND FACTS

Appellant objects to the following facts presented in Appellee=s Answer Brief. The specific objections are as follows:

(1) Appellee states, in the course of describing facts relevant to the State=s failure to disclose and trial counsel=s failure to obtain Mr. Lynch=s high school records, that counsel was Anot concerned@ about Mr. Lynch=s grades because they were Asituational.@ (Answer Brief at 10) However, this is taken out of context. Counsel stated that, while the grades were Asituational,@ the school records as a whole Awould have been extremely useful, just to have this kind of information as far as his SAT and PSAT, his verbal and math scores. My goodness.@ ROA V XII, p. 199.

(2) Appellee states AMr. Figgatt visited Lynch ›probably a dozen times= in jail.@ (Answer Brief at 11) However, Appellee neglects to state that Mr. Figgatt later concedes he only saw Mr. Lynch 6 to 8 times over a two year time span. ROA V. XII, p.

256.

(3) Appellee states that Mr. Figgatt=s factual basis wherein

he said Mr. Lynch voluntarily entered the home was a misstatement. (Answer Brief at 12) Appellee fails to acknowledge, however, that Mr. Figgatt admitted that Mr. Lynch repeatedly said he entered the home voluntarily. ROA V. XIII, p. 60.

(4) Appellee states Mr. Figgatt had Aextensive discussions with the State@ seeking a life sentence. (Answer Brief at 13) Appellee offers no record cite in support of this assertion.

(5) Appellee states throughout the Answer Brief that Mr. Lynch Aadmitted everything,@ or confessed. However, Appellee fails to acknowledge that Mr. Lynch=s statements consistently described voluntary entry into the apartment and, at least 18 times, Lynch describes the shootings as accidental and unintentional.

(6) Appellee states Mr. Figgatt said the records of Mr. Lynch thwarting a robbery and assault were not Arelevant@ to the offense and cites to the record. (Answer Brief at 10) What he actually said was the information didn=t Abear directly@ on the crime and was of a different value than the school records. (ROA V XIV, p. 223.)

(7) Appellee states that Virginia Lynch gave the Aletter to

the police consensually,@ and cites to Mr. Figgatt=s testimony. (Answer Brief at 15)Appellee further states, without citing to the record, that APolice arrived shortly after the murders and Virginia gave them the letter.@ (Answer Brief at 16) To the extent the latter statement suggests Virginia Lynch gave the letter willingly, there is no support in the record for that finding. As to Mr. Figgatt=s statement, the State fails to acknowledge that Mr. Figgatt, when confronted with Virginia Lynch=s sworn statements, conceded that she did not give the letter with consent and he could have filed a motion to suppress. ROA V. XIII, p. 115 - 133.

(8) Appellee states ADr. McCraney thinks Lynch has obsessive compulsive symptoms; he is obsessed with pornography,@ and cites to ROA V. XVI, pp. 749-50. Appellee then states Aobsessive compulsive traits are inconsistent with frontal lobe impairment,@ and cites to Dr. McCraney=s testimony at ROA V. XVI, p. 752. (Answer Brief at 29) This is inaccurate. What Dr. McCraney said, in explaining that Lynch has perfectionist *personality traits*, was to A Keep in mind, there=s a difference between an obsessive compulsive *personality* and obsessive compulsive *disorder*. An *obsessive compulsive disorder* refers to a disease of the structure in the brain called the basal ganglia where its ability to filter out extraneous neural impulses is impaired. In most of those patients [unlike Lynch who has the

traits but not the *disorder*], actually the frontal lobe of the brain is working perfectly well.@ ROA V. XVI, p. 752.

(9) Appellee states that Dr. McCraney Adoes not know the facts of the crime@ and cites to ROA V. XVI, p. 760. (Answer Brief at 30) This is misleading. In an answer to a compound question, Dr. McCraney said he did not speak to Mr. Lynch about the crime itself but he reviewed Aa lot of the evidence,@ and knows Awhat=s been reported by many of the other examiners.@ ROA V. XVI, p. 760

(10) Appellee states Dr. Sesta said Lynch knew right from wrong and gave Lynch a Aprovisional diagnosis@ of a Aneuronal aberration,@ citing to ROA V. XVII, p. 984. (Answer Brief at 33) This is taken out of context. What Dr. Sesta said was that Mr. Lynch was substantially unable to conform his behavior to the standards of the law based on his right frontal lobe damage and that brain function should have been assessed in this case. (ROA V. XVII, p. 983) He further said, AMr. Lynch has basically exactly what you want in a defense case. Had he had aphasia or some left hemisphere or some posterior damage, we would say, okay, what? To have right hemisphere damage, particularly right anterior damage in a capital murder case, certainly it=s mitigating. You might have even been able to find a neuropsychologist to parlay it into an insanity defense. I don=t think that would work, but you certainly have strong mitigation.@

Id. When asked what his diagnosis was, he explained that as a neuropsychologist he tries to answer several questions, including a diagnosis of the nature and extent of the brain damage, *and the cause*. As to the *cause or etiology* of Lynch=s brain damage, Dr. Sesta offered the Aprovisional diagnosis of a neuronal aberration.@ Id. at 984.

11) Appellee states Dr. Sesta said Lynch Adid not have delusions@ and cites ROA v. XVIII, p. 1004. (Answer Brief, p.33)This is misleading. While the question asked was compound and therefore confusing, what Dr. Sesta said was that Lynch *reported no delusions to him.* ROA V. XVIII, p. 1004. When directly asked whether Lynch suffered from psychosis, including delusional thoughts, Dr. Sesta said: AI think so. I think so. The testing is stronger but certainly there is evidence of some delusional ideation. . . . . Other doctors have mentioned there=s some grandiosity, but I think it=s the possibly erotomanic components that reach the delusional proportion. Certainly the definition of delusion, I think the Court=s heard several variations, but it=s obviously a false belief held contrary to logic, or disconfirming evidence. Well, we saw a witness come in here and basically disconfirm the belief that Mr. Lynch had this wild sexual affair at the bank with this very lovely woman. In fact, she sat here today and told us this wasn=t true, yet he maintains this to this day. I believe I was told he was saying

why was she lying when she was on the witness stand. He continues to hold this. *So, certainly I would believe that would certainly qualify as a delusion, it would be of the erotomanic type, and it would be consistent with or convergent with the MMPI-II profile showing that this is a gentleman who=s psychotic*. It would also be convergent with virtually all of the doctors= diagnoses. @ ROA V. XVII, p. 985.

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

The Appellee, in a large part of its Answer Brief to Argument I, simply quotes the lower court=s Order denying relief. The Appellee states that A[t]he judge even included supporting record cites and exhibit numbers,@ (Answer Brief at 66), but fails to acknowledge the record cites and exhibits do not support the lower court=s findings as argued by Mr. Lynch in his initial brief. Appellee also cites *Booker v. State*, 2007 WL 2438372 (Fla., Aug. 30, 2007) in support of its argument that Mr. Lynch=s Aclaim fails for lack of proof.@ (Answer Brief at 67). *Booker* is factually inapposite, does not support Appellee=s argument and merits no further discussion.

Deficient Performance in Advising Mr. Lynch to Plea Guilty

Mr. Lynch alleged that counsel performed deficiently by

failing to adequately investigate his case and advise him of the relevant law, including defenses to the crimes charged, affirmatively misstating the law of burglary at the plea colloquy, and failing to advise him of the right to assert spousal privilege and suppress evidence seized in his home. Mr. Lynch further alleged that he was prejudiced by trial counsel=s performance and but for counsel=s deficiencies he would have proceeded to trial.

Appellee argues that Mr. Lynch,

> Afailed to show that the strategic decisions made by defense counsel were deficient. The evidence presented at the evidentiary hearing revealed that trial counsel fully explored all aspects and strategies and concluded that, given the death of the child and the multiple confessions, entering a plea was strategically advantageous.@

(Answer Brief at 72) Appellee fails to articulate specific facts or provide record cites in support of her assertion that counsel rendered reasonably competent performance within prevailing norms.

Despite Appellee=s broad assertion to the contrary, clearly established law, the ABA Guidelines, guidelines on defending capital cases in Florida, and testimony presented at the hearing established counsel=s performance fell below prevailing norms. Counsel, among other things, failed to inform Mr. Lynch of the defense of consensual entry to the crime of burglary, of his right to assert spousal privilege as to the letter, and his

right to move to suppress the seizure of the letter on Fourth Amendment grounds. AThe failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within Athe wide range of professionally competent assistance@ demanded by the Sixth Amendment.@ *Hill v. Lockhart*, 474 U.S. 52, at 62 (1985)(White, J., with Stevens, J., concurring)(*quoting Strickland v. Washington,* 466 U.S. 668, at 690 (1984)).

In addition, the American Bar Association Guidelines require counsel to identify relevant law and file pretrial motions,

> Awhere ever there exists reason to believe that applicable law may entitle the client to relief. . . . Counsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of the death sentence.@

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.5.1(B)(1989). Motions counsel should consider include suppression of evidence based on Fourth Amendment issues and privileged communications. Id.

At the time of Mr. Lynch=s guilty plea and decision to waive a sentencing jury, Florida capital attorneys were aware that,

A[t]oo 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. This type of Atrial plea@ based on knowing the judge should *rarely if ever* be done. Id.(emphasis added)

Defense attorney Robert Norgard explained that in most capital cases there is strong evidence of guilt but counsel must look for viable defenses. Premeditation is often a debatable point. ROA V. XIV, p. 574. Prevailing norms require that counsel evaluate the case, review applicable law, and investigate facts as they relate to privileges, evidentiary issues, Fourth Amendment issues and technical and factual defenses prior to advising a client to enter a plea. Id. at 574-75. These norms also require counsel to articulate specific reasons for entering a plea and relay those reasons to the client. Id. at 577-78.

Trial counsel admitted that he did not discuss lesser included crimes or defenses in any detail with Mr. Lynch, including to the burglary charge, and essentially advised Mr. Lynch he did not have any defenses. ROA V. XIII, p. 57-58. As noted in Appellant=s Initial Brief, Mr. Figgatt, lead counsel, expressly misstated the law of burglary during the plea colloquy when he stated that the burglary occurred when the initial consent was withdrawn. Mr. Caudill, co-counsel, said they saw

no possible defenses to the crimes charged and that was the advice given to Mr. Lynch at the time of his plea. ROA V. XVIII, p. 1126-27. Mr. Figgatt failed to research or consult an independent expert on Mr. Lynch=s claim of accidental shooting. ROA V. XIII, p. 90-94. Neither attorney informed Mr. Lynch about his right to assert spousal privilege prior to giving the letter to Dr. Olander; Mr. Caudill conceded there was no case law on spousal privilege in their file and he couldn=t say that he or Mr. Figgatt looked at any case law on spousal privilege. ROA, v. XIII, p. 107; v. XVIII, p. 1124-26. Mr. Figgatt failed to file a motion to suppress the letter on Fourth Amendment grounds because he mistakenly thought Virginia Lynch had consented to the seizure of the letter, even though her transcribed, sworn statements, which he had received in discovery, said otherwise. ROA V. XIII, 115, 125 and 115-133. At the time trial counsel advised Mr. Lynch to plea guilty, counsel had done virtually no mitigation investigation. ROA V. XIII, p. 80-81, 133, 147-149. Counsel rendered advice which was developed in a vacuum, based on guesswork that the trial judge would not impose death.

Despite Appellee=s broad assertion, there is no competent, substantial evidence to support a finding that trial counsel=s performance fell within prevailing professional norms.

Prejudice Analysis as to Guilty Plea

The State also appears to misapprehend the significance of

this Court=s opinion in *Grosvenor v. State*, 874 So.2d 1176 (Fla. 2004, as it applies to the prejudice analysis in Mr. Lynch=s case, and the lower court=s failure to properly apply the *Grosvenor* standard. Appellee states that *Grosvenor* Amerely holds that alleging he would not have pled had counsel advised him of defenses, goes to the prejudice prong of *Strickland*.@ (Answer Brief at 67) Appellee then quotes the prejudice analysis set out in *Grosvenor* but fails to address, as the lower court also failed to address, any of the factors prescribed by this Court, other than whether a particular defense would likely succeed at trial. Specifically, the Appellee fails to address whether there were errors and deficiencies in the plea colloquy (there were), the difference between the sentence imposed under the plea and the maximum possible sentence imposed (none), and whether the defendant received a benefit to his plea (he did not). All of these factors support an objective finding of prejudice in Mr. Lynch=s case.

Factually and Legally Viable Defenses Established

Appellee concedes *Delgado v. State*, 776 So.2d 233, 236 (Fla. 2000) established the affirmative defense of consensual entry which applied to Mr. Lynch=s case. (Answer Brief at 68). However, Appellee then claims there is no evidence to support consensual entry. This is simply wrong. At trial, the State introduced as evidence, Mr. Lynch=s statement to police. Mr. Lynch explained

how he got into the apartment.

> Q (by Mr. Parker): How=d you get in to the apartment today?
> A (by Mr. Lynch): Ah, her daughter came home, Leah.
>
> . . .
>
> A: ... [H]er daughter came home and I just sort of said I... I need to ah, talk to your mother, you know, and we just went into [the apartment].

TR ROA Vol. VI, p.557-58. He also said, AI went over there to try and talk to Rose and her daughter came home. She opened the door with the key . . . @ Id. at 544. In addition, the physical evidence is consistent with Mr. Lynch=s statement. There is no evidence of a forced entry, nor is there any evidence of coercion.

Appellee incorrectly states, AAs this Court found, he cajoled or forced his way in [to the apartment].@ (Answer Brief at 69) Presumably Appellee is referring to the lower court=s finding as this Court has not made such a finding. Appellee offers no record cites in support of the lower court=s finding. The lower court also failed to offer any record cites as argued in Mr. Lynch=s Initial Brief. This deficiency necessarily flows from the fact that no evidence exists to support a finding of trick, fraud or force.

The Appellee argues alternatively that Mr. Morgan=s after-the-fact testimony stating Leah was instructed to stay away from Mr. Lynch disproves Mr. Lynch=s defense. This is erroneous. Had

Mr. Lynch gone to trial, and had his statement to law enforcement describing consensual entry been introduced, the State would have had to prove, ***beyond a reasonable doubt***, that Mr. Lynch did not gain entry through consent. Regardless of Mr. Morgan=s testimony, Mr. Lynch has alleged a viable defense supported by Florida law. ***Ruiz v. State***, 863 So.2d 1205 (Fla. 2003), upholding ***State v. Braggs***, 815 So.2d 657 (Fla. 3d DCA 2002); ***Otero v. State***, 807 So.2d 666 (Fla. 2d DCA 2002).

Mr. Lynch also raised as a claim that trial counsel failed to advise him of the defense to kidnapping as set out by this Court in ***Faison v. State,*** 426 So.2d 963 (Fla. 1983) and ***Berry v. State,*** 668 So.2d 967 (Fla. 1996). Appellee argues that the Amovement of Leah was not slight or merely incidental [sic] the murder of Rosa. Lynch could have been convicted of Rosa=s murder even in the absence of evidence that he held Leah at gunpoint, forced her into the apartment, forced her to open the door, and forced her to her knees on the floor,@ and Aordered her around.@(Answer Brief at 70) Appellee fails to cite to any portion of the record in support of these factual assertions. While the record may indicate that Mr. Lynch showed Leah the gun, he stated he did not point it directly at her. But assuming that he did point the gun at Leah, there is still no evidence, and certainly no competent, substantial evidence, to support a

finding that Mr. Lynch Aforced@ Leah into the apartment, Aforced her to open the door,@ Aforced her to her knees on the floor,@ and Aordered her around.@ These facts are simply not supported by the record. Leah=s body was found in the living room. Mr. Lynch=s statement was that she sat Across-legged@ on the floor in the living room and was so sitting when her mother came home. TR ROA V. VI, p.569. Mr. Lynch also said that he would have let Leah leave. Id. at 610-11. There is nothing in the record to support a finding of movement of Leah within the apartment as required by this Court in *Faison* and *Berry*. Mr. Lynch had a factually and legally viable defense to the kidnapping charge that his attorneys failed to tell him about.

Appellee argues that ALynch=s argument@ on the lack of premeditation to kill Leah is Arhetorical.@ (Answer Brief at 70) Appellee fails to acknowledge that even the trial court, in its Sentencing Order, found the murder of Leah to be second-degree murder but for the felony-murder rule. TR ROA V. I, p. 120. Appellee also fails to address Lynch=s statements on the day of the shootings wherein he repeatedly said the shooting of Leah and Roseanna was accidental and unintentional, something a jury may have reasonably taken into account. As explained by Mr. Norgard, premeditation is an operation of the mind and is subject to debate, particularly where the Defendant has claimed an accidental shooting.

Appellee argues Mr. Lynch waived spousal privilege because the Aphotos and letter were a significant portion,@ of Mr. Lynch=s communication to his wife and the statements were Acumulative.@ (Answer Brief at 71) Appellee argues in the alternative that, even if counsel was deficient, Mr. Lynch Acannot show prejudice.@ Id.

Appellee=s argument that the information disclosed was cumulative to Lynch=s statements to the police, dispatcher and hostage negotiator must fail because it is inconsistent with the State=s theory at trial. In his statements to police and the dispatcher, Mr. Lynch repeatedly said that the shooting was accidental. However, the State used the contents and date of Mr. Lynch=s letter as circumstantial evidence to argue that the shooting was premeditated and the CCP aggravator applied. Under the facts of this case, the letter cannot be cumulative evidence.

Appellee fails to cite case law in support of her argument, fails to address the case law cited by Mr. Lynch and fails to acknowledge that the privilege against waiver or disclosure of confidential marital communications has long been recognized as one of the most important privileges. ***Stein v. William Bowman, et*** al., 38 U.S. 209 (1839); ***Mercer v. State***, 40 Fla. 216, 24. So. 154 (Fla. 1898); Ex ***Parte Beville***, 58 Fla. 170, 50 So. 685 (Fla. 1909).

> The rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, when the question is propounded; but it renders them incompetent to disclose facts in evidence in violation of the rule. . . . This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.

Stein v. William Bowman, et al., 38 U.S. at 222-223. The basis of the immunity given to marital communications is the Aprotection of marital confidences, regarded as so essential to the preservation of marriage as to outweigh the disadvantages to the administration of justice which the privilege entails.@ *Wolfe v. United States*, 292 U.S. 7, 14 (1934). Marital communications are presumptively confidential. *Blau v. United States*, 340 U.S. 332, 333 (1951).

Mr. Lynch has cited this Court=s holdings in *Koon v. State*, 463 So.2d 201 (Fla. 1985), *Bolin v. State*, 650 So.2d 19, 21 (Fla. 1995); *Bolin v. State*, 642 So.2d 540 (Fla. 1994) and *Bolin v. State*, 793 So.2d 894 (Fla. 2001) in support of his claim. In these cases, this Court has declined to find a waiver of the privilege even when the substance of the communications have

been disclosed to third parties or where the language of a suicide note suggests consent to disclosure. *See also State v. Stewartson,* 443 So.2d 1074, 1076 (Fla. 5th DCA 1984) (marital privilege should be Aliberally construed@ in case involving suicide note, *citing Mercer v. State*, 40 Fla. 216 (1898)). Because Appellee fails to address or distinguish these cases, she is conceding that they apply.

Appellee argues that there was no basis to suppress the search of Mr. Lynch=s home as Athere was ample probable cause for the warrant.@ (Answer Brief at 71) Appellee also argues that police did not exceed the scope of the warrant, and there is no prejudice because Mr. Lynch confessed and consented to the Asearch of his van.@ Id. At 72. Appellee misapprehends Mr. Lynch=s arguments and there is no record support for her assertion that the warrant was not overbroad.

Mr. Lynch has not challenged the probable cause of the warrant, nor that police exceeded the scope of the warrant, nor that the police searched his van.[1] Mr. Lynch has alleged that his attorneys failed to advise him of the right to or file a motion to suppress the evidence seized during the warrantless search of his *home*, including the letter seized from his wife without

[1] In fact, the warrant was so overbroad it would be virtually impossible to exceed the scope of the warrant as it was written.

valid consent. Mr. Lynch has further argued that his attorneys failed to challenge the subsequent warrant, authorizing a search of his home, as *overbroad*. Appellee fails to cite to any law in support of her argument or address any of the cases cited in Mr. Lynch=s Brief. Finally, Mr. Lynch need not prove his defenses would absolutely prevail but only that, had he been correctly advised of the law, there exists a reasonable probability he would have proceeded to trial. Mr. Lynch has demonstrated factually and legally viable defenses and privileges, his attorneys admitted they did not discuss these defenses with him, they misstated the law at the plea colloquy, mistakenly failed to file a motion to suppress, he received no benefit, and was sentenced to the maximum possible sentence. He has met all four factors of the *Grosvenor* analysis. This Court should set aside Mr. Lynch=s plea.

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.

The Appellee, in a large part of her Answer Brief to Argument II, simply quotes the lower court=s Order denying relief. Appellee contends the lower court=s finding that trial counsel rendered reasonably effective assistance in advising Mr. Lynch to waive a sentencing jury is supported by substantial and

competent evidence. (Answer Brief at 84) Appellee cites to portions of the plea colloquy in support of her argument, much as the lower court did in its Order. However, as argued by Mr. Lynch in his Initial Brief, the plea colloquy does not refute Mr. Lynch=s claim. Mr. Lynch=s argument is that his waiver of a sentencing jury could not have been knowing because his attorneys failed to advise or misadvised him as to the law, defenses, privileges and evidentiary issues and failed to adequately investigate and advise Mr. Lynch of mitigation, including right frontal lobe brain damage. To evaluate this claim, the lower court must look to the evidence presented at the hearing to determine whether counsel=s advice fell within prevailing norms and rendered Mr. Lynch=s plea knowing and intelligently made. The lower court wholly fails to do so and Appellee=s argument fails to address this portion of Mr. Lynch=s claim. Appellee concedes this portion of Mr. Lynch=s claim.

To the extent that Appellee relies on the lower court=s Order to address this claim, the lower court=s Order is insufficient. The lower court simply states, without referring to the record, that counsel made a reasonable strategic decision and cites to *Bolender v. State*, 503 So.2d 1247, 1250 (Fla. 1987). However, as established throughout the record below, Mr. Lynch demonstrated that trial counsel=s performance fell below prevailing norms and their decisions were made based on an

unreasonable investigation. In ***Wiggins v. Smith***, 539 U.S. 510, 123 S.Ct. 2527, 80 L.Ed. 2d 674 (2003), the United States Supreme Court held A*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 judgments 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 Amust 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.

The lower court erred when it found trial counsel=s decision to advise Mr. Lynch to waive a sentencing phase jury was a reasonable tactical decision. No competent, substantial evidence exists to support the lower court=s finding. Rather, trial counsel=s failure to advise their client of the law and investigate mitigation, including brain damage, fell below prevailing norms. Counsel=s own initial expert had written a report stating testing suggested brain damage yet trial counsel

inexplicably failed to have their second expert, the one they presented at trial, conduct any neuropsych testing and she testified at trial that Mr. Lynch did not have brain damage. Further, counsel=s failure to file pretrial motions to exclude the letter on Fourth Amendment grounds and raise spousal privilege, was based on an inadequate investigation that is not supported by reasonable professional judgment. A reasonable attorney would have filed pretrial motions to exclude the letter and investigated brain damage and informed their client, prior to waiving a jury, of the existence of these legal claims and mitigation evidence. Trial counsel conceded, that, had he known of Mr. Lynch=s right, frontal lobe damage, he would have advised Mr. Lynch to demand a sentencing jury, as this type of mitigation is often viewed favorably by juries. Neither Appellee nor the lower court addressed this testimony.

Appellee argues as to subclaim B (failure to conduct a reasonably competent mitigation investigation and present mitigation evidence) that trial counsel made a reasonable strategic decision to present mitigation testimony through Dr. Olander and Awas not ineffective in their investigation@. (Answer Brief at 85) Appellee also argues that the evidence presented at the hearing was cumulative and the trial judge found Anumerous mitigating circumstances.@ Id. at 85-86.

Appellee fails to address the case law cited by Mr. Lynch,

or cite relevant portions of the record in support of her argument that counsel Awas not ineffective in their investigation.@ Appellee, much like the lower court, fails to address the fact that trial counsel never spoke to any of the lay witnesses in person, even though Mr. Lynch had asked counsel to contact approximately 15 friends and family and had provided names, addresses and telephone numbers. One of the two family members trial counsel spoke to over the phone, Danelle Pepe, described the conversation as lasting mere minutes, said it occurred about one month prior to trial, involved trial counsel Achuckling@ about Mr. Lynch=s case and explaining that the judge would go easy on him because he wasn=t having a trial. Trial counsel also wholly failed to speak to other witnesses, including trial counsel=s own barber, whose testimony at the hearing supported a finding of psychotic decompensation just days prior to the murders.

Counsel never went to the evidence locker to see what evidence the State had, even though it was a mere five minutes from their office, and so missed finding many documents supporting mitigation. Trial counsel never obtained elementary or high school records, employment records or credit card records, all of which were relevant to mitigation in this case.

Trial counsel failed to investigate brain damage, even though trial counsel had been told by a neuropsychologist that

Mr. Lynch had brain damage. The strategic decision to present mitigation solely through Dr. Olander was based on an inadequate investigation and therefore cannot be a reasonable decision. The lower court and the Appellee fail to address or acknowledge the record as argued above and in Mr. Lynch=s Initial Brief.

In support of her argument that prejudice is not established because the mitigation presented at the hearing was cumulative, Appellee summarizes Dr. Olander=s testimony (the only defense witness at trial) and broadly asserts that Dr. Olander=s report Ashowed a thorough biopsychosocial assessment.@ Id. at 87. However, Appellee, like the lower court, fails to directly address the powerful mitigation presented at the hearing that was not presented at trial.

As identified in his Initial Brief, Mr. Lynch presented significant mitigation evidence that was *not* presented at trial. Specifically:

* testimony from three neuropsychologists, a neurologist and a neuropsychiatrist that he has right frontal lobe damage, which has existed since childhood, that would substantially impair his ability to conform his conduct to the law.

* expert and lay witness evidence that he suffers from delusional thought processes and erotomanic delusional beliefs.

* testimony of his barber, Gene Cody, who saw Mr. Lynch four days prior to the crime and who said Mr. Lynch appeared

sick, had dyed his hair and looked and acted Adifferent.@ The experts explained Lynch was Adecompensating@ due to the emotional stressors he was facing and their effect on his psychosis and brain damage.

* testimony from lay witnesses about his overly close relationship with his mother, that he shared a bedroom with her into adulthood, spent an inordinate amount of time with her and described his bizarre behavior at the time of her death when he held a bloody Asnuggly@ to his face.

* The witnesses also described how, since early childhood

he had no friends, was a geeky loner, always wore the same type of clothes, and never had a girlfriend until he met his wife in his mid thirties. The experts explained these behaviors were consistent with a lifelong history of right hemisphere brain damage.

* Mr. Lynch also was shown to be a gentle person who loved

his young cousins, wanted to be a police officer, and who had actually prevented a robbery and assault when he was employed as a security guard.

* Counsel also introduced documents and records in support

of mitigation including Mr. Lynch=s elementary and high school

records which corroborated the expert=s finding of brain damage and showed the State expert=s testimony about Mr. Lynch=s high school years to be inaccurate, an endearing childhood confirmation photo where he is shown holding a rosary, records and receipts which corroborate his claim of spiraling credit card debt based on buying the victim a car and helping the victim move into her apartment, his mother=s death certificate corroborating his statement to police that the victim had rejected him on the anniversary date of his mother=s death (part of a series of events that the defense experts explained led to Athe perfect storm@ of a psychotic break for a man with frontal lobe damage), notes from his mother indicating prematurity and low birth weight (a possible indication of neuronal aberration at birth), and certificates from his employer commending his arrests of two violent criminals.[2]

Both the lower court and Appellee fail to squarely address

[2] Additional evidence presented was listed in Mr. Lynch=s initial Brief but space limitations preclude Mr. Lynch from re-listing all the evidence here.

how this evidence is 1)cumulative, 2)of minimal value or, 3) not Amitigating in the case at hand.@ (Answer Brief at 77 and 86) The lower court merely disparages the testimony, stating that the Alaundry list of childhood problems and social difficulties@ do Alittle to expand@ the lower court=s information. (Answer Brief at 78 quoting the lower court=s Order) To the extent the lower court and Appellee identify mitigation as cumulative, as argued in his Initial Brief, the evidence cited was all evidence *presented at trial not at the evidentiary hearing*.

Appellee also argues that Mr. Lynch=s claim that counsel was ineffective for failing to ensure a competent mental health examination and detect brain damage is procedurally barred, citing *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Moore v. State*, 820 So.2d 199, 202, n. 3 & 4 (Fla. 2002). (Answer Brief at 87) Neither *Moore* nor *Ake* support Appellee=s argument. Mr. Lynch alleged that *his trial counsel was ineffective* for failing to ensure an adequate mental health examination and has cited case law which demonstrates this issue is properly raised in post conviction. *Orme v. State,* 896 So.2d 725 (Fla. 2005); *Ragsdale v. State*, 798 So.2d 713, 718-19 (Fla. 2001); *Rose v. State*, 675 So.2d 567, 571 (Fla. 1996); *Glenn v. Tate,* 71 F.3d 1204, 1206-08 (6th Cir. 1995). Appellee=s procedural bar argument is meritless.

To the extent Appellee addresses the merits of Mr. Lynch=s

claim, Appellee states the lower court found ADr. Danziger=s testimony credible.@ (Answer Brief at 87) However, the lower court *never made such a finding*. In its Order, the lower court merely summarizes the expert testimony and does not comment on any of the experts= credibility other than the State=s trial expert, Dr. Reibsame, who the lower court found to be Asomewhat discredited.@ (Answer Brief at 81, quoting the lower court=s Order) Interestingly, however, in its Initial Order Denying Relief, the lower court did make the clearly erroneous finding that because Dr. Danziger had not changed his opinion from trial no prejudice was established. ROA V. XI, p. 1908-09. Dr. Danziger, of course, never testified at trial and the State filed a motion alerting the lower court to its blatant factual error. The lower court promptly changed that language and issued its Amended Order denying Mr. Lynch=s claims. ROA V. XI, p. 1910-62. The lower court removed the language about Dr. Danziger testifying at trial but offered essentially the same analysis in its Amended Order.

Appellee cites *Darling v. State*, 966 So.2d 366 (Fla. 2007) and *Asay v. State*, 769 So.2d 974 (Fla. 2000) for the holding that counsel is entitled to rely on the findings conducted by qualified mental health experts and prejudice is not established by simply finding a more favorable expert opinion. (Answer Brief

at 88) *Asay* and *Darling* are distinguishable. Mr. Lynch=s case is more like *Orme v. State,* 896 So.2d 725 (Fla. 2005); *Ragsdale v. State*, 798 So.2d 713, 718-19 (Fla. 2001) and *Rose v. State*, 675 So.2d 567, 571 (Fla. 1996). As in *Ragsdale* and *Rose*, and unlike in *Darling* and *Asay,* trial counsel failed to provide their expert with basic background information such as elementary and high school records. Further,like in *Orme*, Mr. Lynch=s counsel knew or should have known that Dr. Cox, a neuropsychologist, had diagnosed Mr. Lynch with Cognitive Disorder N.O.S. or brain damage as evidenced by Dr. Cox=s report found in trial counsel=s file. (Def. Ex. 36; ROA V. VIII, p. 1456-62). Inexplicably, trial counsel failed to inform Dr. Olander of this finding or *even ask her to conduct neuropsych testing*. Dr. Olander then testified at trial that Mr. Lynch did *not* have brain damage. And, unlike the trial experts in *Darling* and *Asay*, Dr. Olander testified at the evidentiary hearing that she was wrong at trial about Mr. Lynch=s brain damage, that she did not test for brain damage, that Lynch=s brain damage was significant and would have an Aexponential effect@ on his psychotic thought processes, and, had counsel provided her with school records, or suggested to her there was a suspicion of brain damage, she would have conducted neuropsychological testing.

Appellee also states that Dr. Olander testified to the

existence of Acognitive impairment@ at trial. (Answer Brief at 88) Appellee fails to cite to the record. To the extent that Appellee is suggesting Dr. Olander said *at trial* that Mr. Lynch had brain damage, this is false and not supported by the record.

Appellee also argues that the Amost that the 2005 [postconviction] testing showed was a mild brain abnormality in the frontal lobe which the trial judge held would not change the findings on emotional disturbance and substantially impaired capacity.@ (Answer Brief at 87) This argument is flawed. First, Appellee inaccurately characterizes the testimony of the defense experts. While the experts did say the brain damage was mild, Drs. Cox, Sesta, Olander and McCraney all stressed that it was clinically significant and would substantially impair Mr. Lynch=s ability to conform his conduct to the law. [3] As noted in Appellant=s Initial Brief, Dr. Sesta said Lynch=s brain damage would Aabsolutely@ make him substantially unable to conform his conduct to the law, ROA V. XVIII, p. 1015-16, and was so mitigating that some experts might find Mr. Lynch was legally

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[3] Dr. Wu, the PET scan expert, was not asked to address the statutory mitigators as his role was to offer expertise in PET scans. Drs. Cox and Olander also testified that Lynch was under an extreme emotional disturbance and also met that statutory mitigator. Drs. McCraney and Sesta confined their opinions to the conduct mitigator which speaks Adirectly to frontal lobe damage.@

insane, although he would not go that far. ROA V. XVII, p. 984.

Second, Appellee fails to address Mr. Lynch=s argument that the lower court=s Order is flawed because it mischaracterizes the testimony about Mr. Lynch=s brain damage as noted above, fails to address the conduct statutory mitigator, and then improperly gives no additional weight to the emotional disturbance mitigator in spite of the new evidence of brain damage. As argued in his Initial Brief (at 76), the lower court finds brain damage, applies it to the emotional disturbance mitigator but finds the mitigator was Aappropriately weighed after the penalty phase.@ (Answer Brief at 82, quoting the lower court=s order) The lower court essentially ignores the brain damage. The lower court also mischaracterizes Dr. Sesta=s testimony, stating that ADr. Sesta did not think Lynch was insane and that he knew what he was doing and that he knew it was wrong@ and that Amight@ have made him less culpable. (Answer Brief at 81, quoting the lower court=s order) The lower court=s finding, rejecting any additional mental mitigation in Mr. Lynch=s case, is
not supported by competent, substantial evidence. And, it suggests that the court misunderstood the statutory mitigators as the standard the court applied is Amore appropriate in the insanity context.@ *Coday v. State*, 946 So.2d 988, 1003, fn. 4 (Fla. 2006) As this Court has explained,

> The expert testimony from the defense could be rejected only if it did not square with other evidence in the case. While we have given trial judges broad discretion in considering unrebutted expert testimony, we have always required that rejection to have a rational basis. For example, the expert testimony could be rejected because of conflict with other evidence, credibility or impeachment of the witness, or other reasons. However, none of those reasons are present here. Instead, the State relies on evidence we find not in conflict with the defense evidence. Under these circumstances, the mitigating factor of inability to conform his conduct to the requirements of the law was reasonably established by the greater weight of the evidence and should have been considered by the trial judge as having been established.

Id. at 1005. The same is true in Mr. Lynch=s case. There is no credible evidence refuting his brain damage. Not even the State experts, one of whom was discredited anyway, disputed the existence of the brain damage. The other, Dr. Danziger, had not reviewed, and therefore did not dispute, the neuropsych testing data, the neurological examination, the PET scan and the lay witness testimony which supported the finding of brain damage. The lower court erred and Mr. Lynch has demonstrated prejudice.

CLAIM III

MR. LYNCH WAS DENIED DUE PROCESS WHEN HIS POSTCONVICTION PROCEEDINGS WERE HEARD AND RULED UPON BY A BIASED JUDGE

Appellee claims Mr. Lynch Adoes not appeal the legal sufficiency of his motion to disqualify, and that issue is abandoned.@(Answer Brief at 89, fn. 14) This is wrong. Mr. Lynch argued throughout this claim that his Motion To Disqualify was

legally sufficient. After citing relevant law and facts, Mr. Lynch expressly stated, AThe Motion to Disqualify was legally sufficient and the lower court erred in denying the motion.@ (Initial Brief at 88). This issue was squarely presented for review.

Appellee states that Lynch Ainsinuates@ that the gun was Amysteriously missing@ at the hearing, suggesting it was simply unavailable and the lower court offered to wait until the gun was found, citing to ROA V. XIV, p. 351. (Answer Brief at 89, fn. 15) However, the record shows Appellee is mistaken:

> MR. BASS: For the record, what I=m discussing with the clerk is at the beginning of the hearing, sometime during the day yesterday I gave the clerk the exhibit numbers of the three firearms that were involved in the case**Y** And now the clerk is trying to find out where they are now. They have all the other exhibits from the trial in the evidence room here in court, **but that=s what we=ve been trying to chase down the past few days is the existence of the Glock itself**, which was State=s exhibit Thirty-nine, I believe.
>
> THE COURT: All right.
>
> MR. BASS: And it would be important as a demonstrative aid. Mr. Ruel, of course, can testify about his findings.
>
> THE COURT: Well, you can do it any way you want to, **but at five o=clock I have other things I=m gonna do, and he=s [Roy Ruel] supposed to leave town. So**Y

(ROA V. XIV, p.351-52)(emphasis added)

The Glock was not simply absent from the courtroom, but had been missing for a few days. The lower court expressly stated an unwillingness to continue court past five p.m. and failed to

inquire of the clerk what efforts had been made to find the gun, where the gun might be or how soon it could be found.

Appellee justifies its argument that the lower court=s actions were proper by citing to *Franqui v. State*, 804 So.2d 1185, 1195 (Fla. 2001) and *Mann v. State*, 603 So.2d 1141, 1143 (Fla. 1992). (Answer Brief at 90-91) However, these cases merely stand for the proposition that, during closing arguments, counsel may draw logical inferences and advance legitimate arguments. Neither case addresses the issue of examination of evidence by the fact-finder. Appellee then argues that a Amajority@ of the evidence considered by the postconviction court in denying Mr. Lynch=s claim about the mechanics of the gun was introduced at trial. (Answer Brief at 91) However, the postconviction court does not reference the trial record in its initial Amended Order Denying the 3.851 Motion. ROA V. XI, p. 1918-19. Rather, the postconviction court based its factual findings on its own testing of the gun and other evidence not contained in the record, including the lower court=s observation that Athe trigger pull is not even close to being a >hair trigger=@ and non-record facts about the recoil of the weapon and its effect on a shooter, as outlined in Mr. Lynch=s Brief (Initial Brief p.53). In the Order denying rehearing, the lower court does reference trial testimony, however, the lower court=s

findings of fact are still based on the same non-record evidence.

Appellee asserts that Mr. Lynch failed to present case law that states the finder of fact cannot examine exhibits. (Answer Brief at 90) However, Mr. Lynch stated that Florida law expressly prohibits independent marshaling of facts and evidence by a trial court and judicial neutrality is compromised when a judge enters into a proceeding and becomes a participant, citing *Chillingworth v. State*, 846 So. 2d 674, 676 (Fla. 4th DCA 2003 and *Asbury v. State*, 765 So.2d 965, 966 (Fla. 4th DCA 2000). Mr. Lynch also cited multiple cases where federal and state courts have found out-of-court experiments and independent investigation by the fact finder to be improper. (Initial Brief, p.86, n.20). Appellee fails to address or distinguish any of this case law and therefore presumably concedes that it supports Mr. Lynch=s position.

Appellee also claims because Mr. Lynch did not raise the claim below, Mr. Lynch failed to preserve the issue that the lower court erred when it disputed facts and addressed the merits of the Motion to Disqualify in its Order Denying Rehearing. Under Appellee=s reasoning, in order to preserve this issue, Lynch would have to present a second motion to disqualify, alleging the judge improperly addressed the first motion. Appellee fails to cite any law in support of this

argument and Appellant is unaware of any such law. Further, neither Rule of Judicial Administration 2.330 (renumbered from Rule 2.160, Sept. 21, 2006) nor Fla. Stat. 38.10 authorize such a pleading. This argument lacks merit.

Appellee also argues that the lower court was free to address the facts and issues raised in the Motion to Disqualify because these issues were related to claims raised in the pending motion for rehearing. This is a different position than the one taken by the lower court which expressly stated that it was Afree to address [the Motion to Disqualify] on its merits@ because this Court denied Mr. Lynch=s Writ of Prohibition. (ROA v. XII, p.2039)

Both of these justifications contradict the foundation for the rules prohibiting such comment. AWhen 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.@ ***Bundy v. Rudd***, 366 So.2d 440, 442 (Fla. 1978). To adopt the state or lower court=s position is contrary to the rule itself, which states that Aan order of denial shall not take issue with the motion.@ Fla. R. Jud. Adm. 2.330 (f). Further, in analogous situations where a judge, commenting on a second motion to disqualify because he mistakenly believes it is permissible to comment on a second

motion, the appellate courts have found automatic disqualification. *Cf. J & J Industries, Inc. v. Carpet Showcase of Tampa Bay, Inc*, 723 So.2d 281, 283 (Fla. 2d DCA 1998); *Knarich v. State*, 866 So.2d 165 (Fla. 2d DCA 2004).

Finally, Appellee=s argument that the lower court had to address or dispute the facts set out in the Motion to Disqualify in order to rule on the Motion for Rehearing lacks merit. First, the lower court did not say it felt obligated to address the facts in the Motion To Disqualify in order to rule, rather it expressly stated that because this Court denied Mr. Lynch=s writ, the lower court was entitled to comment on the facts in the Motion to Disqualify. Second, the court did not need to attack the basis of the Motion to Disqualify in order to deny the Motion for Rehearing. It did not need to argue with Mr. Lynch about the definition of *ex parte*, the limits on judicial examination of evidence, or the trial court=s level of gun expertise. And, it did not need to make its response personal (e.g., ALynch takes the Court to task@; ALynch takes the opportunity to chastise the Court@; A[Lynch] also questions the ability of the court to **Y** make general observations@; or, Athese allegations require, *but do not deserve*, discussion.@ ROA V. XII p. 2039-40. (emphasis added) It is indisputable that the lower court=s actions demonstrated both presumed and actual bias.

CLAIM IV

MR. LYNCH WAS DENIED DUE PROCESS WHEN THE LOWER COURT PROHIBITED EXPERT TESTIMONY ON PREVAILING NORMS IN FLORIDA CAPITAL DEFENSE

Appellee cites *Provenzano v. Singletary*, 148 F.3d 1327, 1331-32 (11th Cir. 1998) to argue expert testimony is meaningless in determining ineffective assistance claims and that Athe reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and proof.@ First, *Provenzano* is distinguishable in that Mr. Norgard never offered an opinion of the reasonableness of counsel=s strategy or decisions. Mr. Norgard=s testimony was offered to establish prevailing norms of practice in capital defense work in Florida at the time of Mr. Lynch=s trial based on his experience and knowledge as a Florida capital defense attorney. Second, the Eleventh Circuit=s opinion in *Provenzano* is in conflict with the principle enunciated in *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) and reaffirmed in *Wiggins v. Smith,* 539 U.S. 510, 522 (2003), that, APrevailing norms of practice as reflected in American Bar Association standards *and the like* ... are guides to determining what is reasonable.@ (emphasis added) Mr. Norgard=s testimony, like the ABA Guidelines, was offered as a guide to the lower court, and any subsequent reviewing court, to assess whether Mr. Lynch=s attorneys met prevailing norms, a critical element of proof in

his case. *Provenzano* cannot be reconciled with *Strickland* and *Wiggins*.

Lastly, attorneys have been allowed to testify to the standard of care imposed on insurance companies in settling cases within policy limits, *Government Employees Ins. Co. v. Grounds*, 311 So. 2d 164, 168-69 (Fla. 1st DCA 1975), and an expert in probate law has been allowed to testify in a bench trial because such questions go beyond the ordinary understanding of the trier of fact. *In re Estate of Lenahan*, 511 So.2d 365, 371 (Fla. 1st DCA 1987). These cases are analogous to this situation.

Regardless of the lower court=s extensive experience from the bench, the lower court, and other reviewing courts do not have the breadth of experience in the standard of care or prevailing norms in Florida capital defense practice that Mr. Norgard has and could draw from to help inform the finder of fact and ensure the accuracy and reliability of the court=s ruling. The lower court=s ruling was error and prejudice is established where the lower court found counsel=s performance met prevailing norms despite Mr. Norgard=s testimony establishing it did not.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of December, 2007.

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CERTIFICATE OF COMPLIANCE

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

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