IN THE SUPREME COURT OF FLORIDA

_____

No. SC

_____

RICHARD LYNCH,
Petitioner

versus,

JAMES V. MCDONOUGH,
Secretary, Florida Department of Corrections,
Respondent.

_____

PETITION FOR WRIT OF HABEAS CORPUS

_____

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PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: AThe writ of habeas corpus shall be grantable of right, freely and without cost.@ This petition for habeas corpus relief is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Lynch was deprived of his rights to fair, reliable, and individualized trial and sentencing proceedings, and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

The following symbols will be used to designate references to the record in this instant cause:

ATR ROA, Vol. p.@ -- record on direct appeal to this Court.

APCR ROA, Vol. p.@ -- post conviction record on appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Lynch has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar

procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Lynch, through counsel, requests this Court to permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Lynch=s capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Lynch. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that A*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in

original).

Additionally, this petition presents questions which were ruled on in direct appeal, but should now be revisited in light of subsequent case law in order to correct the violations of Mr. Lynch=s fundamental constitutional rights. As this petition demonstrates, Mr. Lynch is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Lynch=s death sentence.

This Court has jurisdiction, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Lynch=s direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A

petition for a writ of habeas corpus is the proper means for Mr. Lynch to raise the claims presented herein. See, e.g., Way v. Duqqer, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors such as those herein pled is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Lynch=s claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Lynch asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of

the Florida Constitution.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. LYNCH=S CONVICTIONS AND SENTENCES.

A. Introduction.

Appellate counsel had the Aduty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel=s performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result@. Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

This Court has explained that when a petitioner alleges ineffective assistance of appellate counsel for failing to raise a preserved evidentiary issue, a harmless error analysis will be conducted. Jones v. Moore, 774 So.2d 637,643 (Fla. 2000). Appellate counsel may not be deemed ineffective for

failing to challenge an unpreserved issue on direct appeal unless it resulted in fundamental error. Farina v. State, 937 So.2d 612,629 (Fla. 2006).

AObvious on the record@ constitutional violations occurred during Mr. Lynch=s plea colloquy, non-jury penalty phase, and subsequent sentencing which Aleaped out upon even a casual reading of the transcript@, yet appellate counsel failed to raise those errors on appeal. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Appellate counsel=s failures to raise the meritorious issues addressed in this petition prove his advocacy involved Aserious and substantial deficiencies@ which individually and Acumulatively@ establish that Aconfidence in the outcome is undermined@. Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

B. Appellate counsel was ineffective for not challenging the lack of factual basis presented to the court at Mr. Lynch=s change of plea hearing.

During the plea colloquy, attorneys for Mr. Lynch provided a factual basis to the court. (TR ROA Vol. 2, p. 378-380). That factual basis was devoid of any facts supporting premeditation, which was an essential element to the two counts of first degree premeditated murder that were charged

in the indictment and that Mr. Lynch ultimately entered a plea of guilty to. The plea colloquy also lacked sufficient facts to support the charges of burglary and kidnapping. The entire factual basis is as follows[1]:

> What I can indicate to the Court is, that probably is along the lines of that particular document, is that my client had a relationship with the victim alleged in Count One of a romantic nature, it went off track. It went off track in a way where my client was attempting to rekindle the relationship. He went to her new home spelled out in the count related to the burglary, he approached her daughter who was coming home from school, he gained entry voluntarily into the home at that point in time. Subsequently 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.
>
> Subsequently, Ms. Morgan, the victim in Count One, arrived at her apartment, at her home. She was met at the door, we believe either by her daughter or by my client, she had a heated discussion with my client, and refused to come into the apartment with him there.
>
> We believe based on what my client related to the

[1] The State prepared a written factual basis and provided it to counsel approximately thirty minutes before the plea. (TR ROA Vol. 2, p.368,378). Mr. Figgatt stated that he had not had a chance to read it fully and objected to certain descriptions of the facts, including references to premeditation. (TR ROA Vol. 2, p. 377). The State=s factual basis appears in the record,(TR ROA Vol. 2, p. 279-284) but there is no indication from the plea proceedings that the trial judge relied on it or if he even reviewed it.

police shortly thereafter, as well as the physical evidence, that she was shot on her front stoop or porch area in front of the apartment, and then pulled inside. How seriously she was shot at that point in time we do not know. The medical examiner isn't able to tell us the sequence of how she was shot, but she was subsequently shot again.

How many times total, Mr. Caudill?

MR. CAUDILL: I believe there were a total of approximately six wounds.

MR. FIGGATT: And during one of those--my client didn't shoot her with just one gun.

MR. CAUDILL: That's correct.

MR. FIGGATT: He shot her with more than one of the guns he brought. 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.

While all this was going on, people at the apartment complex were calling the Sanford Police Department.

The Sanford Police Department, in conjunction with the Seminole County Sheriff's Office, responded there.

In the meantime, my client's wife had found a letter he had left her and had called the Sanford Police Department and informed them at least briefly of the content. While my client was there he called the Sanford Police Department or 911 and got the Sanford Police Department dispatcher and related in detail what he had done to a dispatcher, who remained on the line with him from thirty-five to forty-five minutes. There is no issue of fact.

> By the time he exited the building, the SWAT team was there. There is no issue of identity in this particular case. And there is no issue of the fact that when he left the building at least two people were dead in connection with what the forensic evidence indicates were firearms that were in his possession and brought into the building.
>
> All of this happened in the City of Sanford, Seminole County, Florida, on the date indicated in the Indictment.

(TR ROA Vol. 2, p. 378-380). No other facts were added or presented to the judge in order to accept Mr. Lynch=s plea of guilty to all four counts in the indictment.

Prior to accepting a plea, a judge must find a factual basis in the record to establish the offense to which the defendant has entered his plea. Fla. R. Crim. P. 3.172(a)(which reads: AVoluntariness; Factual Basis. Before accepting a plea of guilty...the trial judge shall be satisfied that the plea is voluntarily entered and that there is a factual basis for it. Counsel for the prosecution and the defense shall assist the

trial judge in this function.@) See also Koenig v. State, 597 So.2d 256 (Fla. 1992) (citing Williams v. State, 316 So.2d 267, 271 (Fla. 1975).

A stipulation by counsel, without further factual

development, is insufficient to support a factual basis. Koenig v. State, 597 So.2d 256 (Fla. 1992) (citing Dydek v. State, 400 So.2d 1255,1257 (Fla. 2d DCA 1981). See also Farran v. State, 694 So.2d 877 (Fla. 3rd DCA 1997) (a Astipulation, standing alone, does not fulfill the requirements of the court to establish a factual basis as mandated by Florida Rule of Criminal Procedure 3.172(a)@).

It is proper for a judge to look to any source in the record to support a factual basis, but the judge must note the source on the record of the plea proceedings. Franklin v. State, 645 So.2d 166 (Fla. 4th DCA 1994) (citing Williams v. State, 316 So.2d 267 (Fla. 1975). Here, there is no indication that the trial judge looked to any other source in the record other that the indictment and the factual basis provided by Mr. Lynch=s attorneys. He stated:

> All right. Mr. Lynch, you=ve heard your lawyer announce the basic facts that he believed the State would be able to prove in this case. Do you agree that those facts could substantially be proven?
>
> Mr. Lynch: Yes, Your Honor.
>
> ***
>
> The Court finds...a factual basis exist for the plea by your admission under oath and by the recitation of your attorneys as to the facts that may be proven in this case.

(TR ROA Vol. 2, p. 380-381.) If the trial judge did in fact

consider anything else in the record to determine the factual basis, it is absent from the transcript of the plea colloquy. Having a defendant merely acknowledge that he is guilty of the crimes in the information or indictment is insufficient to support a factual basis. Franklin v. State, 645 So.2d 166 (Fla. 4th DCA 1994)(AAppellant=s bare admission during the plea colloquy that he killed victim is as consistent with the elements of manslaughter as it is with second degree murder.@)

1. The factual basis was insufficient to support a plea of guilty for armed burglary.

The only portion of the factual basis where burglary appears is in the first paragraph of the factual basis. Mr. Figgatt states,

> [h]e gained entry **voluntarily into the home at that point in time**. Subsequently removed from a bag that he had, one of [sic] 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.**

(TR ROA Vol. 2, p. 378)(Emphasis added.) Under Koenig, this stipulation is insufficient to support a factual basis. There were no other facts in the record for this Court to find a factual basis. It is undisputed that Mr. Lynch entered into Ms.

Morgan=s home with the consent of Leah Caday. There is absolutely no evidence to contradict that fact. Because there was an insufficient factual basis with respect to the count of armed burglary, Mr. Lynch=s plea must be vacated. As will be discussed below, even if this court should find the factual basis sufficient, Mr. Lynch=s actions as presented by the State do not constitute the offense of burglary as a matter of law. He had consent to enter the home and his Aremaining in@ was not done surreptitiously.

This Court, on direct appeal, in its proportionality review, reviewed the plea for voluntariness. In order to make an accurate determination of proportionality, the Court must examine the sufficiency of the evidence underlying the conviction. State v. Lynch, 841 So.2d 362 (Fla. 2003). In Mr. Lynch=s case, the evidence underlying the conviction was his guilty plea. This Court noted, AWhen a defendant has pled guilty to the charges resulting in a penalty of death, this Court=s review shifts to the knowing, intelligent, and voluntary nature of the plea. State v. Lynch, 841 So.2d 362, 375 (Fla. 2003)(citing Ocha v. State, 826 So.2d 956 (Fla. 2002).

Despite the fact that appellate counsel knew or should have known of this Court=s duty to examine every death penalty

conviction for sufficiency of the evidence, appellate counsel failed to challenge the lack of a factual basis for the plea. Counsel for Mr. Lynch concedes that trial counsel did not object to a lack of factual basis, nor did Mr. Lynch seek to withdraw his plea. Appellate counsel generally cannot be found ineffective for failing to raise an issue on direct appeal that was not properly preserved by a contemporaneous objection in the trial court. However, there is an exception to the contemporaneous objection requirement when an error is fundamental. F.B. v. State, 852 So.2d 226 (Fla. 2003). This Court has defined fundamental error in the following manner:

> [i]n order to be of such a fundamental nature as to justify a reversal in the absence of a timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.

F.B. v. State, 852 So.2d 226 (Fla. 2003)(citing Brown v. State, 124 So.2d 481,484 (Fla. 1960).

Under sufficiency of the evidence claims, this Court has stated that generally claims relating to sufficiency of the evidence have to be preserved with a contemporaneous objection. However, the Court has carved out two exceptions. The first is that in death penalty cases, as noted above, the Court always reviews the sufficiency of the evidence to support the conviction. The second exception occurs Awhen the

evidence is insufficient to show that a crime was committed at all.@ F.B. v. State, 852 So.2d 226, 230 (Fla. 2003). This exception applies here. This Court reasoned:

> Thus, an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved. Such complete failure of the evidence meets the requirements of fundamental error-i.e. an error that reaches to the foundation of the case and is equal to a denial of due process.

F.B. v. State, 852 So.2d 226, 230-231(Fla. 2003).

Even taken in the light most favorable to the State, Mr. Lynch=s actions do not constitute a burglary. It is undisputed that at the time of Mr. Lynch=s plea, he had a complete defense to the charge of burglary, since he was given consent to enter and his Aremaining in@ was not done surreptitiously. Delgado v. State, 776 So.2d 233, 236 (Fla. 2000). The factual basis offers a mere stipulation that a burglary occurred. Mr. Figgatt incorrectly conceded that at the moment that Mr. Lynch produced a weapon a burglary occurred because that is when consent by Ms. Caday would have been withdrawn. This was a complete misstatement of the law in effect at the time of Mr. Lynch=s plea. This factual basis is insufficient to support a conviction for burglary.

Appellate counsel=s failure to raise this claim on direct appeal is a Aserious and substantial@ deficiency which

individually and Acumulatively@ establishes that Aconfidence in the outcome is undermined@. Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

Despite the failure of Mr. Lynch to raise this claim either in the trial court by way of a motion to withdraw his plea or on his direct appeal, Aan appellate court will always consider a fundamental error that is apparent on the face of the record.@ Dydek v. State, 400 So.2d 1255 (Fla. 2nd DCA 1981)(AWe can think of no error more fundamental that the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged.@)

2. The factual basis was insufficient to support a plea of guilty for kidnapping.

With respect to the kidnapping count, counsel for Mr. Lynch again stipulated that a kidnapping occurred as part of the events that took place on the date of the incident. As argued above, a stipulation by counsel, without further factual development, is insufficient to support a factual basis. Koenig v. State, 597 So.2d 256 (Fla. 1992)(citing Dydek v. State, 400 So.2d 1255, 1257 (Fla. 2d DCA 1981). See also Farran v. State, 694 So.2d 877 (Fla. 3rd DCA 1997)(a

Astipulation, standing alone, does not fulfill the requirements of the court to establish a factual basis as mandated by Florida Rule of Criminal Procedure 3.172(a)@).

The only portion of the factual basis which mentions kidnapping states:

> [h]e gained entry voluntarily into the home at that point in time. Subsequently removed from a bag that he had, one of [sic] two or three firearms. And at that point in time the **kidnapping ensues**...

(TR ROA Vol. 2, p. 378)(Emphasis added.) There are no other facts outlined in the factual basis that support the elements of kidnapping. The indictment charged Mr. Lynch in the alternative and states:

> A...did forcibly secrete or by threat confine, abduct, or imprison another person, who was Leah Caday, against her will and without lawful authority with intent to commit or facilitate the commission of a felony, which was murder, **or** with intent to inflict bodily hard **or** to terrorize said victim or another person, contrary to Florida Statutes.@

(TR ROA Vol. 1, p. 23-24)(Emphasis added). There is nothing in the factual basis to support that Mr. Lynch intended to terrorize or inflict bodily harm. And as will be discussed further below, any movement of Ms. Caday was slight and inconsequential.

3. Factual basis was insufficient to support a guilty plea for premeditated first degree murder.

The factual basis relied on by the trial court is insufficient to support a conviction for premeditated first degree murder because it fails to state facts that support the essential element of premeditation. The facts recited are also consistent with Second Degree Murder for both victims. Meredith v. State, 508 So.2d 473 (4th DCA 1987)(Athe material in the file upon which the trial court relied reflects a lack of the essential element of premeditation and, hence, there is no factual basis for the charge of first degree murder.@). See also Franklin v. State, 645 So.2d 166 (Fla. 4th DCA 1994)(AAppellant=s bare admission during the plea colloquy that he killed victim is as consistent with the elements of manslaughter as it is with second degree murder.@)

a. The death of Ms. Morgan

With respect to the death of Ms. Morgan, The factual basis describes the following:

> Ms. Morgan, the victim in Count One, arrived at her apartment, at her home. She was met at the door, we believe either by her daughter or by my client, **she had a heated discussion with my client**, and refused to come into the apartment with him there.
>
> ***
>
> He shot her with more than one of the guns he brought. 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**....

(TR ROA Vol. 2, p. 378-379). It is undisputed that Mr. Lynch

and Ms. Morgan were involved in a romantic relationship that went Aoff track.@ As the attorneys for Mr. Lynch stated, he was Aattempting to rekindle@ that relationship at the time of the incident. The evidence presented to the court in the factual basis is consistent with a killing that occurred in the heat of passion over her breaking off their relationship. There was no additional evidence of premeditation presented or developed in the plea proceedings with respect to the death of Ms. Morgan.

b. The death of Ms. Caday

With respect to Ms. Caday, the factual basis is even more deficient. Mr. Figgatt describes how Ms. Caday died in the following manner:

> 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). That description of the facts is equally consistent with Second Degree Murder or even consistent with Aggravated Manslaughter of a Child. Fl. Stat. 782.04(2); 782.07(3). There were no additional facts to support the essential element of premeditation detailed by counsel or noted by the trial judge in his acceptance of the

plea with respect to Ms. Caday.

4. Mr. Lynch suffered prejudice and manifest injustice by the lack of factual basis for his pleas.

Mr. Lynch concedes that in order to obtain relief based upon an inadequate factual basis, a defendant must show prejudice or manifest injustice. Wuornos v. State, 676 So.2d 966 (1995); Williams v. State, 316 So.2d 267,273 (Fla. 1975). This Court has stated:

> Where a defendant raises the possibility of a defense to his guilty plea, the potential prejudice is apparent. In such circumstances, a trial judge should make extensive inquiry into factual basis before accepting the guilty plea.

State v. Kendrick, 336 So.2d 353 (Fla. 1976). See also Lyles v. State, 316 So.2d 277 (Fla. 1975). Mr. Lynch, both through counsel=s factual basis at the plea colloquy and his own statements at the Spencer Hearing denied certain factual elements of the crimes, specifically premeditation. First, in the factual basis, counsel stated that Mr. Lynch and Ms. Morgan were Ahaving a heated discussion@ when she was shot and that Ms. Caday merely Agot in the way of the shooting and she was shot one time and she died.@ (TR ROA Vol. 2, p. 378-379). Neither of those scenarios are sufficient to support a finding of premeditation.

Further, Mr. Lynch=s statement to the trial court at the Spencer hearing referenced a possibly insanity defense. He

mentioned the mental health experts testimony about his mental illnesses and stated, AAlthough I don=t understand everything they said, I know much of what went on **was like I was watching another person doing these awful things**.@ (TR ROA Vol. 9, p. 1117). Finally, with respect to Ms. Caday he stated, AI should have never- -I never meant absolutely to harm her, but I know I pulled the trigger.@ (TR ROA Vol. 9, p. 1118).

With these possible defenses and challenges to the evidence asserted by Mr. Lynch and his counsel, the trial court should have conducted an extensive factual inquiry pursuant to Kendrick and Lyles. That inquiry did not occur.

Under federal law, a guilty plea will support a conviction only if the plea was given Avoluntarily, knowingly, and intelligently.@ Bradshaw v. Stumpf, 545 U.S. 175, 125 S.Ct. 2398 (2005)(citing Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463,25 L.E.d.2d 717 (1970). Moreover, a plea is involuntary and the conviction entered without due process if a defendant does not receive adequate notice of the offenses to which he pleaded guilty. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253 (1976).

In Henderson, the question presented was Awhether a defendant may enter a voluntary plea of guilty to a charge of second degree murder without being informed that intent to

cause the death of his victim was an element of the offense.@ Id at 638, 2254. The defendant in Henderson was Timothy Morgan, and Mr. Morgan entered a plea to second degree murder in full satisfaction of the first degree murder charge that was made in the indictment. Id at 642, 2256. At his sentencing hearing that took place a week later, his attorneys provided a factual basis to the trial court that included a statement of Mr. Morgan that he Ameant no harm to the lady@ when he went into her bedroom with a knife. Id at 643, 2256-57. His attorneys further described the assault as follows, Ain the excitement and tension of it all, the assault occurred and as a result Mrs. Francisco met her death.@[2] Id at 643, 2257.

The factual basis presented to the trial court in Mr. Lynch=s case was similar:

> And there is no issue of the fact that when he left the building at least **two people were dead in connection with** what the forensic evidence indicates were **firearms that were in his possession** and brought into the building.

[2]Applicable New York law at the time required intent to cause death as an essential element of second degree murder.

(TR ROA Vol. 2, p. 380)(Emphasis added). The Court in Henderson reasoned that a jury could have accepted Mr. Morgan=s account of the crime as only manslaughter in the first degree.[3] Mr. Morgan was not challenging the fact that his actions caused the death of the victim. However, the Court opined that Aan admission by respondent that he killed Mrs. Francisco does not necessarily also admit that he was guilty of second-degree murder.@ Id at 646, 2258. Similarly, Mr. Lynch and his attorneys described a factual scenario consistent with Second Degree Murder. Fl. Stat 782.04(2). Just as in Henderson, the fact that Mr. Lynch admitted to causing the deaths of Ms. Caday and Ms. Morgan, that does not necessarily make him guilty of premeditated first degree murder.[4]

[3]Applicable New York law at the time defined manslaughter as a killing Ain the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon.@ Id at 646,2258.

[4]The facts here are distinguishable from Bradshaw v. Stumpf, 545 U.S. 175, 125 S.Ct. 2398 (2005). In Bradshaw, the Court found that the defendant=s assertion that he did not shoot the victim did not necessarily preclude him from admitting his specific intent to cause death because Ohio=s capital murder statute supports a conviction for capital murder if the defendant aids or abets, as long as the Aaiding and abetting is done with the specific intent to cause death.@ Id at 184, 2406. This narrow set of facts is distinguishable from the instant case where there was only one shooter and the question was not whether or not he pulled the trigger, but rather his intent at the time.

Additionally, the lack of factual basis as to the kidnapping and the burglary charge prejudiced Mr. Lynch and resulted in a manifest injustice. The convictions for burglary and kidnapping rendered Mr. Lynch automatically eligible for the death penalty as they are statutory aggravators.

The sentencing judge found three aggravators for the death of Ms. Morgan and three aggravators for the death of Ms. Caday. For Ms. Morgan, the trial court found the following aggravators: 1)CCP, 2)prior violent felony (which was actually the contemporaneous felony for the death of Ms. Caday), and 3)felony committed while defendant was engaged in armed burglary. (TR ROA Vol. 9, p. 1125). As noted above, the factual basis for burglary was insufficient and the actions of Mr. Lynch as described in the factual basis do not legally constitute an armed burglary. As such the Afelony committed while defendant was engaged in armed burglary@ aggravator would be negated. For a sentence of death where the trial judge only found three aggravators, this is significant and confidence in the outcome is surely undermined. This, coupled with the fact that there was substantial mitigation, including brain damage and mental illness, that was not presented to the trial court, would likely lead to a different result.

With respect to Ms. Caday, the Court found: 1)prior

violent felony (which was actually the contemporaneous felony of the

murder of Ms. Morgan), 2)felony committed while defendant was engaged in aggravated child abuse, armed burglary, or kidnapping, and 3)HAC. (TR ROA Vol. 9, p. 1126). As noted above, the factual basis for burglary and kidnapping was insufficient.[5] Without convictions for burglary or kidnapping, the weight of this aggravator would be lessened and perhaps negated. As noted above, for a sentence of death where the trial judge only found three aggravators, this is significant and confidence in the outcome is undermined. This, coupled with the fact that there was substantial mitigation, including brain damage and mental illness, that was not presented to the trial court, would likely lead to a different result.

C. Mr. Lynch=s convictions for Burglary and Kidnapping are erroneous as the facts alleged and proven by the State do not constitute the charged offenses as a matter of law.

1. Mr. Lynch=s actions on March 5, 1999 do not constitute a Burglary.

The statute in place at the time of Mr. Lynch=s crime

[5]The trial judge also found that the murder was committed during the commission of Aggravated Child Abuse, which was never a charged offense.

defined Burglary as Aentering 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 prior to the plea, this Court decided Delgado v. State, 776 So.2d 233 (Fla. 2000). Delgado held that the phrase Aremaining in@ applied only in situations where the remaining in was done surreptitiously. This Court further stated Aif a defendant can establish either that the premises were open to the public or that the defendant was an invitee or licensee, the defendant has a complete defense to the charge of burglary.@ Id at 236. Therefore, at the time of Mr. Lynch=s plea, his actions did not support a conviction for armed burglary. It is undisputed that he had the consent of Ms. Caday to enter the apartment. While the State may argue that Mr. Lynch entered Ms. Morgan=s home through fraud or by trick, there is simply no evidence of that in the record.

During the legislative session in 2001, the Florida Legislature amended the burglary statute and issued legislative findings and intent. Fl. Stat. 810.02 (2001). They stated that Delgado was decided contrary to legislative intent and that the Aremaining in@ need not be done

surreptitiously in order to constitute the crime of burglary. That subsection was to operate retroactively to February 1, 2000.

However, in 2003, this Court decided State v. Ruiz, 863 So.2d 1205 (Fla. 2003). Ruiz specifically did not overrule Delgado and stated that the legislative intent and findings of 2001 did not apply to conduct that occurred prior to February 1, 2000. Id. Mr. Lynch=s crimes occurred on March 5, 1999. Clearly, then, Mr. Lynch is entitled to the interpretation of the burglary statute as defined in Delgado. Since his Aremaining in@ was not done surreptitiously, his conviction for burglary cannot stand. The reasoning behind the opinion in 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 that of State v. Braggs, 815 So.2d 657 (Fla. 3d DCA 2002). The facts in Braggs are analogous to the facts here. 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).

Courts often look to the relationship between the accused and the victim to determine whether or not there was consent to enter. For example, in Otero v. State, 807 So.2d 666 (Fla. 2d DCA 2002), a former client went to visit his former attorney. The Fourth District Court of Appeal found that Athe 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 Anot intended to cover the situation where an invited guest turns criminal or violent.@ Id at 669.

Ms. Caday had known Mr. Lynch for several months. She had interacted with him and his children. She knew that he was involved in a romantic relationship with her mother. He had never been violent with her and she had never seen him exhibit any signs of violence. She had no reason to fear him

when he approached her that afternoon. There were no signs of struggle or forced entry. Mr. Lynch did not display any weapon or threaten Ms. Caday in any manner in order to gain entry into the apartment.

It is undisputed that the facts as alleged by the state do not constitute burglary as a matter of law. At the time of his plea, Mr. Lynch could not have been found guilty of burglary based on the evidence that the state possessed. As such, his conviction on the burglary count reversed. Griffin v. State, 705 So.2d 572 (Fla. 4th DCA 1998)(AA conviction is fundamentally erroneous when the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law.@)

2. Mr. Lynch=s actions on March 5, 1999 do not constitute Kidnapping.

There was insufficient evidence to support a finding of guilt to the charge of Kidnapping. Mr. Lynch was charged in the alternative in the indictment, and one of the alternatives was that the kidnapping was Adone to facilitate the commission of a felony, which was murder.@[6] This Court has held that in

[6] Mr. Lynch was also charged with the intent to terrorize or inflict bodily harm. However, the evidence suggests that Mr. Lynch did not threaten Ms. Caday, did not point any weapon

order to uphold a conviction for kidnapping under those circumstances, 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 Aconfined the victims by simply holding them at gunpoint@ or Amoved the victims to a different room in the apartment, closed the door, 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

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at her, nor did he physically touch or harm her in any way

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. Quite the opposite in fact, if Mr. Lynch needed to kidnap Ms. Caday in order to facilitate the murder of Ms. Morgan, he would have moved her to a different room, or bound her in some way, instead of allowing her in plain sight of Ms. Morgan when she arrived home. Either way, the conviction for kidnapping cannot stand.

D. Prejudice.

Appellate counsel=s failures to raise the above arguments on direct appeal prejudiced Mr. Lynch. A[C]onstitutional errors, with rare exceptions, are subject to harmless error analysis@. State v. DiGuilio, 491 So.2d 1129, 1134 (Fla. 1986). Harmless error analysis Arequire[d] an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury

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prior to Ms. Morgan entering the apartment.

could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the verdict.@ Id. at 1135. Once error is found, it is presumed harmful unless the state can prove beyond a reasonable doubt that the error Adid not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]@. DiGuilio, 491 So.2d at 1138. Accordingly, reasonable competent performance obligated counsel to raise and address all Aof the impermissible evidence which might have possibly influenced the verdict@ to hold the state to its burden of proof. Id; Fitzpatrick v. State, 490 So.2d 938 (Fla. 1986). Counsel had "a duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland, 466 U.S. at 688. Appellate counsel failed to do so. Had appellate counsel addressed the lack of factual basis in the plea colloquy, the insufficiency of the evidence to support a conviction for Burglary and Kidnapping, and the judge=s improper finding of aggravated child abuse, there is a reasonable probability that the outcome of the appeal would have been different. Strickland, 466 U.S. at 688. See Eagle v. Linaham, 279 F.3d 926, 943 (11th Cir. 2001)(AWhere, as here, appellate counsel

fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so.@).

CLAIM II

MR. LYNCH=S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. LYNCH MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if Athe person lacks the mental capacity to understand the fact of the impending death and the reason for it.@ This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

Richard Lynch acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Lynch acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes

(1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin=s counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent=s Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court=s subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct.

> 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]
> Stewart v. Martinez-Villareal does not conflict with Medina=s holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion.

This claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, Richard Lynch raises this claim now.

Mr. Lynch has been incarcerated since 1999. Statistics show that incarceration over a long period of time will diminish an individual=s mental capacity. Because Mr. Lynch may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

Mr. Lynch suffers from mental illness and brain damage. For the last 6 years, Richard Lynch has lived on Florida=s

death row, in a cell approximately 6 feet wide, 9 feet long, and 9.5 feet high. Union Correctional Institution is located in central Florida and is not air conditioned, even during dangerously hot weather. Roaches often reach the food served to death row inmates before it is delivered to the inmates. Mr. Lynch is allowed yard time only twice a week and showers every other day. The majority of Mr. Lynch=s fellow death row inmates, the people with whom he can routinely talk and associate, also suffer various forms of mental illness and personality disorders. Richard Lynch=s already fragile mental condition could only deteriorate under these circumstances. His mental condition may well decline to the point that he is incompetent to be executed.

CLAIM III

MR. LYNCH=S DEATH SENTENCE VIOLATES THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE ELEMENTS OF THE OFFENSE NECESSARY TO ESTABLISH CAPITAL MURDER WERE NOT CHARGED IN THE INDICTMENT

Jones v. United States, 526 U.S. 227 (1999), held that Aunder the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.@ Jones, at 243, n.6. Apprendi v. New Jersey, 530 U.S. 466

(2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-476.[7] Ring held that a death penalty statute=s Aaggravating factors operate as >the functional equivalent of an element or a greater offense.=@ Ring, 122 S.Ct. at 2443 quoting Apprendi at 494, n. 19. In Jones, the Supreme Court noted that A[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration,@ because Aelements must be charged in the indictment.@ Jones, 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution, Article I, Section 15, of the Florida Constitution provides that ANo person shall be tried for a capital crime without presentment or indictment by a grand jury.@ Florida law clearly requires every Aelement of the offense@ to be alleged in the information or indictment. In State v. Dye, 346 So.2d 538, 541 (Fla. 1977), this Court said A[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference.@ In State v. Gray, 435 So.2d 816, 818 (Fla. 1983), this Court said A[w]here an indictment or information wholly omits to allege one or more of the essential elements

[7] The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477, n.3.

of the crime, it fails to charge a crime under the laws of the state.@ An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including Aby habeas corpus.@ Gray, 435 So.2d at 818. Finally, in Chicone v. State, 684 So.2d 736, 744 (Fla. 1996), this Court said A[a]s a general rule, an information must allege each of the essential elements of a crime to be valid.@

The most Acelebrated purpose@ of the grand jury Ais to stand between the government and the citizen@ and protect individuals from the abuse of arbitrary prosecution. United States v. Dionisio, 410 U.S. 19, 33 (1973); *see also* Wood v. Georgia, 370 U.S. 375, 390 (1962). The Supreme Court explained that function of the grand jury in Dionisio:

> Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people . . . As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep.

Id., 410 U.S. at 35.

The shielding function of the grand jury is uniquely important in capital cases. See Campbell v. Louisiana, 523 U.S. 392, 399 (1998) (recognizing that the grand jury Aacts as a vital check against the wrongful exercise of power by the State and its prosecutors@ with respect to Asignificant decisions such as how many counts to charge and . . . the

important decision to charge a capital crime@).

The Sixth Amendment requires that A[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . .@ A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, supra, citing Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Lynch=s rights under Article I, Section 15, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. By omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Mr. Lynch Ain the preparation of a defense@ to a sentence of death. Fla. R. Crim. Pro. 3.140(o).

CLAIM IV

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. LYNCH OF THE FUNDAMENTALLY FAIR CAPITAL TRIAL AND APPEAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Lynch did not receive the fundamentally fair trial

and penalty phase to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Lynch=s plea colloquy, non-jury penalty phase and sentencing, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this petition, Mr. Lynch=s 3.851 motion, his 3.851 appeal, and in his direct appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court=s numerous errors significantly tainted Mr. Lynch=s plea colloquy, non-jury penalty phase, sentencing, and direct appeal to this Court. Specifically, the errors that resulted from appellate counsel=s failure to raise on direct appeal the lack of factual basis for the pleas and the insufficiency of the evidence to sustain a conviction for burglary and kidnapping, prejudiced Mr. Lynch and undermine the fairness and correctness of the result.

Under Florida case law, the cumulative effect of these errors denied Mr. Lynch his fundamental rights under the

Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Lynch respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 2nd day of July, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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