IN THE SUPREME COURT OF FLORIDA

DAVID MILLER,

Appellant,

v. CASE NO. SC04-892

STATE OF FLORIDA

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND THE FACTS

This case is here on appeal from the denial of postconviction relief after evidentiary hearing. Miller's Statement of the Case is acceptable. However, Miller's Statement of Facts does not discuss the trial record, and his discussion of the postconviction record omits relevant testimony supporting the judgment. Because the trial record contains much that is relevant to Miller's present claims of ineffective assistance of trial counsel, the State will first offer a summary of the pertinent testimony, arguments of trial counsel, and the trial court's findings. Then the State will present a summary of the testimony presented at the postconviction evidentiary hearing. The State will cite to the trial record as "TR" and to the record on this appeal as "R."

The Trial

This Court summarized the evidence presented at trial in its opinion on direct appeal:

> On March 5, 1997, Linda Fullwood and the victim, Albert Floyd, went to sleep on the floor of a covered doorway of a Jacksonville church. Floyd slept toward the outside and Fullwood closer to the building. Fullwood awoke to a man beating Floyd with a pipe or stick and screamed. The assailant then started hitting Fullwood.
>
> Jimmy Hall testified that he was walking along Duval Street at the time in question when

he heard someone yelling. Hall ran behind the church and saw a man beating two people with a pipe. Hall stated that the pipe was four or five feet long with a bent end, the assailant used both hands to swing it, and that blood flung off the pipe onto the ceiling and walls. Hall yelled at the assailant to stop, the assailant turned and started toward Hall, but then fled.

Consequent to the attack, the victim died from three blows to the head. The victim's autopsy revealed three head lacerations that fractured the skull and penetrated into the brain. The injury was consistent with blows from a pipe, any one of which could have resulted in unconsciousness and death. n2

n2 Fullwood had a concussion, one broken arm, two broken fingers, and several fractured ribs.

Two and one-half months later, appellant told a police officer in Louisiana that he killed someone in Jacksonville. Miller met with a detective at the police station, was advised of his rights, and told the detective that he had beaten a man to death while attempting a robbery. Appellant stated that the victim was sleeping, that he intended to knock him unconscious with a five-to-six-foot pipe that was curved at the end, that a woman woke up and started screaming, and that he struck her too. A fourth person then appeared, told appellant to stop, and appellant fled. Miller further stated that he turned himself in because he thought the victim’s family was looking for him, his conscience bothered him, he knew that what he did was wrong, and that he wanted to apologize to the victim’s family.

Appellant also told detectives that on the night in question he drank three or four quarts of beer, smoked a $ 10 rock of crack, and then went looking for more money and alcohol. He found a dented six-foot pipe in a park and walked behind a building where he saw a man sleeping under a blanket on a covered concrete porch. Appellant decided to strike the victim to disable

him and avoid a struggle before robbing him, although he did not intend to kill him.

In Jacksonville, another detective interviewed appellant and appellant showed him the crime scene. Appellant repeated his story and walked detectives through the crime. He explained that he struck the victim to avoid resistance because he knew that homeless people carry knives and guns, and he did not want to get injured.

Appellant testified that he did not decide to rob the victim until he was actually standing over him with the pipe. He acted without thinking because of his mental state and he battered Fullwood instinctively when confronted by her. When Hall approached, appellant realized his actions and walked away.

During the penalty phase, appellant presented familial, expert, and his own testimony. Appellant's mother, sister, and brother testified about his family background-including abuse by his father when he was a child-and drug and alcohol abuse as an adult. Furthermore, Dr. Harry Krop, a clinical psychologist, testified regarding his findings as to appellant, which included a diagnosis of alcohol and drug abuse, frontal lobe defects, and schizoid personality traits. Appellant testified that he was greatly affected by the fact that his parents never told him that they loved him, although he subsequently learned that his mother loved him as evidenced by her hard work in raising the children. He also expressed religious beliefs and stated that he would accept responsibility for his actions, he apologized to the decedent's family and Fullwood, and he asked for forgiveness.

Miller v. State, 770 So.2d 1144, 1146-47 (Fla. 2000).

In his closing argument at the guilt phase, trial counsel reminded the jury of his admonition in opening

statements that this case was not about “what happened,” or “where it happened,” or “when it happened,” or “how it happened”; instead, it was about “why it happened and the mental process” of Miller “when it happened” (10TR 728). He disputed the prosecutor’s claim that Miller’s ”intent was clear,” arguing that the State had presented not “one shred of credible evidence” of Miller’s intent to kill (10TR 730). Miller, trial counsel argued, was guilty of no more than second degree murder (TR 730). Counsel argued that Miller had been so intoxicated at the time of the killing that he was incapable of forming mental intent (10TR 734). Counsel reminded the jury that Miller had not actually taken anything from either of the victims, and argued that the State had not proved intent to rob, much less intent to kill (10TR 735). In response to the prosecutor’s argument that Jimmy Hall was credible, trial counsel noted that Hall had failed to respond to the State’s subpoena and had testified under “contempt actions” by the court (10TR 737). By contrast, Miller had been arrested only because he had turned himself in at a time when the State had no suspects, and then had admitted his guilt to police, while denying intent to kill (10TR 744-45). Miller had also testified when he did not have to (10TR 745). Counsel concluded by telling the jury that if

it had any reasonable doubt as to premeditation or any theory of felony murder, that it would have the duty to find Miller not guilty of first-degree murder, but only guilty of the lesser-included offense of second-degree murder (10TR 748).

Miller's mother testified at the penalty phase that his sister Valnese had died in 1990 (11TR 831, 854) while he was in prison (11TR 854-55), and his friend Boyd Howe had died in 1991 or 1992 – again, while Miller was in prison (11TR 855) (he was released in 1993, 11TR 858-60). These deaths, she testified, greatly affected Miller (11TR 835-36, 925-26). The mother described her children's father as an abusive alcoholic (11TR 839-41). He worked all week, but on the weekend would drink heavily and fight (11TR 839-41). He once hit her on the head with a soda bottle hard enough to require stitches (11TR 840). He beat the children with a belt (11TR 841).

Brother David testified that Miller became a heavy drinker in the Navy (11TR 847-48). Sister Sharon testified that she and Miller had a good relationship (11TR 863). Their father was abusive; he once grabbed their mother by the neck and choked her (11TR 865). Afterwards, their father beat all the children with an electrical cord (11TR 866). Sharon also remembered the soda bottle incident; she

testified that it left a large scar on her mother's head (11TR 865). Sharon testified that Miller did not have a drug or alcohol problem until he joined the Navy (11TR 871-72). He became more aggressive afterward (11TR 873).

Miller's brother Leonard testified that he was very close to Miller (11TR 923). Miller once risked his life to put out a house fire (11TR 928-29). Their father was an abusive alcoholic (11TR 926-27). He once strapped their now-deceased older sister Valnese to a door and beat her with an electrical cord (11TR 927). Valnese committed suicide when Leonard was in college (11TR 927). Miller began drinking in the Navy, and became more aggressive as a result (11TR 930).

Dr. Krop testified that Miller is competent and sane; he "clearly knew right from wrong" (11TR 903). Miller does not have anti-social personality disorder (11TR 903), but does have "mixed personality disorder (11TR 900), which is "not considered a major mental illness" (11TR 899). Miller is "avoidant, schizoid and paranoid," meaning he is "suspicious" and "aloof," viewing himself "as different," but not to the point where he is out of touch with reality (11TR 900-01). Miller is articulate and does well on intelligence tests (11TR 906). The only tests Miller showed any "deficits" in "were those that mentioned frontal

lobe functions" (11TR 907). The frontal lobe is the part of the brain which controls start-stop behavior or inhibition (11TR 906). Miller has a history of alcohol abuse which apparently began while he was in the Navy (11TR 908). When released from incarceration, he did not follow up with treatment for his problems (11TR 908). Dr Krop testified:

> [A]lcohol . . . affects a person's inhibition and impulse control and judgment. When you have a person who already has these personality traits, such as schizoid traits and paranoid traits, when you have a person who has difficulty organically controlling his impulses and then you add to that a substance which also exacerbates or makes it more difficult to control your behavior you have a pretty seriously disturbed individual when all of those are combined.
>
> It's hard to say at any one time which of those disorders are contributing to a given behavior. But certainly when all three of them are interacting with each other you have a pretty seriously disturbed individual who has very impaired judgment, usually, and who engages in behavior that probably a, quote, normal person would not engage in.

(11TR 908-09).

On cross-examination, Dr. Krop acknowledged that Miller had made a choice when he decided to administer three skull-crushing blows to the victim's head (11TR 912-13). When asked if his opinion was based upon the defendant having been under the influence of either drugs

or alcohol at the time of the murder, Dr. Krop answered that it really did not matter; whether or not Miller was intoxicated at the time of the murder, “his whole motive in being involved in this situation was to get money to support his alcohol and drug habit, so that has as much of an influence as the actual chemical effects of the alcohol” (11TR 917-19).

Miller testified on his own behalf, describing his family as “a very honorable and respectable family, loving,” the one problem being that he never heard the word love from either of his parents (11TR 936). He knew now “all the hard work” his mother did “to raise four kids on her own,” so he felt “like I can’t use anything that happened in my childhood as an excuse” (11TR 936). He apologized to Linda Fullwood and to the family of Albert Floyd (11TR 937). He acknowledged on cross examination that in 1986 he had apologized to the family of Ervin Oliver (who Miller had murdered on February 6, 1986) (11TR 937-38).

At the penalty phase, Miller’s trial counsel reminded the jury that, by its verdict at the guilt phase, it had “already held Mr. Miller accountable for his actions” (11TR 969). Miller, he argued, would “never, ever get out of prison” (11TR 969). He would “not be paroled” (11TR 969).

He would “die in prison” (11TR 969-70). The only question was whether he would die of natural causes or in the electric chair (11TR 970).

Counsel argued that the prior violent felony aggravator should be given little weight, reminding the jury that “we don’t know the circumstances” of Miller’s 1986 second degree murder because the State had presented no evidence other than the conviction itself which, he emphasized, was not a first degree murder conviction (11TR 972-73). Moreover, in this case Miller would not be eligible for parole, as he had been in North Carolina (11TR 973).

Counsel acknowledged that, as the prosecutor had argued, the State had the right to present victim impact evidence to show who the victim was (11TR 973). But, he argued, the defense had a corresponding right to present evidence about himself and his character (11TR 973-74). Counsel noted, first, that Miller had turned himself in, not because there were any warrants outstanding for his arrest, and not because he had “any kind of self-serving interest,” but only because he was sincerely remorseful (11TR 975). Miller’s remorse, trial counsel insisted, was “mitigation,” and entitled to “great weight” (11TR 975-76). Secondly, Miller told the police the truth, and that also

was “mitigation” (11TR 976). Third, Miller had not intended to kill, and that was mitigating too (11TR 976). But, counsel argued, “we don’t stop there” (11TR 977).

He noted that Miller had been physically abused by his father, and that his family had “conflict resolution problems” arising out of the lack of a role model (11TR 978). Counsel noted that, according to Dr. Krop, Miller did not suffer from anti-social personality disorder, and argued that Miller would adapt to and behave himself in the structured environment of prison (11TR 979-81). Additionally, the frontal lobe deficit Dr. Krop testified about, coupled with Miller’s drug and alcohol problems, while not a defense to murder, strongly mitigated Miller’s crime (11TR 980-81).

Trial counsel concluded by noting that a sentence of life without parole would mean that Miller would never see any sunrises or sunsets; he would never have children; he would not be with his mother before she died (11TR 982). Counsel argued that, considering all the facts and circumstances of this case, life without parole was a sufficient and appropriate punishment for Miller (11TR 982-84).

The jury recommended death by a vote of seven to five (11TR 995-96).

The trial court's findings were summarized by this Court on direct appeal:

> In support of the death sentence, the trial court found the following aggravating circumstances: (1) prior violent felony conviction; and (2) the homicide was committed during an attempted robbery and for pecuniary gain (merged). The trial court did not find any statutory mitigators, but found the following nonstatutory factors: (1) the victim was rendered unconscious immediately and did not suffer-very little weight; (2) the alternate sentence for murder is life without possible release-very little weight; (3) appellant turned himself in-slight weight; (4) exhibited remorse and apologized to the victim's family-some weight; (5) did not resist and cooperated with the police investigation-some weight; (6) suffered emotional distress over the death of his sister and a close cousin-little weight; (7) has a frontal lobe deficiency that affects inhibition and impulse control-modest weight; (8) would likely adapt well to long-term incarceration-very little weight; (9) was loved by his family and had performed good deeds-slight weight; and (10) had adjusted well while incarcerated-slight weight. The trial court considered but rejected the following nonstatutory mitigators, including that appellant: (1) did not intend to kill the victim; (2) suffered an abusive childhood and his father was an alcoholic; (3) suffered his own alcohol and drug problem as an adult, and (4) supported himself by working through labor pools.

770 So.2d at 1146 (fn. 1).

The Postconviction Evidentiary Hearing

Five witnesses testified at the evidentiary hearing: trial counsel Refik Eler, VA social worker Debra Lee, Miller's sentencing phase mental health expert Dr. Harry Krop, and two medical doctors who testified about the PET

scan administered in 2002 to Miller at the behest of Miller's collateral counsel: Dr. Joseph Wu (for the defense) and Dr. Lawrence Holder (for the State). The State will address the testimony of each witness, albeit in different order than they testified.

Dr. Wu is an associate professor in the Department of Psychiatry at the University of California College of Medicine, and is also clinical director of the University's Brain Imaging Center (9R 1624). An MRI shows brain structure; a PET scan shows brain functioning as measured by sugar metabolism (9R 1630-32). "PET" stands for "positron emission tomography" (9R 1634). Brain activity consumes sugar, and more active parts of the brain consume more sugar than less active parts (9R 1633). After intravenously injecting sugar that has been specially treated to emit positrons, a PET scanner can detect sugar metabolism in the brain through a series of "crystal detectors" (9R 1634-35).

The "vast majority" of most PET facilities scan to detect the presence of cancers or tumors; Dr. Wu's center primarily focuses on using PET scans to study neuropsychiatric disorders such as schizophrenia, Alzheimer's and Parkinson's diseases and traumatic brain injury (9R 1624).

In Miller's case, the PET scan in Dr. Wu's opinion showed "a pattern of abnormal decrease in frontal lobe activity" (9R 1639). The visual vigilance task Miller was asked to perform (9R 1659-60) did not "activate the frontal lobe" to the extent that performing the task would have in a normal patient (9R 1639-40). Dr. Wu concluded that "this was an abnormal brain with a frontal lobe deficit" (9R 1642). Because Miller's records showed no history of significant traumatic brain injury or stroke or disease, the most likely cause was the Axis 2 "schizophrenic spectrum disorder" previously identified by Dr. Krop (9R 1643).[1] Such disorder would be characterized by someone who has schizophrenia-like symptoms without meeting the full diagnostic criteria for Axis 1 schizophrenia (9R 1644, 1651-52). Dr. Wu testified that people with similar neurobiological vulnerabilities are more likely to respond to childhood abuse with aggression and violence than persons without such vulnerabilities or vulnerable persons without abusive childhoods (9R 1646).

The PET scan administered to Miller provides no additional diagnoses, but cross-validates and corroborates the neuropsychological testing done by Dr. Krop before the

[1] Axis 2 disorders are personality disorders (9R 1652). Schizophrenia is an Axis 1 disorder; Miller has never been diagnosed as such (9R 1652).

original trial (9R 1638, 1653). Dr. Wu acknowledged that the color displayed in the exhibits was the product of a choice from color scales available (9R 1664). The images presented to the court were not photographs; they were images created mathematically (9R 1665). A PET scan alone would not support a finding of brain damage; it "is only one piece of the puzzle" (9R 1666). Dr. Wu's impression of an abnormal scan was based upon his visual observation; he had a "reference library in [his] head" from reviewing "countless scans" (9R 1668). Unlike mass spectrometer testing of a sample of alleged cocaine, in which, if you follow the test properly and the machine is working, you consistently get a certain result (9R 1669, 10R 1676), there is no document that comes out of the PET scan that says "frontal lobe disorder" (9R 1677). Different experts can draw different conclusions from a PET scan (9R 1669).

Dr. Holder is a Clinical Professor of radiology at Shands (University of Florida) (10R 1732). He is a medical doctor specializing in nuclear medicine, and is not only board certified in diagnostic radiology and nuclear medicine, but is the chairman of the American Board of Nuclear Medicine (10R 1730-32). His present duties at Shands include teaching residents and interns how to evaluate and review PET scans (10R 1733). Nuclear medicine

is a specialty in which radioactive materials are used for diagnosis and treatment; PET scans are a subset of nuclear medicine (10R 1733-35). Dr. Holder has reviewed PET scans on a regular basis (10R 1736-37).

Dr. Holder reviewed Miller's PET scan images and associated computer data, as well as Dr. Wu's report, Dr. Krop's report, and some of the trial testimony (10R 1742). In Dr. Holder's opinion, the PET scan showed no abnormalities; Miller's "global metabolism was normal" (10R 1744). There were "no focal cortical abnormalities" and "no non-cortical abnormalities"; in Dr. Holder's opinion, "it was a totally normal PET scan" (10R 1744). He thought the "basal ganglia activity" was a bit below average, but was "within normal limits" (10R 1744).[2] He saw no "areas of increase or decrease in any pattern that I would associate with a disease process that's known and understood" (10R 1748).

There are at present no standard normal databases for brain imaging (10R 1748). Just as most people do not have exactly the same size feet, there will be some normal variation; plus or minus five or ten percent may be normal, and "people are trying to get an absolute standard and in

[2] The basal ganglia are "some deeper structures in the brain, as opposed to some cortical structures" (10R 1745).

my view there's no absolute standard yet" (10R 1748-49). At present, there will be a point in a "physiologic spectrum" that Dr. Holder would say is within normal limits, but someone else might say "gee, that may be just over the line" (10R 1749). In "areas where you really want to make diagnoses, that should not occur"; in other words, a scan will be clearly normal or clearly abnormal, or it will be in an area in which "there will be some disagreement, which means that what you're seeing is probably fairly subtle" (10R 1749).

On cross-examination, Dr. Holder testified that he was neither agreeing or disagreeing with Dr. Krop's report of frontal lobe impairment based on neuropsychological testing; all he was saying was that Miller's PET scan showed no abnormality (10R 1758).

Debra Lee, a social worker with the Veterans Administration, testified that she first contacted Miller in a homeless shelter in North Carolina, and eventually persuaded him to seek in-patient treatment late in 1996 (9R 1586-91). She was a case manager, who did not counsel, treat or test Miller (9R 1610-11, 1614-15). She never spoke to the treating psychologist (9R 1615-16). She did not see Miller "at all" while he was in in-patient treatment (9R 1618-19).

Dr Krop, a licensed Ph.D. psychologist, testified that he had originally been brought into this case by Miller's original trial counsel, assistant Public Defender Alan Chipperfield (10R 1693). Chipperfield "usually sends me comprehensive notes" including his "perspective of the case" and "things for me to focus on" (10R 1694). In Chipperfield's initial letter to Dr. Krop, Chipperfield asked Dr. Krop to look for mitigation, including drug or alcohol use, remorse, family situation and Miller's prison record (10R 1694-95). Chipperfield provided information from defense interviews with family members which "suggested the possibility of a dysfunctional family," school records, military records, records from various psychiatric facilities, the court file from Miller's 1986 conviction for second degree murder, prison medical records, prison classification records, records from a 1996 in-patient treatment by the VA, and (from the instant offense) police reports, the medical examiner's report and a copy of Miller's confession (10R 1695, 1709-10). Chipperfield also delivered copies of "several depositions" (10R 1696).

In his preliminary report to Chipperfield, Dr. Krop indicated that Miller was competent and sane; that he did not appear to have anti-social personality disorder; that

he was probably intoxicated at the time of the offense; that he did not suffer from any major mental illness, but appeared to be suspicious and paranoid; and that he appeared to have grown up in a dysfunctional family (10R 1699).

Subsequently, Dr. Krop personally interviewed three family members, including Miller's mother, brother and sister (10R 1700). He also administered neuropsychological testing. Based on Miller's prior records of various kinds, interviews with family members, and interviews with and testing of Miller, Dr. Krop diagnosed Miller with avoidance, schizoid and paranoid features (10R 1697). His diagnosis was consistent with similar diagnoses by various facilities and doctors over the years (10R 1697). Additionally, his findings were consistent with those of Dr. Wu (10R 1696-97). Dr. Krop communicated his findings either to Chipperfield or to Refik Eler (10R 1700).

Noting that "dysfunctional" was not a "diagnostic term," but "more of a relative term" (10R 1705), Dr. Krop testified that what was significant was Miller's own perception of "emotional deprivation"; he felt "starved emotionally" (10R 1705). Miller felt there was "too much discipline," and felt himself capable of "killing" his mother and father (10R 1705). Dr. Krop had told trial

counsel that Miller's family was potentially mitigating, and would have been willing to testify about the impact of Miller's family on him if he had been asked (10R 1706-07).

Dr. Krop testified that Miller described the 1986 murder to him:

> He said the guy threatened him, it was in a boarding house, he went upstairs to bed, he saw a rifle, he went down and shot him. He said, like I was on automatic . . . pilot . . . .

(10R 1724). Dr. Krop could not recall whether Miller had expressed remorse about that incident (10R 1724).

Dr. Krop did not recall "exactly" what he had said during his penalty-phase testimony, but Miller had three "areas of concern," including substance abuse, frontal lobe deficits and a personality disorder, the combination of which would "lead to problems with judgment, impulse control, and so forth" (10R 1703).

Miller had "long-standing maladaptive" behavior patterns, which would require "extensive" and "on-going" treatment (10R 1713). "[U]nfortunately," Miller's "personality traits" were the least responsive to "therapeutic intervention" (10R 1715). His "personality traits" were "just a bad combination" (10R 1715).

Dr. Krop testified that his opinion today was the same as he testified to at Miller's penalty phase; nothing has

changed in his diagnosis (10R 1716). He was able to render an opinion without a PET scan (10R 1717). Dr. Krop has recommended PET scans in other cases, but did not in this one (10R 1717). He was confident in his own testing (10R 1717). He would have found frontal lobe deficits even in the face of normal PET scan results (10R 1718).

Dr. Krop acknowledged that Miller made a conscious decision to strike the victim with an iron pipe, and that he had the ability to conform his behavior to the requirements of the law (10R 1721-21A). Dr. Krop continues to believe that Miller was **not** operating under an "extreme" emotional disturbance (10R 1721A). Finally, it is still Dr. Krop's belief that Miller did **not** have a major or severe mental illness (10R 1721A-22).

Refik Eler, Miller's trial counsel testified that he has been an attorney since 1986, and has defended capital defendants in "half a dozen to a dozen" trials as lead counsel (9R 1482, 1485-86). This number does not count those that were "worked out" (9R 1486). He was primarily responsible for the penalty phase in four or five of those trials (9R 1487). At the time of Miller's trial, he had attended more than "half a dozen" capital seminars (9R 1488), and had a copy of the "Defending Capital Cases in Florida" (9R 1489).

Eler testified that, “in its broadest sense,” mitigation is anything the trier of fact could consider mitigating (9R 1490). A defense attorney’s preparation for a capital trial would include “taking broad information and narrowing it down to information . . . that would be relevant and important for a jury to hear” (9R 1490). Eler would typically get prison or military records, talk to the defendant, and talk to his family (9R 1490). In this case, much of the initial investigation had already been done by assistant public defender Al Chipperfield, who had the case “almost ready to try” (9R 1490). Eler reviewed what Chipperfield had already collected, and, with his own investigator, did some “accumulation” and “follow-up” (9R 1491). It was obvious that the State’s case against Miller at the guilt phase was going to be very strong (9R 1539). Eler felt he had a chance at the penalty phase, however (9R 1540).

Eler testified that obtaining the services of a mental health professional was “one of the first things you’d want to do” (9R 1491). In this case, Chipperfield had already brought Dr. Krop “on board” (9R 1491). Dr. Krop, a “leading expert” in “psychology and neuropsychology,” is frequently used by defense counsel in capital cases, and Eler had worked with him before (9R 1492).

Eler explained:

> I don't usually recommend to the mental health experts. I say this is an issue that I'm looking at. There's alcohol, drug abuse, there's family member problems, you're my expert, you help me get some mitigation to the jury. And that's when Dr. Krop would say, okay, give me all the reports, give me the records, let me look at them, let me test, and then we would regroup and he would suggest issues that he thought were significant, such as in this case a frontal lobe [deficit].

(9R 1551).

In Miller's case, Eler used Dr. Krop to establish that Miller has a frontal lobe deficit, could adapt well to long-term incarceration, and had alcohol and drug abuse issues (9R 1493). Dr. Krop had talked to Miller and his family and was aware that his family had some issues (9R 1496). Eler agreed that a mental health professional could testify as to the psychological impact a poor family background might have on a defendant "if there was a sufficient basis" (9R 1497-98). It would "depend on what those factors were and whether or not that would be favorable to the defense" (9R 1499). In this case, Dr. Krop had "emphasized to me that we really need[ed] to focus on this frontal lobe and the alcohol" (9R 1499). Eler did not recall Dr. Krop discussing the effect, if any, of Miller's dysfunctional family (9R 1499). He felt that "if Dr. Krop felt that was a feature we needed to bring out, he

would have communicated that to me and I . . . don't believe he did" (9R 1504). Eler was "not sure the record was so clear that Miller had a dysfunctional family" (9R 1520). "Dysfunctional" was an "all-encompassing term" (9R 1520). There was some early domestic violence and other issues, which Eler chose to present evidence to the jury through the family members themselves (9R 1495). Such testimony, Eler believed, had a "very effective impact" on the jury (9R 1500). In many cases, the defendant's family has given up on him; here, Miller's family was able to "humanize" him by testifying on his behalf (9R 1540-42). Although "there's a two-edged sword to everything," and at least two of Miller's siblings had "turned out fine" despite having similar family backgrounds, nevertheless, testimony from family members tearfully pleading for a defendant's life "to me has always been . . . very effective" with a jury (9R 1541, 1561).

Eler was aware of Miller's mental health records, as was Dr. Krop (9R 1509). Eler chose not to proffer the records themselves in evidence, as there was "good and bad" in them (9R 1510). Moreover, while the State could not present non-statutory aggravation, it could "call rebuttal witnesses," as he had experienced in previous cases (9R 1512). For example, evidence that Miller had been violent

during in-patient treatment would, in Eler's view, have been contrary to his argument that Miller was a "good candidate" for a prison sentence because he functioned well in a structured environment (9R 1514). While evidence that Miller had been a danger to others might have "fit in" with evidence of his mental health problems, Eler felt that it would have been more detrimental than positive to inform the jury that Miller was a danger to others even in a mental hospital (9R 1515). Using his "best professional judgment," he chose not to present the records themselves, but present mental mitigation through the testimony of Dr. Krop (9R 1513). Eler "wanted the jury to hear . . . good mental mitigation as opposed to bad mental mitigation, [and] that's what we did" (9R 1519).

In Eler's opinion, the only thing mitigating about any of the circumstances of the 1986 second-degree murder was that he had pled guilty to the crime (9R 1556). Asked about "the fact" that the sentencing judge in the prior case had "found mental problems that significantly reduced his culpability for that murder,"[3] Eler answered that "the problem with that is that [it's] . . . one of those two-edged swords . . . that shows perhaps a history of this

[3] Nowhere does Miller cite to any record support for this assertion of "fact."

mental problem, but it also shows that he had one bite of the apple" and after his release had murdered again (9R 1572-73). Eler did not want to dwell on the negative; better to let the State put the prior conviction in and then move "on to something good" (9R 1524). Eler did not think it would have been beneficial to present evidence detailing how Miller had shot and killed someone in a rooming house after an argument (9R 1553-54). Instead, Eler used the absence of evidence to diminish the impact of the prior murder by arguing that the State had *not* presented the facts of that crime, but merely a judgment and sentence (9R 1553).

Eler testified that whether to object to prosecutorial argument is "a thing I struggle with" (9R 1531). Eler might refrain from objecting, even if grounds exist to do so, if the argument is not significant or persuasive to the jury, or if a jury might deem it overkill by the prosecutor (9R 1533-34). The "last thing I want to convey to the jury is that I'm trying to hide something by objecting" (9R 1559). Eler did not believe the prosecutor impermissibly vouched for the credibility of witness Jimmy Hall by arguing that Hall was telling the truth (9R 1534-35). Other arguments might have been objectionable, but Eler

would often take the State's argument and use it against them in his argument (9R 1536).

Eler testified that the non-statutory mitigation in this case was "more than I usually get" (9R 1547). In his view, that Miller had "turned himself in to an unsolved crime," had a good (albeit somewhat dysfunctional) family and was genuinely remorseful were significant factors in the jury's close 7-5 recommendation in a case involving a brutal murder of a "helpless, sleeping victim," committed by one who had previously committed murder (9R 1540, 1547-48, 1553, 1561-62).

Medical records submitted in evidence by the defense indicate that Miller had been involuntarily committed to the North Carolina Division of Mental Health Services in September of **1983** "on a petition signed by his mother," stating that Miller had been "violent and destructive during the past twenty four hours" (4R 635). The final straw, apparently, came when Miller knocked the glass out of the front door and chased his brother with a knife while threatening to kill him (4R 609, 635). The records indicate that Miller had been given an administrative discharge from the Navy for "inability to adapt to military service" after he got "fed up" and "went awol" (4R 649).

Outpatient treatment was terminated when Miller failed to continue services (4R 655).

Records of Miller's **1986** evaluation after his arrest for murder indicate that Miller showed little remorse for his action. He felt that he was "just someone who drinks too much," and his "only present worries seem to be how much time he may do and whether he will be able to start another life for himself on his release from prison" (4R 648). An "Interval Intake" report dated July 16, 1986 indicates that Miller had been referred by his lawyer, and that he had been charged with first degree murder "after shooting a man in his rooming house with a rifle after they had what seems to be a minor disagreement" (4R 656). Miller's legal history included shoplifting, driving under the influence and "hit and run on a fence" (4R 657). He was diagnosed, inter alia, with "Intermittent Explosive Disorder" (4R 657). Because Miller reported no distress in excess of what was appropriate for his circumstances, no return appointment was scheduled (4R 657-58).

Records of Miller's in-patient treatment in **1996** indicate that Miller had spent four weeks in jail the previous year (3R 574). The records indicate that Miller "had some difficulty with group participation" (3R 574). He had "reacted strongly" to orders from staff (3R 573) and

had disrupted his counseling group (3R 497). He was allowed to continue after promising not to hurt himself or others, and to "notify the staff if he felt he was going to be out of control" (3R 573). A "progress note" dated 11-20-96 indicates that Miller would tell staff "if he was having frightening thoughts" (3R 543-44).

In a typed report dated 11/22/96, Dr. Arthur Satterfield, Ph.D., states that Miller had "given conflicting reports" about "possible childhood sexual abuse" (3R 538). Miller claimed that he had been verbally and physically abused by his parents and that his two sisters had raped him at age 10 (3r 538). Miller also claimed to have no knowledge of his sisters having been sexually abused (3R 538). These statements were in conflict "with information given to a prior facilitator," to whom Miller had reported seeing his sisters raped by a cousin but had denied ever being sexually abused himself (3R 538). Dr. Satterfield reported that Miller had been disrupting his counseling group (3R 538).

A "Social Work History" prepared by Richard Turner, MSW, on November 5, 1996, indicates that Miller had an "extensive legal history" and notes that he had spent the month of September in jail (3R 521). The report also noted

that Miller's reporting was "inconsistent," and therefore "somewhat unreliable" (3R 521).

SUMMARY OF THE ARGUMENT

Miller presents seven issues on appeal, not all of which were raised below:

I. Miller's claim that trial counsel Refik Eler failed to conduct a reasonable investigation into mitigating evidence was not raised below and therefore has not been preserved for appeal. Moreover, it is meritless. Other than a PET scan, which Miller has virtually ignored on appeal, he can point to no evidence that went undiscovered because Eler failed to investigate. Between his own efforts and the efforts of the assistant public defender originally appointed to represent Miller, extensive mitigation was developed. Eler had all known school, military, prison and mental health records. In addition, he talked to and was able to secure the testimony of all known available family members. Finally, Miller was evaluated by a competent mental health expert who testified at the penalty phase. Eler's judgments about which part of the available evidence to present, and how to present it, were reasonable. In addition, Miller has not demonstrated prejudice.

II. Miller's claim that trial counsel should have "mitigated" his prior second degree murder conviction is nothing more than after-the-fact second guessing of trial

counsel's reasonable strategic decisions. The evidence that Miller now suggests should have been put in was a "two-edged sword" that could have helped in some respects, but hurt in others. Eler reasonably chose not to dwell on the prior murder, but concentrate on mitigation, while using the absence of evidence about the prior murder to argue that it was not entitled to much weight.

III. Miller's claim that trial counsel was ineffective for failing to object to prosecutorial closing argument fails because he cannot demonstrate that the arguments cited were improper. Even if they were, Eler not unreasonably believed that sometimes it is more effective to let the prosecutor go on, and then respond to the State's argument in the defense closing.

IV, VI and VII. Miller's various complaints about Florida's capital sentencing procedures are procedurally barred and meritless.

V. Miller is not entitled to a new proportionality review.

ARGUMENT

ISSUE I

MILLER'S CLAIM THAT HIS TRIAL COUNSEL'S INVESTIGATION AND PRESENTION OF MITIGATING EVIDENCE WAS CONSTITUTIONALLY DEFICIENT HAS NOT BEEN PRESERVED FOR APPEAL AND IS MERITLESS

Miller argues here that trial counsel Refik Eler failed to conduct a reasonable investigation into available mitigation evidence in that he: failed to interview VA case manager Debra Lee; failed to discuss and consult with Dr. Krop before trial; failed to conduct an independent review of various medical records; failed to complete the work begun by original trial counsel Chipperfield, or even to review the material collected by Chipperfield; and "wholly" failed to present "any evidence whatsoever of [Miller's] severe mental illness and emotional disturbances." Initial Brief of Appellant at 43-44, 52.

The applicable principles of law relating to claims of ineffective assistance of counsel are well settled. This Court has summarized them:

> In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. See id. at

> 694. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689; see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; see also Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. See Strickland, 466 U.S. at 695; see also Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

Spencer v. State, 842 So.2d 52, 61 (Fla. 2003). See also, Nixon v. Florida, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004)(unless counsel completely failed to function as the client's advocate, a criminal defendant can prevail on a claim of ineffective assistance of counsel *only* by demonstrating *both* deficient attorney performance *and* actual prejudice). On appeal, the standard of review of claims of ineffective assistance of counsel is:

> The performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but . . . the trial court's factual findings are to be given deference. See

> Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.

Pace v. State, 854 So.2d 167, 172 (Fla. 2003).

Initially, it must be observed that Miller's appellate argument bears little resemblance to any claim in his motion for postconviction relief or to any argument made to the court below. He argues here that Eler failed to investigate and prepare for a penalty phase. The trial court's order denying relief does not specifically address the constitutional adequacy of Eler's investigation and preparation. This was not an oversight on the part of the trial court, however, as no claim of inadequate investigation and preparation was made below.

In Claim II of his postconviction motion, Miller made various accusations of ineffective assistance of counsel at both the guilt and penalty phases of trial and, as well, claimed prosecutorial suppression of evidence and presentation of false or misleading testimony. Most of these claims were abandoned by the time Miller presented his written closing argument below. The remaining claims

were basically that Eler's strategic decisions were unreasonable. The State is unable to discern any claim in Miller's motion for postconviction relief that Eler's investigation or preparation was inadequate. See Claim II, Amended Motion To Vacate Judgment of Conviction and Sentence and Memorandum of Law With Special Request for Leave to Amend (1R 173, 182-208). Nor did Miller argue that Eler's investigation and preparation were inadequate in his post-hearing written closing argument, except with respect to an alleged failure to "develop and present" PET scan evidence.[4] Defendant's Written Closing Argument Regarding Evidentiary Hearing (5R 799-838, 801).

Thus, Miller is arguing here a claim that was not raised below and was not ruled upon by the trial court. This, he may not do:

> A claim of ineffectiveness of trial counsel must be raised in circuit court, not this Court, for—above all—it is this Court's job to review a circuit court's ruling on a rule 3.850 claim, not to decide the merits of that claim. The record shows that the present claim was not raised in Thomas's original rule 3.850 motion or amendments thereto. Thus, there is no ruling on this issue before this Court to review.

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[4] On appeal, Miller does not argue the PET scan in connection with his claim of ineffective assistance of counsel, but only in connection with his claim that a death sentence is not appropriate (Issue V). The State will address the PET scan in its response to that issue.

Thomas v. State, 838 So.2d 535, 539 (Fla. 2003) (fn. omitted).

Nevertheless, the record refutes any claim that Eler failed to investigate this case or to prepare for the penalty phase. His task was of course made easier by the extensive groundwork laid by assistant public defender Chipperfield, who had the case virtually "ready to try" (9R 1490). Eler testified that he finished what Chipperfield had started (9R 1491).

Miller argues that Miller only spoke to Dr. Krop for a few minutes the day before trial and never talked to him about mitigation. Initial Brief of Appellant at 30, 45. Dr. Krop testified that his initial communication had been with original counsel Alan Chipperfield. His time records showed that he had talked with an attorney just before trial and Dr. Krop testified that, given the time frame, this attorney must have been Eler. Dr. Krop had also talked to an attorney after he had interviewed Miller's family and administered neuropsychological testing, but Dr. Krop did not remember which attorney this had been (10R 1698-1700). This testimony hardly supports a claim that Dr. Krop did not talk to Eler until just before trial. Eler, on the other hand, had a specific recollection of having discussed the case with Dr. Krop, and recalled that

Dr. Krop had emphasized Miller's frontal lobe deficit and alcohol abuse (9R 1499).

But regardless of the extent of Eler's pre-trial communications with Dr. Krop, it is clear that Eler had access to all of the various record Dr. Krop had relied on in making his diagnosis, as well as Dr. Krop's written diagnosis. See e.g., Response to State's Request for Production (3R 421-22) (producing copies of these items *from Eler's file folders*: mental evaluation of 12/97; letter from Chipperfield to Dr. Krop; Miller's school records; Miller's Navy service record; Forsyth-Stokes mental health records; Dix medical records; and Miller's North Carolina DOC records). It is also clear that Eler had discussed the case with Miller and with Miller's family. (Miller does not even argue to the contrary, nor has he presented testimony to the contrary from Miller or any members of his family — none of whom testified at the evidentiary hearing.)

Miller vigorously contends that Eler unreasonably failed to contact and present the testimony of Debra Lee. Eler probably did not personally contact Lee; she testified that he did not, and Eler was not asked one way or the other. However, Chipperfield had already contacted her (she admitted as much), and Eler was certainly aware of her

role and of the 1996 VA in-patient treatment that Miller had received. As Miller's own response to the State's motion to disclose demonstrates, the VA records were in Eler's file. Thus, this is not a case in which counsel lacked information; it is instead a case in which a fully informed attorney made a strategic decision not to call Lee as a witness. While counsel is obligated to conduct a reasonable investigation into mitigation, counsel is not required to investigate all possible leads until they wither away or bear fruit. Gates v. Zant, 863 F.2d 1492 (11th Cir. 1989) ("Counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers."); see also Wiggins v. Smith, 539 U.S. 510 (2003) ("Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing"; neither does it "require defense counsel to present mitigating evidence at sentencing in every case."). Counsel is required only to conduct an investigation that is reasonable under the circumstances. Ibid. Counsel was aware of the 1996 VA treatment records and of Lee's notes. However, he chose not to enter the records themselves in evidence (as will be discussed below), and Lee was only a social worker, not a

mental health expert. Nor did she counsel, treat, or test Miller. Nor did she have any contact with Miller during his in-patient treatment.[5] Even some of her testimony might have had some relevance, a reasonable attorney could have decided not to present it, especially given her testimony that Miller was moody and uncooperative, and, instead of pursuing out-patient treatment at the conclusion of his in-patient treatment, he left town.

Miller argues that Eler should have introduced his mental health records in evidence. Whether to introduce such records is of course a strategic decision by trial counsel that is entitled to deference. Eler testified that he preferred to present the Miller's mental health issues through Dr. Krop, who had thoroughly reviewed all the records and was fully aware of Miller's history. Eler chose not to present the records themselves because they contained "bad" as well as "good" (9R 1510). Eler was concerned that the introduction of these records would have opened the door to damaging state cross-examination and possibly rebuttal witnesses (9R 1512).

Miller argues that the record fails to support one of Eler's stated reasons for not introducing the records,

[5] Significantly, Miller has not presented the testimony from anyone who did actually evaluate, treat or counsel Miller during his 1996 in-patient treatment.

which was that they showed that Miller had got into some kind of physical altercation with another patient. Assuming Eler's memory was faulty in this regard, however (and the State is unaware of any specific, direct record support for such an altercation, although some of the record materials are not legible to undersigned counsel), the records do corroborate Eler's judgment that "there was good and bad in them" (9R 1510). The 1983 records, for example, show that Miller had tried to kill his own brother with a knife during a "violent and destructive" twenty-four hour period. The 1986 records contain a report that tends to refute Miller's claim that he was remorseful after his first murder (4R 468). The 1986 diagnosis of "intermittent explosive disorder" is something the State probably would not have minded the jury knowing. The 1996 records indicate that Miller had had problems getting along with others, had "frightening thoughts," and was sometimes "out of control." They indicate that Miller had an extensive criminal history, and had spent a month in jail earlier that year. The records also show that Miller told inconsistent stories about his childhood and about possible sexual abuse. Finally the 1983 records, the 1986 records and the 1996 records all show that Miller rejected treatment for his problems.

Clearly, Eler's judgment that these records were a two-edged sword was not unreasonable. Henry v. State, 862 So.2d 679 (Fla. 2003) (finding reasonable trial counsel's decision not to put on mental mitigation that was a "two-edged sword").

Below, Miller argued that trial counsel have presented expert testimony about the "psychological impact" of Miller's allegedly abusive childhood and dysfunctional family, rather than simply presenting the testimony of family members (5R 804). The State is unable to discern such an argument on appeal; the State would note, however, that failed to present any testimony from Dr. Krop on the "psychological impact" of Miller's childhood or his allegedly "dysfunctional" family. In fact, Dr. Krop noted that "dysfunctional" was an "arbitrary" term, not a "diagnostic" term (10R 1705). Further, Dr. Krop did not seem especially concerned by the "documented history of physical abuse" by the father, and he did not suggest how Miller's perception of his childhood contributed in any way to his overall mental health or to the murder in this case (19R 1075-76). Significantly, Dr. Krop made no mention of any sexual abuse, and the only "evidence" of such Miller can point to are Miller's own self-serving, inconsistent,

uncorroborated statements to counselors during his 1996 evaluation.

Eler's judgment that Miller's family background would best be presented through the emotional and sympathetic testimony of his own family members which, he felt, would "humanize" Miller is not refuted by anything in the trial record or anything Miller presented at the evidentiary hearing. Cf. Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994) (finding counsel not ineffective for choosing a mitigation strategy of "humanization" and not calling a mental health expert).

Finally, Miller's argument that "Eler completely failed to present any evidence whatsoever of the severe mental illness and emotional disturbance that Mr. Miller suffered from" (Initial Brief of Appellant at 52) is complete nonsense. First of all, Miller is not severely mentally ill; Dr. Krop doesn't think he is (10R 1721A-22), and no one else has ever thought so either. Secondly, Eler called Dr. Krop at the penalty phase of the trial to testify about the mental health issues that Miller does have. Neither Dr. Krop nor anyone else now suggests that his trial diagnosis was wrong or inadequate. His diagnosis then is the same as his diagnosis now. In fact, the results of the PET scan that Miller made such a big deal

about below (and virtually ignores on appeal) were, according to both Dr. Wu and Dr. Krop, entirely consistent with Dr. Krop's original diagnosis in this case.[6]

Despite Miller's present argument that trial counsel failed to investigate and prepare (an argument he presents for the first time on appeal), it is clear that counsel had obtained a wealth of material, including school, military, prison and mental health records, a pre-trial evaluation by a qualified mental health expert, and the cooperation of all available family members. Other than the PET scan, Miller has identified no new evidence that counsel was unaware of at the time of trial. This is not a case in which trial counsel "never attempted to meaningfully investigate mitigation," Rose v. State, 675 So.2d 567, 572 (Fla. 1996), or where counsel's investigation was "woefully inadequate." Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995). Here, counsel was aware of Miller's childhood, his substance abuse problems, and his mental health issues.

[6] Miller argued below that trial counsel was ineffective for failing to obtain a PET scan. Dr. Krop, however, had not seen the need for one at the time. It should be noted that Dr. Krop's testimony of frontal lobe damage was unrefuted at the original penalty phase. Had Eler presented the testimony of Dr. Wu, the State could have countered with the testimony of Dr. Holder that Miller's brain appeared to be completely normal and then argued that Dr. Krop's diagnosis of frontal lobe disorder was suspect because it could not be corroborated by objective testing.

Trial counsel made strategic decisions about what parts of this wealth of material to present to the jury. Some he presented; some he did not. His decisions were the product of informed judgment, after alternatives were considered and rejected. Strategic decisions by an experienced attorney who has conducted a reasonable investigation are virtually unassailable. Oats v. Singletary, 141 F.3d 1018, 1023 (11th Cir. 1998); Maharaj v. State, 778 So.2d 944, 951 (Fla. 2000).

Miller's various factual premises are either wholly unsupported by the record or, at least, refuted by substantial and competent evidence supporting the trial court's rejection of Miller's claim of ineffective assistance of counsel. The record, interpreted in the light most favorable to the judgment below, sustains a conclusion that Eler's investigation and preparation was at the very least constitutionally adequate, if not exemplary. The strategic decisions he made based upon that investigation and upon his extensive experience cannot reasonably be faulted. Even if they could be, Miller has utterly failed to demonstrate prejudice.

ISSUE II

THE TRIAL COURT CORRECTLY REJECTED MILLER'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE WITH REGARD TO MILLER'S PRIOR VIOLENT FELONY CONVICTION

Miller argues here that trial counsel was ineffective for failing to "mitigate" his prior murder. What counsel should have done, he argues, was to present the facts of the prior murder and the "mental health issues" that Miller was experiencing at the time, as shown by the concurrent and prior mental health records and the North Carolina judge's sentencing order allegedly finding mental problems reducing his culpability for the 1986 murder.

Miller has presented nothing that trial counsel did not know at the time of the trial. Miller is merely engaging in the kind of after-the-fact second guessing of trial counsel's strategy that Strickland warns against. 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.").

Eler did not want to dwell on the prior murder conviction; better in his view to let the State put it in and then move on to mitigation. This was reasonable strategy. As Strickland admonishes us, there are

"countless ways" to try a case. Other attorneys might have pursued a different strategy, but Eler's strategy was not constitutionally unreasonable.

Nor can Miller demonstrate prejudice. He argues that the introduction of his mental health records would have mitigated his prior murder by showing that he labored under mental disabilities at the time he committed it. However, the records also would have informed the jury that, three years before committing this murder, Miller had tried to kill his own brother. The records would also have shown that Miller had not been especially remorseful, and had spurned the offer of continued treatment for his problems. Finally, the records indicated that Miller had committed the murder in retaliation for some minor argument, after leaving the scene, obtaining a weapon, and then returning to kill. While a judge's finding that he had mental problems at the time of the prior murder might have been supported a defense argument that the murder was not so bad, proof of the actual circumstances of the killing, coupled with medical records of Miller's previous violent assault on his own brother and reports that Miller was not genuinely remorseful afterward, might have persuaded the jury that the Miller's claim of remorse in this case was not genuine, that the prior killing had really been a first

degree murder and that the judge had simply been too lenient. In short, the evidence that Miller now claims should have been presented was, as Eler recognized, a "two-edged sword" (9R 1572-73).

Eler presented expert and family testimony to support mitigation of alcohol and substance abuse, family background, and brain damage. In a case in which a defendant with a prior conviction for murder had brutally murdered a sleeping homeless person and brutally assaulted (and seriously injured) a second sleeping homeless person, just a few years after having been released from prison on the first murder, Eler obtained a 7-5 jury recommendation. Miller cannot demonstrate any reasonable probability that he would have been better off by presenting additional evidence of dubious mitigating value.

The trial court properly rejected this claim of ineffectiveness.

ISSUE III

THE TRIAL COURT CORRECTLY DENIED MILLER'S CLAIM THAT TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO PROSECUTORIAL ARGUMENT

Miller contends that Eler was ineffective for failing to object to three arguments made by the prosecutor during closing arguments. Miller's brief does not identify the

allegedly improper arguments by citation to the original trial record. However, he contends the prosecutor: argued that Miller would have committed a second murder but for the intervention of Jimmy Hall; improperly vouched for Hall's credibility; and improperly invoked sympathy.

Initially, the State would note that Miller is foreclosed from raising an issue of improper prosecutorial argument for the first time on postconviction. Spencer v. State, supra, 842 So.2d at 60-61. Any issue of prosecutorial argument at trial may be addressed only in the context of ineffective assistance of counsel; Miller bore the burden to prove that trial counsel's performance was both deficient and prejudicial.

A. Miller first argues that the prosecutor argued non-statutory aggravating circumstances by suggesting that Miller would have committed a second murder but for the intervention of Jimmy Hall. Although, as noted, Miller does not cite to the trial record or specifically identify the allegedly improper argument, in his motion for postconviction relief he cites to Volume 10, pp. 698, 703, 704, 710 and 716-17 of the original trial record (2R 209-10). The significant thing about these citations is that they are *all* to the guilt phase of the trial (the *penalty* phase arguments are in Volume 11). Thus, although it

cannot be discerned from Miller's appellate brief, the arguments he is complaining about are all *guilt-phase* arguments. The prosecutor obviously was not arguing non-statutory aggravation or any other penalty phase issue. Instead, the prosecutor was addressing the guilt-phase contested issue of Miller's state of mind, as it related to premeditation, which Miller vigorously contested at trial and on appeal. Because his arguments were reasonable inferences from the evidence and were relevant to a disputed guilt-phase issue, they were not objectionable.

Significantly, on appeal the State argued these same circumstances of the crime to argue that this was a first degree murder; noting that Miller had argued on appeal that "this was a killing caused by an accidental extreme use of force due to an impulsive act," the State argued:

> Even Miller . . . admitted intentionally striking the victim; what he contended was that he only meant to knock the victim out and not to kill him. The jury, however, was plainly entitled to reject Miller's self-serving statements and testimony as unworthy of belief in light of all the circumstances of the case. Miller himself showed police how he had administered "full-blown" swings, raising the pipe over his head and swinging down to the victim's head (8R 536-37). Jimmie Hall testified that not only did Miller have both hands on the pipe and was swinging it "with full force" (7R 316), but the pipe was so dripping with the victims' blood that, with every swing, blood was "slung up on the wall and onto the ceiling" (7R 318-19). The medical examiner testified that

> Miller hit Albert Floyd in the head at least three times. And the damage he did--crushing the victim's skull in three places, bursting his eyeball, and fracturing four of his teeth--is totally inconsistent with any claim that Miller only intended to knock out, not kill, the victim. *And he did not attack only Floyd; when Linda Fullwood woke up and said something, Miller attacked her too. And even though, unlike Floyd, she was awake and able to throw her hands up to defend herself, and even though Miller was interrupted by the appearance of Jimmie Hall during his attack on Fullwood, Miller still severely injured her; she suffered a concussion, two broken fingers, several fractured ribs, and injuries to her arm severe enough to have required multiple surgeries. These simply are not the kinds of injuries caused by one who intended merely to knock someone out and "accidentally" used just a bit too much force.* Because competent evidence existed from which reasonable jurors could infer premeditation to the exclusion of all other inferences, the trial court did not err in allowing the state's premeditation theory of first degree murder to go to the jury.

Answer Brief of Appellee, Case No. 93,792, pp. 35-37 (internal citations omitted).

As this Court noted in its opinion on direct appeal, Fullwood suffered "a concussion, one broken arm, two broken fingers and several fractured ribs." 770 So.2d at 1146-47 (fn. 2). Given the serious injuries that Miller inflicted to Linda Fullwood before being interrupted by Jimmy Hall, and the other evidence in the case, the prosecutor's argument was a reasonable inference from the evidence, and Miller's state of mind at a time contemporaneously to the

attack on Albert Floyd was relevant to both premeditation and felony murder. The argument was not improper, and Eler did not perform deficiently by failing to object to it. Further, Miller does not suggest that any omission of trial counsel at the guilt phase was prejudicial, and, given the strength of the evidence, it could not have been.

B. Miller next complains that the prosecutor improperly vouched for the credibility of Jimmy Hall. He contends that a prosecutor may not express an opinion or even *imply* that a witness is telling the truth.

An attorney, including a prosecutor, should not argue facts not in evidence or express a personal opinion about the credibility of a witness. However, an attorney clearly is entitled argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence. Craig v. State, 510 So. 2d 857, 865 (Fla. 1987) ("When counsel refers to a witness or a defendant as being a 'liar,' and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the

prosecutor was merely submitting his view of the evidence to them for consideration."). Viewing the argument in context (10TR 716-18), it is clear that the prosecutor did not express his personal opinion or "vouch" for Hall. He simply argued based on the evidence that Hall's testimony was credible despite his felony convictions. Juries not only may, but should, evaluate witness credibility based on the evidence presented to them, and credibility arguments based upon the evidence and reasonable inferences from the evidence are not improper. Gorby v. State, 630 So.2d 544, 547 (Fla. 1993) ("It is improper to bolster a witness' testimony by vouching for his or her credibility. [Cit.] No improper bolstering occurred here, however. Rather, the prosecutor's comments simply drew the jury's attention to evidence of the expert's experience and qualifications after defense counsel sought to cast doubt on her testimony in cross-examination.").[7]

[7] The cases cited by Miller do not say what he claims they say. For just one example, he claims that Williams v. State, 747 So.2d 474, 475 (Fla. 5th DCA 1999) says it is reversible error for a prosecutor to argue that a witness is telling the truth. Initial Brief of Appellant at 73. What Williams really says is: "A prosecutor may argue any reasons, if supported by the evidence, why a given witness might or might not be biased in a case, but the prosecutor may not properly argue that a police officer must be believed simply because he is a police officer."

Eler's belief that the argument at issue was not an example of improper bolstering (9R 1533A-35) was not unreasonable, and the trial court correctly rejected Miller's claim that Eler was ineffective for failing to object to this argument.[8] In addition, Miller has failed to demonstrate prejudice.

C. Finally, Miller contends that trial counsel was ineffective for failing to object to prosecutorial argument that Miller had not cared that the victim had a family and friends "who loved and cared for him," but wanted the jury to hear that Miller had people who loved and cared for him (7TR 946, 966). The State would note that Section 921.141(7), Fla. Stat. expressly allows the State to present and "argue" victim impact evidence. Moreover, our United State Supreme Court has explicitly recognized the State's "legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as a murdered should be considered an individual, so too the victim is an individual whose death represents a unique loss to society

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[8] Even if the argument had been objectionable, Eler reasonably could have decided not to object, but to respond to the State's argument in his own closing, as he did when he pointed out that Hall had testified only under threat of contempt, in contrast to Miller who had turned himself in and then testified voluntarily even though he could not have been compelled to do so (10TR 737, 744-45).

and in particular to his family." Payne v. Tennessee, 501 U.S. 808, 825 (1991) (internal citations omitted). "[T]urning the victim into a faceless stranger at the penalty phase of a capital trial . . . deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." Ibid (internal quotations and citations omitted).

The State would contend that the prosecutorial argument at issue here was not objectionable at all. Even if it were, however, trial counsel's decision to respond in his own closing rather than objecting cannot be deemed deficient attorney performance. Thomas v. State, 838 So.2d 535, 542 (fn. 8) (Fla. 2003). The trial court properly rejected this claim of ineffectiveness.

ISSUE IV

THE TRIAL COURT CORRECTLY FOUND MILLER'S JURY-INSTRUCTION CLAIMS PROCEDURALLY BARRED. THEY ARE ALSO MERITLESS

Miller contends here that Florida's capital sentencing procedures are unconstitutional because jury instructions improperly shift the burden of proof, denigrate the role of the jury, and fail adequately to define mitigation. These obviously are claims that could and should have been raised at trial and on direct appeal. They may not be raised for

the first time on postconviction. E.g., Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999). Thus, they are procedurally barred.

The State would note, in addition, that Miller's claim that the instructions given failed adequately to define mitigation was *not* raised below. Thus, it is additionally barred, as it was neither presented to, nor ruled upon, by the trial court. Thomas v. State, supra, 838 So.2d at 539.

Miller does not even argue that counsel was ineffective for failing to object to these instructions, but the State would note that trial counsel cannot be deemed ineffective for failing to object to a standard jury instruction which had not been invalidated at the time of the trial (or since). Thompson v. State, 759 So.2d 650, 665 (Fla. 2000).

Finally, the claims raised here have been rejected repeatedly by this Court. See, e.g., Burns v. State, 699 So.2d 646, 654 (Fla. 1997) (rejecting claim that standard jury instructions denigrated role of jury); Bowles v. State, 804 So.2d 1173, 1177 (Fla. 2001) (rejecting claim that standard instructions failed to define mitigation adequately); Demps v. Dugger, 714 So.2d 365 (Fla. 1998) (rejecting claim that Florida's standard penalty-phase

instructions improperly shift the burden of proof to the defendant).

The trial court correctly rejected the two claims that Miller presented below (5R 867-68). The remaining claim has not been preserved for appeal, and is both procedurally barred and meritless.

ISSUE V

MILLER'S CLAIM THAT DEATH IS NOT AN APPROPRIATE SENTENCE IN THIS CASE IS PROCEDURALLY BARRED AND MERITLESS

Miller contends, as he did below, that he is "innocent" of the death penalty. His argument, however, bears no resemblance to that raised below. In Claim V of his motion for postconviction relief, Mungin asserted that he was innocent of the death penalty because the sentencing court erred in instructing the jury on, and finding, the prior violent felony aggravator and the pecuniary-gain aggravator (2R 219-21). The trial court summarily denied this claim, noting that Miller's 1986 conviction for second degree murder had not been set aside and remained a valid conviction, that this Court had upheld the use of contemporaneously-committed felonies (here, aggravated battery of Linda Fullwood) to support a finding of the prior violent felony aggravator, and that the pecuniary gain aggravator had been properly found (2R 865-66).

Miller does not complain about this finding on appeal; instead, he argues that "substantial" mitigation presented at the evidentiary hearing, including evidence of Miller's mental problems at the time of the 1986 murder, his abusive and dysfunctional family and the results of the PET scan, compel reconsideration of the proportionality of his sentence. Much of this has been addressed previously. There was in fact no "substantial" new mitigation. That Miller had some mental issues was known to the jury and to the trial court. His mental issues are the same now. Dr. Krop's opinion remains the same. No reliable "new" family background evidence has emerged, except that we now know of an additional act of violence *by Miller* against a member of his own family. The results of the PET scan offer nothing new; indeed, to the extent that Dr. Holder's testimony is credited, Dr. Krop's finding of frontal lobe deficit is, if anything, weakened.

This Court addressed the issue of proportionality on direct appeal. Its ruling is the law of the case. Miller is not entitled to relitigate that issue merely because he would have tried the case differently. Miller has shown no "exceptional circumstances" or "manifest injustice" as would justify reconsideration of an issue already decided by this Court on his direct appeal. State

v. Owen, 696 So. 2d 715, 720 (Fla. 1997) ("this Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice"). Moreover, having failed to show deficient attorney performance or prejudice on the part of trial counsel, Miller cannot demonstrate that his death sentence is disproportionate. The same reasons that support trial counsel's judgment about what to present and what to hold back, and that support the absence of any prejudice from trial counsel's decisions, also support the rejection of any reconsideration of Miller's proportionality claim.

ISSUE VI

MILLER'S "RING" CLAIM IS PROCEDURALLY BARRED AND MERITLESS

The State will not belabor this claim. Miller does not even argue that trial counsel was ineffective for failing to contest the role of judge versus jury in Florida's capital sentencing procedures. He merely presents a direct merits argument. Because no such claim was raised at trial or on direct appeal, it is procedurally barred on postconviction. Furthermore, his claim is meritless. Not only does the prior violent felony aggravator take this case outside any possible ambit of

Ring v. Arizona, 536 U.S. 584 (2002), but his Court has now expressly held that Ring is not retroactive. Johnson v. State, 30 Fla.L.Weekly S297 (Fla. April 28, 2005) ("we now hold that Ring does not apply retroactively in Florida").

ISSUE VII

MILLER'S "AUTOMATIC AGGRAVATOR" CLAIM WAS PROPERLY REJECTED AS PROCEDURALLY BARRED AN MERITLESS; MILLER'S OTHER COMPLAINTS ABOUT FLORIDA'S CAPITAL SENTENCING PROCEDURES WERE NOT RAISED BELOW AND ARE NOT PRESERVED FOR APPEAL

Miller contended in Claim XIV of his motion for postconviction relief that the committed-during-a-robbery aggravator is unconstitutional because it is an "automatic" aggravator (2R 237-38). The trial court correctly found this claim to be procedurally barred for failure to raise it at trial and on direct appeal, and also meritless. See, e.g., Parker v. State, 873 So.2d 270, 286 (fn. 12) (Fla. 2004); Hudson v. State, 708 So.2d 256, 262 (Fla. 1998).

Miller now makes additional claims of defects in Florida's capital sentencing procedures that he did not make below, either in Ground XIV (which he cites to in his brief, Initial Brief of Appellant at 95) or, insofar as the State can determine, anywhere else in his of his motion for postconviction relief.[9] Thus, his additional claims have

[9] Ground XI alleges that Florida's capital sentencing "scheme" is unconstitutional on its face, but only on the

not been preserved for appeal. They are also procedurally barred for failure to raise them at trial and on direct appeal. Finally, they are meritless. This Court has repeatedly rejected claims that Florida's capital sentencing procedures are constitutional. E.g., Fotopoulos v. State, 608 So.2d 784 (Fla. 1992).

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert A.

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ground that "it fails to adequately narrow the class of eligible people and fails to provide sufficient guidance to the sentencer" (2R 232).

Norgard, Attorney at Law, P.O. Box 811, Bartow, Florida 33831, this 20th day of June, 2005.

_____
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