IN THE SUPREME COURT OF FLORIDA

DAVID MILLER,

Appellant,

vs. APPEAL NO. SC04-892

STATE OF FLORIDA,

Appellee,
_____/

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

INITIAL BRIEF OF APPELLANT

ROBERT A. NORGARD
ATTORNEY AT LAW
FLORIDA BAR NUMBER 322059

P.O. BOX 811
BARTOW, FL 33831
(863)533-8556

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The instant appeal arises from the denial of the Appellant's Motion for Post-Conviction Relief by the trial court. This is a capital proceeding. The record on appeal consists of ten volumes. Volumes I-VI contain the documents filed with the clerk and will be referenced in the Initial Brief by volume number, "R", and the appropriate page number. The remaining volumes contain the transcripts, which will be referenced in the Initial Brief by volume number, "T", and the appropriate page number.

The Appellant, David Miller, will be referred to as Mr. Miller. The Appellee, the State of Florida, will be referred to as the State.

STATEMENT OF THE CASE

David Miller was indicted by the Grand Jury, Duval County, Florida, for the first-degree murder of Albert Floyd and the aggravated battery of Linda Fullwood. (I,R174) Mr. Miller was convicted by a jury of first-degree murder on June 26, 1998 and the same jury returned a death recommendation by a vote of 7-5. (I,R174) The trial court sentenced Mr. Miller to death on July 24, 1998. (I,R174;II,R249-252)

Mr. Miller was also sentenced to 25 years incarceration for aggravated battery as a habitual violent felony offender. (II,R253-256)

Mr. Miller challenged his conviction and sentence in this Court. Both conviction and sentence were affirmed on direct appeal. Miller v. State, 770 So. 2d 1144 (Fla. 2000), rehearing denied, (October 24, 2000).

Mr. Miller, through counsel, filed a "shell" Motion for Post-Conviction Relief on September 27, 2001, in order to toll the time periods for federal habeas corpus relief. (I,R52-81) The State moved for summary denial on October 26, 2001. (I,R93-99) On January 23, 2002, the trial court granted the State's motion for summary denial and granted an additional 30 days for the filing of an Amended Motion. (I,R156-157) The parties stipulated to an order holding the Amended Motion would relate back to the October 2, 2001 filing date.

The Amended Motion to Vacate Judgment of Conviction and Sentence was filed on March 11, 2002. (I,R173-200;II,R201-267) The Amended Motion raised sixteen claims for relief, summarized as follows:

Claim I: Unconstitutionality of public records exemption and accompanying prejudice arising from deadline for the filing of the motion prior to receipt of all

public records. (I,R175-181)

Claim II: Ineffective assistance of trial counsel in failing to investigate and utilize available evidence; to challenge state's case; to properly object; to request jury instructions; and to present mitigation where the mental state of Mr. Miller was at issue; and to properly present a voluntary intoxication defense. (I,R181-200;II,R201-209)

Claim III: Ineffective assistance of trial counsel in failing to object to improper and inflamatory closing arguments of the prosecutor in both guilty and penalty phase. (II,R209-215A)

Claim IV: Ineffective assistance of counsel in failing to obtain an adequate mental health evaluation and failing to provide necessary materials to a mental health consultant in order to ensure that a proper evaluation was conducted.

Claim V: Unconstitutionality of the death penalty due to the use of unconstitutional aggravating factors and accompanying jury instructions including prior violent felony and pecuniary gain. (II,R219-221)

Claim VI: Unconstitutionality of the death sentence due to repeated instructions which denigrate the significance of the jury sentencing recommendation. (II,R221-224)

Claim VII: Unconstitutional shifting of the burden of proof to the defendant as to appropriateness of the death penalty and as to the demonstration of mitigating factors and aggravating circumstances. (II,R224-226)

Claim VIII: Unconstitutional limitations on counsel conducting juror interviews. (II,R226-229)

Claim IX: Execution by lethal injection/electrocution

is cruel and unusual punishment. (II,R229-231)

Claim X: Execution of the incompetent is cruel and unusual. (II,R231)

Claim XI: Unconstitutionality of the death penalty due to arbitrary and capricious imposition (II,R232)

Claim XII: Denial of adequate direct appellate review due to deficient record on appeal. (II,R232-235)

Claim XIII: Ineffective assistance of counsel in failing to adequately investigate and present mitigating factors present in the prior convictions of Mr. Miller. (II,R235-237)

Claim XIV: Unconstitutional use of the contemporaneous felony convictions to satisfy the prior violent felony aggravating circumstance. (II,R237-238)

Claim XV: Unconstitutionality of non-unanimous sentencing recommendation for death. (II,R238-244)

The State filed their response on May 9, 2002. (II,R286-307) The State asserted that no relief was warranted and no hearing was necessary on Claims I and VXIV. (II,R290;298;299;300;302-306) The State agreed that the hearing was necessary on Claims Ii; III and IV. (II,R294;296)

The trial court conducted a *Huff* hearing on September 17, 2002. (X,T1287) Defense counsel then supplemented

claims 6, 7, 9, 14, 15 and 16 with *Ring* claims. (X,T1291-1292) The State continued to oppose an evidentiary hearing on any claims other than claims 2, 3 and 4. (X,T1294) Defense counsel requested an evidentiary hearing on any claim containing an element of ineffective assistance of counsel. (X,T1294-1300) Defense counsel agreed that no evidentiary hearing was necessary on claims 8, 9, 10, 11, 12, 13 and 14. (X,T1303-1317)

The trial court issued an Order on October 2, 2002, granting an evidentiary hearing on Claims 2-4, 8, and 13. (II,R397) The trial court ruled that no hearing was necessary on Claims 14, 15 and 16. (II,R397)

On June 20, 2003, defense counsel Heidi Brewer advised the trial court that Mr. Miller would need to have new counsel appointed to him due to the closing of the Office of Capital Collateral Representatives as the result of legislative action. (IC,R712-717) The trial court then reappointed Ms. Brewer as registry counsel. (IC,R727-728) Co-Counsel, Robert A. Norgard, was appointed on October 6, 2003. (IV,R759)

An evidentiary hearing was conducted before the Honorable Haldane Taylor, Circuit Judge, on November 4-5, 2003. (IX;X) Written closing arguments were submitted by

both the State and defense counsel. (IV,R775-798;V,R799-838) Final oral argument to the court by each of the parties was held on February 9, 2004. (X,T1776-1828)

The trial court entered an order denying the Amended Motion for Post-Conviction Relief on April 23, 2004. (V,R841-1000;VI,R1001-1177).

A timely Notice of Appeal was filed on May 7, 2004. (VI,R1178-1179)

STATEMENT OF THE FACTS

The following summarizes the testimony presented at the evidentiary hearing on November 4-5, 2004:

Refik Eler represented Mr. Miller at his trial. (IX,T1482) Mr. Eler's ultimate goal in this case was to get a life recommendation from the jury. (IX,T1559) He didn't feel there was much of a guilt phase. (IX,T1559)

Mr. Eler began to practice law in 1986 with the State Attorney's Office. (IX,T1483) Mr. Eler stayed in county court for six to nine months, then moved into the Special Prosecution Division specializing in economic crime. (IT,1484) Mr. Eler did not prosecute any first-degree murder cases to trial. He served as second chair on one first-degree case, basically completing work assigned to

him by the lead attorney. (T,R1483) That case did not go to trial. (IX,T1484)

Mr. Eler left the State Attorney's Office in 1989 to enter private practice, where he continues at the present time. (IX,T1484) Since 1989 Mr. Eler has tried or co-tried six or seven cases where the death penalty was sought. (IX,T1485) Mr. Eler served as lead counsel in penalty phase in roughly half of those cases. (IX,T1487)

Mr. Eler attended the public defender sponsored "Life Over Death" training seminars. (IX,T1487) From 1989 through trial in this case Mr. Eler attended more than six training seminars. (IX-T1488) Mr. Eler had a copy of the training manual Defending Capital Cases in Florida. (IX,T1489) He had read the manual. (IX,T1489)

Mr. Eler believed that a defense lawyer was responsible for investigating mitigation and narrowing it into a fashion that jurors could understand. (IX,T1489-90) Collecting records and talking to family members were the investigative means Mr. Eler generally used to gather mitigation information. (IX,T1490)

In Mr. Miller's case the Public Defender had done a substantial amount of the mitigation investigation, so Mr. Eler was "pretty fortunate". (IX,T1490)

When investigating mental health issues Mr. Eler seeks a confidential expert to determine competency, but pretty much defers to the expert for any follow-up. (IX,T1491) Dr. Harry Krop was already working on this case when Mr. Eler took over because he had been retained by the Public Defender. (IX,T1491) Mr. Eler believed that Dr. Krop was a leading expert in the areas of psychology and neuropsychology. (IC,T1492) Mr. Eler acknowledged that the decision about what evidence to present to a jury or the court is a decision that the attorney must make. (IX,T1499)

Mr. Eler presented the testimony of Dr. Krop during the penalty phase on two areas: (1) to establish a non-statutory mitigating factor of frontal lobe deficit and (2) to establish Mr. Miller's ability to adjust to long-term incarceration. (IX,T1493) Some evidence of drug and alcohol usage was testified to by Dr. Krop as well. (IX,T1493)

Mr. Eler acknowledged that using a mental health professional to develop mitigation is extremely important. (IX,T1497) A mental health professional can offer testimony as to the psychological impact that dysfunctional familial acts have upon an individual. (IX,T1497) This opinion would be outside the scope of what the family members would be able to testify to. (IX,T1495)

Only three family members, Dr. Krop, and Mr. Miller testified at penalty phase. (IX,T1495) The family members testified briefly during penalty phase about the dysfunctional family situation, with very limited testimony of child hood abuse and parental alcoholism. (IX,T1495) Dr. Krop did not testify about any psychological impact these events had on Mr. Miller.

Mr. Eler believed that Dr. Krop interviewed Mr. Miller's family members. (IX,T1496) Dr. Krop had asked permission from the public defender to do this. (IX,T1496) Mr. Eler believed that Dr. Krop had the benefit of background materials on Mr. Miller and had talked with the family and Mr. Miller. (IX,T1498) Mr. Eler felt that Dr. Krop would have been able to offer an expert opinion as to the psychological impact that the abusive childhood and dysfunctional family had on Mr. Miller. (IX,T1499) Dr. Krop did not testify as to the psychological impact the events of childhood had on Mr. Miller.

Mr. Eler acknowledged that the sentencing order of the trial court referenced the death of one of Mr. Miller's siblings and the death of his cousin. However, the order stated that an absence of testimony in either the guilt or penalty phase as to the emotional trauma suffered by Mr.

Miller as a result of the deaths led to a determination that this mitigation evidence was entitled to little weight by the trial judge. (IX,T1502)

Likewise, very little evidence of childhood abuse and a dysfuncational family was presented as mitigation. (IX,T1503) Mr. Eler agreed that he failed to present evidence relating to the psychological trauma suffered by Mr. Miller as a result of these abuses, though such evidence could have been developed through a mental health professional. (IX,T1503) Mr. Eler acknowledged that this evidence would have been important for the jury and trial judge to hear. (IX,T1504) Mr. Eler's reason for not presenting this testimony was because he didn't think that Dr. Krop told him that this was a feature he needed to bring out. (IX,T1504)

Some evidence was presented through Mr. Miller's mother, Yvonne Jordan, a sister, and a brother of Mr. Miller's history of drug and alcohol abuse. (IX,T1504) Mr. Eler recalled that their testimony had been that Mr. Miller began using alcohol at age 18 or 19 while he was in the Navy, and that it made him more talkative. (IX,T1505) Once again, Mr. Eler did not ask Dr. Krop to testify about the various psychological and emotional ramifications of a

substance abuse disorder and the long term effect it would have had on Mr. Miller and how such long-term addictions would have affected Mr. Miller's judgment on the night of the homicide. (IX,T1506) Mr. Eler only focused on Mr. Miller's drug/alcohol usage on the night of the incident. Mr. Eler did not try to present any evidence which would have established Mr. Miller's attempts at treatment and the systemic failures of those treatment programs. (IX,T1509)

No medical records relating to Mr. Miller's mental health were presented to the jury. (IX,T1509) Mr. Eler thought that some information in the records was detrimental to Mr. Miller and didn't want to admit that evidence to the jury. (IX,T1510) Mr. Eler agreed that the records contained much relevant mitigation evidence. (IX,T1511)

Mr. Eler admitted to being familiar with the concept of motions in limine. (IX,T1568) He will usually file a motion in limine if he anticipates a problem with evidence. (IX,T1568) He doesn't usually anticipate potential areas of improper argument by the State that would necessitate a motion in limine. (IX,T1569) Mr. Eler did not seek a pretrial ruling from the court to determine what the court would have permitted the State to introduce

as rebuttal evidence to the information contained in the medical records. (IX,T1513) Mr. Eler couldn't remember what was in the records that he thought was so bad that it justified excluding all the records, he could recall only one item in the records that referred to one instance of aggressive behavior by Mr. Miller during treatment. This consisted of a statement that Mr. Miller had pushed another patient. (IX,T1513)

Mr. Eler believed that showing a defendant has had previous involuntary hospitalizations due to mental health issues was detrimental. (IX,T1514) Mr. Eler thought evidence of mental illness which required hospitalization would undercut an argument that Mr. Miller was a good candidate for rehabilitation in prison. (IX,T1514) In Mr. Eler's opinion the fact that a defendant had been previously committed to a mental institution was something he would never want a jury to hear. (IX,T1515) When asked why a diagnosis of alcohol dependence with psychological dependence, cocaine dependence with psychological dependence, cannabis abuse, and schizoid personality disorder three or four months before the murder occurred was not relevant mitigation and how that evidence would open the door to testimony that Mr. Miller pushed someone

in the mental hospital, Mr. Eler only responded that Dr. Krop considered these things. (IX,T1516) Mr. Eler acknowledged that he did not have Dr. Krop testify about Mr. Miller's many contacts with mental health agencies and his involuntary hospitalization for attempting to harm himself and his brother three or four months prior to the homicide. (IX,T1517;1519) Mr. Eler did not have Dr. Krop testify about the life-long adult addiction to drugs and alcohol suffered by Mr. Miller and the psychological and emotional impact those addictions had on him. (XI,T1518) Mr. Eler presented no evidence of the treatment that Mr. Miller had sought during his life. (XI,T1518)

Mr. Eler first claimed that he did not present all the above-referenced testimony because it would have been detrimental to Mr. Miller. (XI,T1521) Mr. Eler could not offer a single negative point that Dr. Krop could have been cross-examined on if he had testified about what the alcohol and drug problems meant to Mr. Miller. (IX,T1521)

Mr. Eler finally acknowledged that "I'm not sure that would have been a bad thing" to have had Dr. Krop testify in this area. (IX,T1521)

Mr. Eler didn't know if Dr. Krop evaluated Mr. Miller to determine the level and effect of the trauma he suffered

as a result of the death of his sibling and cousin. (IX,T1516) Mr. Eler didn't present any testimony by Dr. Krop on this issue, he only presented the fact that a sister and neighbor had died. (XI,T1516) Mr. Eler could not point to any bad things that would have come out had Dr. Krop testified in this area. (IX,T1522) Mr. Eler then claimed he didn't present this testimony because he deferred to Dr. Krop (IX,T1522) Mr. Eler admitted that the lawyer asks the questions in court, not the doctor. (XI,T1522)

Mr. Eler did not have Dr. Krop testify as to the psychological impact childhood abuse and a dysfunctional family had on Mr. Miller. (IX,T1518) Mr. Eler chose not to follow up on any of the psychological testimony, despite having it available to him. (XI,T1519-1520) While believing such evidence was detrimental, he did choose to present some very limited factual testimony about alcohol usage and childhood abuse only from family members.

Mr. Eler agreed that a defense attorney has the duty to exclude or minimize the aggravating circumstances the state relies upon. (IX,T1522) In this case Mr. Miller had a previous conviction for second-degree murder in North Carolina. (IX,T1522) Mr. Eler recalled that Mr. Miller had

pled guilty to that offense. (IX,T1522) Mr. Eler could not recall presenting any evidence or making any argument to the jury to mitigate this prior conviction other than the fact of the guilty plea. (IX,T1522-1523)

Mr. Eler was familiar with the circumstances surrounding the prior second-degree murder conviction. Mr. Eler knew that Mr. Miller had been evaluated by two mental health professionals because of mental health issues in that previous case and the North Carolina judge made specific findings that mental problems significantly reduced Mr. Miller's culpability for that offense. (IC,T1523;1572) He did not present any evidence of the judicial findings made in North Carolina which mitigated the prior conviction to the jury or trial court in this case. (IX,T1523;1572)

Mr. Eler did not think that it was important to present evidence of the circumstances surrounding a prior conviction to the judge or jury. (IX,T1524) Mr. Eler acknowledged judicial opinions which talked about the need to mitigate prior felonies by showing the circumstances of what happened and make them not as serious as they might seem. (IX,T1524) Mr. Eler didn't do it because he doesn't like to dwell on the negative and didn't want to show that

Mr. Miller already had “one bite at the apple”. (IX,T1524) Mr. Eler agreed that everybody already knew that Mr. Miller had “one bite at the apple” because both the jury and trial court were going to be told of the conviction irrespective of whether or not evidence of the facts surrounding it were presented. Mr. Eler admitted that giving the jury and trial judge information about the circumstances surrounding the prior conviction would not have allowed otherwise inadmissible evidence to come before the jury. (IX,T1573)

Mr. Eler acknowledged that an unexplained prior conviction for second-degree murder was a significant aggravating circumstance. (IC,T1525) Mr. Eler believed a reasonable way of dealing with this aggravator was to “gloss over it” and not let the State talk about it. (IC,T1526) Mr. Eler also acknowledged that he knew the State was not planning to put on testimony about the underlying facts of that conviction because he had seen their witness lsit. (XI,T1526) Mr. Eler presented nothing to mitigate the prior judgment for second-degree murder. (IX,T1527)

Mr. Eler did not present evidence of mental mitigation at the time of the instant homicide. (IX,T1524) Mr. Eler

didn’t look at the psychological reports because he believed that Dr. Krop had, so he didn’t present that evidence to the jury. (XI,T1525)

Mr. Eler was questioned on why he did not object to numerous arguments made by the State. (IX,T1527) Mr. Eler had no independent recollection of the particular points and had not reviewed the motion for post-conviction relief prior to testifying. (XI,T1527) Mr. Eler did not quarrel with what the transcripts reflected was argued by the State. (XI,T1528)

Mr. Eler agreed that an attorney in any case has the responsibility to preserve the errors in the proceedings for appellate review. (XI,T1529) Mr. Eler agreed that if an issue is not objected to at the trial level, it is waived for appeal unless it rises to the level of fundamental error. (XI,T1529) Mr. Eler acknowledged that appellate courts rarely find fundamental error, even though he hadn’t done much research into fundamental error. (IX,T1563-1564) Mr. Eler agreed that it is important to object to improper argument by the State in certain instances. (IX,T1529-1530)

Mr. Eler doesn’t object to argument over small issues because he doesn’t want the jury to dislike him. But Mr. Eler did state that “…If there’s fundamental error, I’m

going to object whether the jury like me or doesn't like me." (IX,T1557) Mr. Eler doesn't object to argument at times because he didn't want to lose his "bond" with the jury over small issues. (IX,T1533A;1558;1567) Mr. Eler acknowledged that there is a jury instruction that deals with jurors not holding the objections of counsel against the defendant. (IX,T1567) Mr. Eler didn't know if he ever asked for it in this case. (IX,T1567)

Mr. Eler does not believe in objecting to things which he considers to be in the "gray" area such as where a prosecutor's argument crosses the line of acceptable argument, but is not fundamental error. (IX,T1563) Mr. Eler acknowledged that many objectionable events happen during trials that are reversible error if objected to, but will not rise to the level of fundamental error. (IX,T1563-1564) When asked what the attorney has to do in order to preserve reversible error, Mr. Eler first stated he didn't understand the question, but agreed that an objection and motion for mistrial would be one way to preserve a record. (IX,T1656)

Mr. Eler didn't object to numerous arguments by the State that Mr. Miller would have killed Ms. Fullwood but for the intervention of Jimmy Hall because he didn't feel

the argument was affecting the jury. (IX,T1530) Mr. Eler did agree that having the State argue that this would have been a double homicide but for the actions of a third party was pretty bad. (IX,T1537) Mr. Eler termed it "a very zealous prosecution argument." (IX,T1538) The prosecutor actually made this argument on six different occasions. (IX,T1538) Upon reviewing the argument, Mr. Eler thought that maybe he should have objected. (IX,T1530;1533) Even Mr. Eler was willing to admit that this argument did not help his case. (IX,T1533A) Mr. Eler also acknowledged that cumulative error can be a factor and six times was quite a bit. (IX,T1568)

Mr. Eler admitted that prosecutorial vouching for the credibility of his witness is something that should be objected to. (IX,T1533A) When confronted with the prosecutor vouching for the credibility of Jimmy Hall, Mr. Eler seemed confused and wasn't sure if the argument was improper. (IX,R1534) Mr. Eler didn't think that arguing to the jury that a witness had told the truth was vouching for their credibility. (IX,T1534) Mr. Eler also admitted to being familiar with case law which prohibited an attorney from stating to the jury whether a witness is lying or

telling the truth. (IX,T1535) Mr. Eler thought that this instance of prosecutorial misconduct was pretty insignificant.

Mr. Eler agreed it was not appropriate for the State to argue the lack of sympathy for the victim as means of attacking mitigation. (IX,T1535) Mr. Eler, when confronted with the State's closing argument on this point, admitted it was objectionable argument for penalty phase. (IX,T1535A;1536) He should have objected, but at the time he didn't think it was significant. (IX,T1535A;1536) Mr. Eler sometimes doesn't object to these types of arguments because he "takes them and turns them around in his closing." (IX,T1536) He hoped he did that in this case, but he didn't remember. (IC,T1536)

Ms. Debra Lee is a substance abuse counselor and social worker in Charlotte, North Carolina. (IX,T1586) She works for the Salisbury VA Medical Center. (IX,T1587) In 1994, she worked as an outreach counselor for homeless and chronically mentally ill veterans with the goal of helping them to gain access to needed health-care services. (IX,T1587) The VA provided funding for outreach activities to homeless shelters, camps, bridges, wherever homeless people congregate for the purpose of interviewing people in

order to conduct an assessment that will lead to finding programs to assist them with health-care needs. This includes treatment for medical needs, substance abuse, and psychiatric treatment. (IX,T1588)

Ms. Lee worked with Mr. Miller for an 18 month period, beginning in 1994, in North Carolina. (IX,T1580) She met Mr. Miller in a day shelter and helped him secure treatment for substance abuse and alcoholism. (IX,T1589) During her contact with Mr. Miller they spoke at length about his family history, including his father's alcoholism, physical and sexual abuse, his witnessing the rape of both of his sisters, and the eventual suicide of his sister and cousin. (IX,T1589) Mr. Miller would become very upset when talking of these things. (IX,T1589) It took almost a year before Mr. Miller agreed to treatment, which is not unusual among the chronically homeless. (IX,T1590)

Mr. Miller eventually agreed to be evaluated by a psychiatrist and medical doctors. (IX,T1590) Initially, outpatient treatment was agreed upon for Mr. Miller due to some concerns about his level of commitment to treatment. (XI,T1590) During this treatment Mr. Miller had difficulty maintaining sobriety. (XI,T1591) After Mr. Miller demonstrated a commitment to treatment, the decision was

made to switch to inpatient treatment. (IX,T1597) In the fall of 1996, Mr. Miller entered a 30 day inpatient treatment program. (XI,T1591;1596)

Mr. Miller entered into a substance abuse unit. (IX,T1591) Treatment records from this program were admitted as Defense Exhibit A. (IX,R1591) During treatment Ms. Lee characterized Mr. Miller as quiet, with a tendency to isolate himself. (IX,T1592) Mr. Miller was depressed and very paranoid about what would happen to him in the VA hospital. (XI,T1592) Mr. Miller had a previous suicide attempt, so his self-isolation was cause for concern. (IX,T1596) He had some problems with groups in the beginning due to the pressure to open up in these settings, which led to increased depression. (IX,T1600) In response to his increased depression, a program of more intensive one-on-one therapy was began in part for a concern that Mr. Miller could hurt himself. (IX,T1597) At one point there was some concern that Mr. Miller needed to be in an acute psychiatric unit, but the decision was eventually made to keep him at the substance abuse unit. (IX,T1597)

Mr. Miller was diagnosed with schizoid personality disorder on November 22, 1996, as a result of his abusive childhood, his witnessing of the rapes of his sisters, his

own sexual abuse, and the suicide of his sister. (IX,T1599) The instant offenses occurred on March 17, 1997, four months later. (IX,T1601)

During her entire contact with Mr. Miller, Ms. Lee did not see him act out. (IX,T1592) Mr. Miller shared his previous legal problems with Ms. Lee. (IX,T1593) Mr. Miller told her that he had gotten into an argument with someone at a rooming house and that he had shot the person. (IX,R1612) He served seven years in prison and was released not too long before he sought help from Ms. Lee. (IX,T1612;1621) Ms. Lee found Mr. Miller to be very remorseful and extremely saddened by his actions. (IX,T1593) She believed he was plagued by what had happened and often expressed that he should be punished for it. (XI,T1612)

Mr. Miller had a history of abusing many substances, including hallucinogens such as Valium and Quaaludes, cocaine, marijuana, crack cocaine, and significant amounts of alcohol. (IX,T1593)

Ms. Lee was aware that Mr. Miller had a family history of mental illness, including schizophrenia. (XI,T1595) There was a question of concern as to whether Mr. Miller also suffered from this. (IX,T1595)

Mr. Miller was discharged on his 30th day, November 27, 1996, with a referral to return to the mission he had been staying at prior to the inpatient program and to continue out-patient psychological counseling. (IX,T1601) Mr. Miller wanted to go to the half-way house, but that didn't happen because there weren't any. (XI,T1602) Mr. Miller returned to the same environment he had been in prior to treatment. (IX,T1602) A short time later he left town. (XI,T1602)

Ms. Lee stated that a person with a discharge plan such as that given to Mr. Miller, coupled with his history, has less than a three percent chance of success. (XI,T1602) It is now well-recognized that persons who return to the same environment do not fair well. (XI,T1603) Today, Mr. Miller would have been placed in an aftercare program with housing available for up to two years and other support. (IX,T1603) Mr. Miller's only stable housing as an adult occurred during the military or when he was incarcerated. (XI,T1603) The services provided to homeless persons, especially those such as Mr. Miller, have evolved greatly since 1994-1996. (IX,T1607) Now, there are supportive services in the community that just did not exist in 1996. (IX,T1608) It would not be realistic to have expected Mr. Miller to succeed once he was discharged in 1996.

(IX,T1622)

Ms. Lee was contacted by public defender Alan Chipperfield in this case. (IX,T1604) It was her understanding that he represented Mr. Miller. (IX,T1604) She spoke with him and his investigator. (IX,T1605) She was not contacted by anyone else until a week before this hearing, when she was asked to testify. (IX,T1605) She had never heard the name Refik Eler. (XI,T1605)

Dr. Joseph Chong Sang Wu is a physician at the University of California, Irvin College of Medicine. (IX,T1624) He is the clinical director of the Brian Imaging Center and associate professor in the Department of Psychiatry. (IX,T1624) The primary focus of the Brian Imaging Center is the administration and interpretation of PET scans and PET scan studies of neuropsychiatric disorders such as schizophrenia, Alzheimer's dementia, Parkinson's disease, and traumatic brain injury. (IX,T1624) Only 20-30 centers nationwide utilize PET scans for neuropsychiatric purposes. (IX,T1625) Dr. Wu is a preeminent researcher in studies of PET scans involving cocaine addiction, depression, and schizophrenia. (IX,T1626) He conducts pharmaceutical studies to test the effectiveness of antipsychotic medications for treatment as

well as treatments for cocaine additions and depression. (IX,T1627)

According to Dr. Wu, an MRI scan looks at the brain structure and determines if the shape of the brain structure is altered in any way. (IX,T1630) A PET scan looks at the function of the brain. You can have a portion of the brain that is structurally intact but does not function. (IX,T1630) An MRI scan of a cadaver would show a perfectly normal brain shape, an intact brain, but a PET scan would show no function. (IX,T1631) The PET scan shows the level of brain function as measured by sugar metabolism. (IX,T1632) The more active a particular area of the brain is the more sugar that part of the brain consumes. (IX,T1633) These areas of activity, or sugar metabolization, are color-coded on the PET scan films- high activity areas are colored with hot colors such as red; moderate areas of metabolism with yellow or green, and low metabolism areas with blue. (IX,T1633) The mechanics of how PET scans are obtained has been in use over 20 years and is a science that is generally accepted in the scientific community. (IX,T1633-1636)

PET scans help to corroborate neuropsychological test data. (IX,T1637) Dr. Wu was provided with the results of

psychological tests that Dr. Krop performed on Mr. Miller. (IX,T1638) Dr. Krop diagnosed frontal lobe problems. (IX,T1638) Dr. Wu's actual evaluations of Mr. Miller corroborate that conclusion. (IX,T1638) The PET scan of Mr. Miller showed a pattern of abnormal decrease in frontal lobe activity, especially in the orbital frontal lobe area and in the relative pattern of activity of the frontal lobe relative to the occipital lobe. (IX,T1639) Mr. Miller's scan looked more like that of a schizophrenic, also in line with Dr. Krop's diagnosis of schizophrenic spectrum disorder. (IX,T1640) Dr. Wu's findings were that Mr. Miller showed a significant decrease in the functioning of the frontal cortex of the brain, especially the orbital frontal cortex, a pattern of metabolic hyperfrontality with a decrease in the frontal occipital gradient, and metabolic decreases in the subcortical area. (IX,T1642) This was an abnormal brain with frontal lobe deficit. (IX,T1642) This determination is consistent with a schizophrenia spectrum disorder as identified by Dr. Krop and documented in the records of Mr. Miller. (IX,T1643)

Schizophrenic spectrum disorder is characterized by someone who has symptoms that are schizophrenia-like, but who does not necessarily meet the full-blown diagnosis

under the DSM-IV-R for schizophrenia. (IX,T1644) This diagnosis would include behaviors such as being withdrawn, odd behaviors, paranoia, and poor social functioning. (IX,T1644-1645) Mr. Miller's family history is also highly indicative of schizophrenia. (IX,T1645) Mr. Miller reported some auditory hallucinations, just not persistent enough for a full-blown diagnosis of schizophrenia. (XI,T1645)

There is a correlation between childhood abuse and neurobiological vulnerability. (XI,T1646) If someone who has some sort of frontal lobe abnormality is subject to childhood abuse, the likelihood of aggression increases. (IX,T1646) Mr. Miller is an example of someone with a neurobiological vulnerability. (XI,T1647) There is an increased likelihood of aggressive impulses, loss of judgment, and an inhibition of improper impulses in someone with frontal lobe lesions, such as Mr. Miller. (IX,T1647)

The instant PET scan was done in 2002. (IX,T1649) The homicide occurred in 1997. (IX,T1649) Dr. Wu did not believe there was any change in Mr. Miller's brain between 1997 and 2002. (IX,T1649)

Dr. Harry Krop, a psychologist and the director of Community Behavioral Services, focuses his practice on forensic psychiatry. (X,T1691) Dr. Krop was retained as a

mental health expert in this case by public defender Alan Chipperfield in 1997. (X,T1693) Mr. Chipperfield requested that Dr. Krop review competency and sanity as related to Mr. Miller and to do an analysis of his drug/alcohol intoxication and mental health problems on the day of the homicide. (X,T1694) Mr. Chipperfield also suggested in a letter to Dr. Krop possible mitigating factors that he felt needed to be explored in the area of remorse, family situation, and prison record. (X,T1695) Dr. Krop was sent some information by Mr. Chipperfiled after the public defender investigator had interviewed some family members. (X,T1695) Mr. Chipperfiled also provided Dr. Krop with a list of records he felt were important, which included school records, military records, prison classification records, VA records, and psychiatric records. (X,T1695) Mr. Chipperfield provided a copy of Mr. Miller's confession, as well as, other information relating to the homicide. (X,T1695) Dr. Krop did not have the benefit of a PET scan in 1997. (X,T1696)

Dr. Krop had since received a copy of Dr. Wu's report and a report from a Dr. Holder. (X,T1697) He was familiar with Dr. Wu's findings. (X,T1696) Dr. Wu's findings were consistent with the abnormalities that Dr. Krop had

detected in his neuropsychological testing of Mr. Miller in 1997. X,T1697) Dr. Krop's 1997 diagnosis was also consistent with earlier diagnosis. (X,T1697)

Dr. Krop had reviewed his records regarding time he spent consulting with Mr. Eler. (X,T1698) His records reflected a one-half hour consultation on July 6, 1998, during Mr. Miller's trial. (X,T1698) Dr. Krop testified in Mr. Miller's trial on July 7, 1998. (X,T1698) He might have spoken to Mr. Eler for a few additional minutes before he testifield. (X,T1698)

Dr. Krop did not recall speaking to Mr. Eler about possible mitigation. (X,T1698) He believed he provided a report of his findings, which included concerns about the dysfunctional family, cognitive defects in the frontal lobe, and the results of psychological testing to either Mr. Chipperfield or Mr. Eler. (X,T1700) Dr. Krop did not recall having any discussion with Mr. Eler wherein he advised Mr. Eler to refrain from presenting certain areas of mitigation. (X,T1700) He did not create a situation where Mr. Eler would have deferred to his opinion about what should or should not be presented. (X,T1700-1701)

Dr. Krop stated that in 1997 he had clearly identified a long-standing history of drug and alcohol abuse by Mr.

Miller. (X,T1701) Mr. Miller's substance abuse contributed to his psychiatric problems, led to depression, and ultimately led to hospitalization. (X,T1702) Dr. Krop believed that these facts would support a mitigating factor that has been utilized in other cases he has been involved in. (X,T1702) Dr. Krop felt that he had enough information in 1997 that he could have testified as to the psychological effects the addictions had on Mr. Miller. (X,T1702-1703) Dr. Krop could have testified how the severe personality disorder Mr. Miller suffered interacted with his addictions and cognitive defects. He could have testified how these factors impacted on Mr. Miller's judgment making ability, impulse control, and so forth had be been asked the appropriate questions by Mr. Eler. (X,T1703)

Dr. Krop could have also testified about adjustment disorders that Mr. Miller had faced which led to a life of homelessness. (X,T1704) The combination of mental health issues Mr. Miller faced would not usually be conductive to the seeking of voluntary treatment. (X,T1704) It would not be likely that Mr. Miller, given his diagnosis, would seek out-patient treatment on his own following his discharge from the 30 day treatment program unless he had significant

support and efforts expended by others to ensure he continued treatment. (X,T1714)

It was Dr. Krop's opinion that the 30-day treatment program that Mr. Miller entered into shortly before the instant offense was not sufficient to address his problems. (X,T1713) Individuals who suffer from the long-standing mental health issues that Mr. Miller suffers from usually require long and extensive out-patient treatment, which would necessarily include medication and psychotherapy on an on-going basis. (X,T1713)

Dr. Krop testified at the evidentiary hearing that Mr. Miller reported to him significant emotional deprivation in his childhood and significant physical abuse by an alcoholic father. (X,T1705) Mr. Miller believed his father was capable of killing his mother. (X,T1705) Her victimization caused her to be a very negative person who verbally and mentally abused Mr. Miller. (X,T1706) Dr. Krop interviewed three family members, including Mrs. Miller, for the purposes of developing additional information about the circumstances of Mr. Miller's youth. (X,T1706) Dr. Krop was surprised that he was not asked by Mr. Eler to address his findings in these areas in his testimony, especially after he had brought this area of mitigation to the

attention of Mr. Chipperfield in his initial letter to defense counsel. (X,T1707)

Mr. Miller also spoke with Dr. Krop about the suicide of his sister and cousin. (X,T1707) The death of his sister was especially traumatic because Mr. Miller was closest to her. (X,T1708)

Mr. Miller talked with Dr. Krop about the witnessing of the rape of his sisters by two male cousins. (X,T1708) When Mr. Miller told his father what he witnessed, he was accused of lying and beaten. (X,T1708)

According to Dr. Krop, medical records reflected that Mr. Miller received little out-patient mental health treatment. (X,T1709) Mr. Miller did receive an extensive evaluation at the Dorothea Dix Hospital when he was in acute crisis in 1983 and there were medical records from 1986, the time of the North Carolina second-degree murder. (X,T1709) All medical records Dr. Krop reviewed substantiated a long-standing history of mental health problems. (X,T1709)

Mr. Miller was court-ordered into the Dorothea Dix Hospital win 1983. (X,T1710) The psychiatric reports diagnosed Mr. Miller with adjustment disorder, alcohol abuse, and mixed personality disorder with avoidance,

schizoid, and borderline features. (X,T1711) The evaluater in 1983, directed the North Carolina trial court to potentially mitigating factors present in that episode, which include the history of alcohol abuse, Mr. Miller's intoxication at the time of that offense, and a history of emotional problems associated with an underlying personality disorder. (X,T1712) These findings were consistent with Dr. Krop's current findings. (X,T1712)

Dr. Krop felt that Mr. Miller's admission to a VA hospital in 1996 several months before the instant homicide was significant in confirming the continuing mental health difficulties that Mr. Miller had suffered from for years. (X,T1710)

Dr. Krop testified in the penalty phase of the trial. (X,T1725) He was able to provide only a cursory explanation for the basis of his opinion under the questions proposed to him by Mr. Eler. (X,T1725) Dr. Krop opined that a cursory reference to a particular record is significantly different from being asked to describe the details of the record that is pertinent to the diagnosis or testimony. (X,T1726) It is important to get into the substance of the material contained in the records and to develop significant facts which support his opinion and give the

jury the proper insight into the defendant. (X,T1726) Dr. Krop's testimony at the evidentiary hearing was significantly different from that at trial. (X,T1726) For example, at trial Dr. Krop was not asked any questions about Mr. Miller's psychiatric records, anything which related to the 1983 offense, or Mr. Miller's perceptions of the dysfunctional family environment and its effect on him. (X,T1726)

While Dr. Krop did not find that Mr. Miller suffered from a "major mental illness", but that is a term of art. (X,T1727) Dr. Krop firmly believed that Mr. Miller has serious psychological problems and serious emotional problems and those were operating at the time of the instant homicide in 1997. (X,T1727)

The prosecution presented the testimony of Dr. Lawrence E. Holder, a clinican at Shand's Hospital and a supervisor in the administration of PET scans. (X,T1730) During the period of time that Dr. Holder was training and at the time he became board certified in nuclear medicine, he received no training relating to PET scans. (X,T1751) He had been a clinical professor of radiology for two years at Shands. (X,T1733) His areas of research focus on radio nuclide bone imaging in orthopedic sports medicine and

trauma, RSD, and tumor imaging. (X,T1751;1752-1753) He is not published in the area of PET scans and has not published any materials related to the brain. (X,T1754) Dr. Holder has no specialized training in the area of psychiatry. (X,T1755) He focuses on the diagnosis of medical conditions as a determinate of treatment. (X,T1738) Dr. Holder has only done PET scan reviews for five or fewer years since PET scans hae only been around clinically for three or so years. (X,T1756) He primarily does examinations ordered by medical doctors as opposed to psychiatric testing. (X,T1739) Dr. Holder has testified before in civil cases, but never in a criminal case. (X,T1738)

The use of a PET scan is a subset of nuclear medicine. (X,T1735) Dr. Holder reviewed the PET scans of Mr. Miller and the report of Dr. Wu. (X,T1741) He also very briefly reviewed some trial testimony. (X,T1742) In Dr. Holder's opinion Mr. Miller's PET scans were of adequate technical quality. (X,T1743) Dr. Holder found no focal cortical abnormalities and no non-cortical abnormalities. (X,T1744) He opined the PET scan as normal. (X,T1744) Dr. Holder admitted that there is debate in the medical community as to what constitutes "normal" v. "abnormal". (X,T1748) Dr. Holder did not find any abnormality in the frontal lobe

area. (X,T1745) Dr. Holder admitted that the images in Defense Exhibit 6 (those of Mr. Miller and a control image) were different. (X,T1760)

Dr. Holder did not disagree with the results of the neuropsychological tests performed by Dr. Krop. (X,T1757-1758)

Dr. Holder has never utilized a visual vigilance test, as was used by Dr. Wu in this case. (X,T1746) He believed the increased glucose activity observed in Mr. Miller's scan was consistent with a visual stimuli taking place. (X,T1746)

Dr. Wu was recalled by the defense. (X,T1764) Dr. Wu believed that the differing opinion reached by Dr. Holder was due to his unfamiliarity with the visual vigilance test coupled with his lake of experience in reviewing scans of both normal and schizophrenic patients during the performance of those tasks. (X,T1764) Dr. Wu noted that the use of the visual vigilance test and his conclusions regarding the results of that test in the instant case was supported by peer reviewed literature (which included 50 articles that he personally authored) specifically addressing schizophrenia as compared with normal responses. (X,T1765) Dr. Wu felt that experience with this application

of the PET scan is important when analyzing the test that should be used and the type of pathology being assessed. (X,T1765) While Dr. Holder has many interests, he does not have a special interest or any experience in the area of PET scans of the brain involving neuropsychiatric illness. (X,T1766)

SUMMARY OF THE ARGUMENT

ISSUE I: Trial counsel was ineffective in failing to present to the jury and trial court significant mitigation evidence in dereliction of his duty to reasonably investigate, prepare, and present evidence of mitigating circumstances. Trial counsel wholly failed to present any evidence of Mr. Miller's long-term mental health and emotional illness, his medical history which included both voluntary and involuntary hospitalizations for mental and emotional issues and drug/alcohol dependencies, the testimony of Mr. Miller's mental health case worker from the VA just prior to the time of the homicide, testimony demonstrating the systemic failure of treatment programs at the time of Mr. Miller's placement in 1997, evidence establishing long-term poly-substance abuse, and evidence of continued remorse for the prior conviction. Trial

counsel's failures severely prejudiced Mr. Miller as the trial court rejected mitigating factors which this evidence undeniably established.

ISSUE II: The trial court erred in finding that trial counsel's decision to forgo the presentation of evidence during the penalty phase or to the court which mitigated the prior violent felony aggravator did not constitute ineffective assistance of counsel. Substantial information was present and available through the medical records of the defendant and sentencing documents from North Carolina which would have established that the prior conviction for second-degree murder was substantially mitigated by the mental health, emotional, and addictive disorders suffered by the Appellant at the time of that offense. Other evidence would have established the Appellant's continued great remorse for that previous conviction. Trial counsel's failure to attack/mitigate this aggravating circumstance severely prejudiced the Appellate, both during the trial/penalty phase proceedings and in the direct appeal. This aggravating factor formed the whole basis for the imposition of the affirmance of the death sentence.

ISSUE III. The trial court erred in finding that trial counsel was not ineffective by failing to object to

numerous and repeated instances of improper prosecutorial argument in both the guilt and penalty phase of trial where trial counsel admitted that such objections might have been proper and where counsel's stated reasons for his failure to object were based upon his erroneous understanding and interpretation of the use of fundamental error and the need for contemporaneous objections to reversible error in order to preserve appellate issues. The deficient performance of counsel prejudiced the Appellate because the repeated instances of improper, inflammatory, and prejudicial argument undermined the reliability of the jury verdict and sentencing recommendation.

ISSUE IV: Numerous jury instructions given in this case are unconstitutional. Florida standard jury instructions impermissibly shift the burden of proof to the defendant in penalty phase by requiring that the defendant establish mitigating factors and then show that they outweigh the aggravating factors; the instructions unconstitutionally minimize and denigrate the role of the jury in the capital sentencing process and they fail to advise the jury as to the nature, meaning, and effect of mitigation evidence.

ISSUE V: The sentence of death is disproportionate in

this case. Testimony presented at the evidentiary hearing established significant mental health mitigation that was not presented at the penalty phase. This new evidence contradicts the rejection by the trial court of mental health mitigation as set forth in the original sentencing order and alters the proportionality analysis as previously determined by this Court. The presentation of copious records and testimony at the evidentiary hearing chronicling the mental health and emotional issues suffered by Mr. Miller, his involuntary and voluntary hospitalizations, and his long-standing and debilitating alcohol and poly-substance addictions demonstrate the ineffective representation of trial counsel. Trial counsel wholly failed to present any of this evidence. The further mitigation of the prior violent felony aggravator based upon the Appellant's previous conviction for second-degree murder through the establishment of significant facts which mitigate the seriousness and weight which should be afforded to that conviction render a sentence of death disproportionate in this case.

ISSUE VI: The Florida capital sentencing procedure is unconstitutional because it permits a judge rather than jury to determine sentence and does not require a unanimous

recommendation for death before a death sentence can be imposed.

ISSUE VII: The Florida Death Penalty statutes is unconstitutional as it violated the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REJECTING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN INVESTIGATING AND PRESENTING MITIGATING EVIDENCE TO THE JURY AND TRIAL COURT AND IN FAILING TO PRESENT EXPERT MENTAL HEALTH TESTIMONY WHICH WOULD HAVE DEMONSTRATED THE EXISTENCE OF A DYSFUNCTIONAL FAMILY, LONG-STANDING ALCOHOL AND DRUG ABUSE BY THE APPELLANT, PREVIOUS FAILED TREATMENT, AND THE PSYCHOLOGICAL IMPACT THESE FACTORS HAD ON THE APPELLANT.

In his Motion for Post-conviction relief Mr. Miller raised the claim that trial counsel was ineffective in investigating and presenting mitigating evidence to the jury and in failing to present detailed factual testimony of the underlying circumstances and facts that Dr. Krop's conclusions were based upon.

The trial court found that Eler's failure to properly utilize Dr. Krop and in failing to provide him with needed

information was not outside the wide range of reasonable professional assistance. (V,R864) The trial court found that a reasonable mental health examination had been conducted by Dr. Krop in 1997 and that adequate materials were provided to him. (V,R864)

The trial court's ruling is erroneous. The ruling overlooks the fact that Mr. Eler failed to conduct a reasonable investigation into available mitigation evidence when he failed to follow through with interviewing Ms. Lee and when he failed to discuss and consult with Dr. Krop prior to trial, to conduct an independent review of the medical, VA, and other mental health records of Mr. Miller and when he wholly failed to present any evidence of Mr. Miller's longstanding drug/alcohol addiction and history of mental and emotional problems. Although the first attorney on the case, Mr. Chipperfield, had originally done some initial mitigation investigation, Mr. Eler failed to continue the investigation and follow through with the preliminary investigation with Dr. Krop. Mr. Eler failed to follow through with the investigation of Mr. Miller's mental health history in North Carolina and utilize Ms. Lee as a witness. Mr. Eler failed to present powerful and compelling mitigation evidence which conclusively refuted

the trial court's findings as recited in the sentencing order regarding the lack of evidence to support drug/alcohol addiction and abusive childhood as mitigating factors. Mr. Eler failed to present evidence to establish other nonstatutory mitigators that the trial court did not even consider.

Once Mr. Eler assumed representation of Mr. Miller from the public defender it was incumbent upon Mr. Eler to affirmatively pursue continued investigation and follow through with the presentation of evidence at the penalty phase and not simply rely upon the unfinished investigation commenced by Mr. Chipperfield. Mr. Eler clearly failed in this regard. Mr. Eler failed to competently complete the mitigation investigation or to review that done by the public defender.

Two witnesses at the evidentiary hearing testified as to their contact with Mr. Eler on this case and the role that they could have played in establishing mitigation in this case. Those two witnesses were Ms. Lee and Dr. Krop.

Ms. Lee testified that she was contacted by Mr. Chipperfield in 1997. She heard from him once, then did not hear from anyone on this case until one week before the evidentiary hearing. She was contacted by post-conviction

counsel and asked to testify. Ms. Lee would have been an available and willing witness in 1997. Ms. Lee had never heard of Mr. Eler. Mr. Eler had never spoken to Ms. Lee about the mitigation evidence that she could have offered to support several nonstatutory mitigating factors.

Dr. Krop was originally retained by Mr. Chipperfield. He and Chipperfield exchanged some detailed communication on possible mitigating factors and Dr. Krops' progress. Mr. Eler then took over the case.

Dr. Krop testified that he did not recall speaking to Mr. Eler about this case but for a brief conversation the day before his trial testimony. Dr. Krop testified that this was not normally how defense attorneys work with him. Dr. Krop could not recall ever having influenced or determined for an attorney what evidence would be testified to before the jury. According to Dr. Krop, the decision on what evidence to present is made by the attorney and is reflected in the questions that the attorney asks. Dr. Krop could not confirm Mr. Eler's claim that he deferred to Dr. Krop's opinion on what evidence should be introduced in the penalty phase. In order to believe Mr. Eler's assertion that it was Dr. Krop's opinion about what evidence should be presented in mitigation that governed the day Dr. Krop

would have to had flat out lied in his testimony at the evidentiary hearing. Dr. Krop testified that he was surprised that Mr. Eler did not have him testify about the underlying facts supporting his conclusions, the medical records of Mr. Miller, or any information about his prior hospitalizations or the effects of long term polysubstance abuse. Dr. Krop found certain aspects of Mr. Miller's psychological history, especially his hospitalization just four months before the homicide, particularly significant, but Mr. Eler did not ask him any questions about this.

Claims of ineffective assistance of counsel are reviewed under the standards enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Strickland established a two-prong test to determine whether or not counsel rendered ineffective assistance of counsel. Under Strickland a defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id., at 687. Second, the defendant must also establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id,. at 694. A reasonable

probability has been further defined as a "probability sufficient to undermine confidence in the outcome." Monlyn v. State, 29 Fla. Law Weekly S741 (Fla. December 10, 2004). The standard of appellate review is plenary- this Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact. Id.

In addressing the specific area of mitigation this Court has held that counsel has an obligation to conduct a reasonable investigation into death penalty mitigating factors. Pietri v. State, 885 So. 2d 245 (Fla. 2004); King v. Strickland, 748 F. 2d 1462 (1984). This Court must consider whether or not counsel's preparation for the penalty phase and his presentation of mitigating evidence was unreasonable under the prevailing professional norms. Cherry v. State, 781 So. 2d 1040 (Fla. 2000).

Nonstatutory mitigating evidence is evidence which tends to "prove the existence of any factor that in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed or anything in the life of the defendant which mitigates against the appropriateness of the death penalty". Maxwell v. State, 603 So. 2d 490, 491 n.2 (Fla. 1992)[citing *Waters*

Dictionary of Florida Law, 432-33 (Fla. 1992), citing Rogers v. State, 511 So. 2d 526 (Fla. 1987)]. A mitigating circumstance need only be proven by the greater weight of the evidence. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Trial counsel Eler did not render effective assistance of counsel when he failed to properly investigate the mental health and substance abuse mitigation, failed to properly prepae for trial by consulting with the mental health expert, and failed to present compelling mitigation evidence which would have established by the greater weight of the evidence that Mr. Miller suffered from severe mental and emotional problems, that these problems affected him at the time of the homicide. Trial counsel's deficient performance deprived Mr. Miller of a reliable penalty phase proceeding. Asay v. State, 769 So. 2d 974, 985 (Fla. 2000).

I. FAILURE TO INVESTIGATE

Mr. Eler testified that at the time he took over Mr. Miller's case much of the investigative work had been done for him, making him a "pretty fortunate" lawyer. Testimony at the evidentiary hearing established that prior to Mr. Eler representing Mr. Miller he had been represented

by the public defender. The public defender had retained Dr. Krop. The public defender had outlined for Dr. Krop some areas of potential investigation and procured numerous records of Mr. Miller for Dr. Krop. Dr. Drop had written a letter back to the public defender requesting additional interviews and offering a very preliminary opinion on certain mitigation. An initial contact had been made with Ms. Lee by the public defender. Unfortunately, that was all the investigation that ever took place in this case.

Mr. Eler failed to complete the investigation, speak with lay witnesses, and speak with the mental health expert prior to trial. Had he conducted a reasonable investigation of his own by effectively completing the preparation of the penalty phase, Mr. Eler would have discovered vital mitigation evidence.

Mr. Eler would have learned that Ms. Lee had spent 18 months to 2 years with Mr. Miller just before the instant case. He would have learned of the lengthy substance abuse Mr. Miller suffered and he would have had a witness who could have testified to the extensive duration of that abuse. Mr. Eler would have had a witness who could have testified to Mr. Miller’s attempts at treatment, the lack of supportive services to ensure a reasonable chance of

treatment success, his great and continuing remorse over the circumstance of the previous incident. He would have found a witness who could have offered compelling testimony about the mental and emotional health of Mr. Miller from both his medical records and from her own observations just before the homicide, including the abuse he suffered as a child. Such testimony would have conclusively rebutted the trial court's rejection of the non-statutory mitigating factors of abusive childhood and substance abuse and altered the weight given to this mitigating factor in proportionality analysis by this Court.

Trial counsel Eler failed to properly investigate the mental health mitigation present in this case. Had he done so he would have determined that the medical records contained no record of violence by Mr. Miller against another inmate, contrary to his belief. Mr. Eler would have learned that the sole reason that he used as a basis for his decision to forgo the presentation of mental health mitigation did not exist. Mr. Eler wholly failed to investigate the strength of the mental and emotional health issues when he failed to discuss the case with his own mental health expert. Mr. Eler did not review Dr. Krop's conclusions with him or discuss the case with him during

the pretrial stages. Instead, Mr. Eler waited until the day before Dr. Krop was scheduled to testify to speak with him. This conversation with Dr. Krop lasted no more than one half hour. If Mr. Eler was planning on relying on Dr. Krop's decision regarding what testimony he should present as he testified at the evidentiary hearing, then Mr. Eler certainly should have taken the time to talk to Dr. Krop, solicit his advice, and make sure Dr. Krop told him what questions to ask far in advance of trial. Mr. Eler instead did nothing. He did not make the decision about what evidence to present and he did not let Dr. Krop know that he was leaving the decision about what evidence should be presented to Dr. Krop. Mr. Eler's utilization of his mental health expert fell below acceptable standards and was deficient performance by a capital trial attorney.

As a result of these failures, the presentation of mitigation evidence was a complete failure. Dr. Krop didn't know that Mr. Eler had delegated his responsibility of ensuring that evidence was presented to him. Dr. Krop testified only to the questions that Mr. Eler asked him, which resulted in the omission of compelling non-statutory mitigation.

II. FAILURE TO PRESENT MITIGATION EVIDENCE

Mr. Eler completely failed to present any evidence whatsoever of the severe mental illness and emotional disturbances that Mr. Miller suffered from. Mr. Miller's mental health issues were well documented through his medical records, military records, VA records, and through the testimony of family members and Ms. Lee. Had Mr. Eler presented testimony about Mr. Miller's longstanding mental illness and drug abuse the jury/judge would have learned that Mr. Miller had a family history of schizophrenia. Mr. Miller began to exhibit evidence of a schizoid personality while in the military at age 18, the time period when his substance abuse began. Mr. Miller's battle with mental illness continued uninterrupted throughout his life from that point forward. It included both voluntary hospitalizations and involuntary commitments. His illness was so significant that his mental health was recognized and documented by the criminal court of North Carolina. There Mr. Miller's substance abuse, mental illness, and alcoholism were found to be legally mitigating in a second-degree murder charge. This illness led to a life of marginal existence on the streets and a life lived in homeless shelters. Coupled with a defined frontal lobe

deficient, Mr. Miller's substance abuse coupled with schizophrenic and paranoid personality disorder prevented him from functioning appropriately in society. It led to great depression. Had Mr. Eler chosen to present this evidence, several non-statutory mitigators including that Mr. Miller suffered from severe mental and emotional problems, that he had a schizoid personality disorder, that he had affirmatively sought mental health treatment, and that treatment had not been successful through no fault attributable to him would have been established by the greater weight of the evidence.

This Court affirmed the trial court's rejection of an abusive childhood as a mitigating circumstance due to the lack of evidence of severe physical injury or hospitalizations. However, had Mr. Eler properly presented evidence available to him the record would have reflected that Mr. Miller suffered the psychological effects of an abused childhood. The jury would have learned of significant incidents in Mr. Miller's childhood that had a traumatic impact on him.

The jury/judge would have learned that Mr. Miller witnessed the rapes of his sisters by his cousins and that he was beaten by his father for reporting what he had

witnessed. The trial record would have contained evidence of the emotional deprivation Mr. Miller suffered as a child, the emotional deprivation he suffered as a result of his mother's withdrawal in response to his father's violence, and the effect his father's alcoholism had on him. Had Mr. Eler presented this evidence, the non-statutory mitigating factor of an abusive childhood would have been established by the greater weight of the evidence.

The trial court rejected the non-statutory mitigating factor of drug and alcohol abuse and while that finding was not affirmed by this Court, this Court found the error to be harmless in light of the aggravation. However, Mr. Eler had evidence available to him that documented a long-term polysubstance abuse and failed to present it. Had this compelling evidence been presented, a finding of harmless error by this Court would not have been appropriate. Instead, Mr. Eler focused only on intoxication at the time of the crime.

The only evidence of alcohol abuse that was testified to by the family, which was that Mr. Miller drank and that he chose to leave his mother's residence rather than

discontinue drinking. What the jury didn't hear was the depth of addiction that Mr. Miller suffered and that his addictions were documented for much of his adult life.

The jury did not learn, or did this Court, that Mr. Miller was hospitalized just four months prior to this crime for treatment which included substance abuse/addiction. Had Mr. Eler properly ensured that this evidence was in the record, the failure to find and assign weight to this mitigation would not have been harmless error.

This case is distinguishable from such cases as Cave v. State, 30 Fla. Law Weekly S37 (Fla. January 20, 2005). Cave asserted that his trial attorney was ineffective because he failed to introduce mental health evidence and evidence of Cave's drug abuse. Cave had been evaluated prior to trial by four mental health experts- three retained by defense counsel and one hired by the State. Trial counsel chose not to present mental health testimony because the testimony of the experts and their reports contained much damaging information about Cave severely beating a jail inmate, evidence of anti-social personality disorder, no evidence of major mental illness, and the finding that Cave had "good common sense at the time of the

crime.” The experts could only have offered positive testimony about Cave’s lowered intellect. With regards to the drug abuse, conflicting information had been given about Cave’s usage that differed from that testified to by a new doctor at the post-conviction evidentiary hearing. In rejecting the claim of ineffective assistance of counsel, this Court noted that neither Cave nor his family had reported heroin abuse history of any significance to counsel or to any of the mental health experts prior to trial.

In this case Mr. Eler claimed that he did not want to present the medical and metal health records of Mr. Miller to the jury because they contained a report of Mr. Miller pushing a fellow patient at a mental health hospital. The records contain no report of any such incident. Mr. Eler could not point to any other instance of negative information contained in the records beyond his own misguided belief that have the jury hear about the longstanding poly-substance abuse and longstanding mental health issues was not a good idea. Mr. Eler could not explain his failure to present this evidence to only the court if he was concerned about a negative impact on the jury. In hindsight, Mr. Eler conceded that perhaps he

should have admitted this evidence.

Unlike the defendant in Cave, Mr. Miller had reported his addictive history and prior hospitalizations to Dr. Krop, his family reported to Dr. Krop what they knew of his illness, and numerous records substantiating his longstanding mental health and emotional difficulties were made available to Dr. Krop. Dr. Krop was prepared to testify about Mr. Miller's mental and emotional health issues, the failed treatment, and his poly-substance abuse. Ms. Lee was available as a witness to testify as to her contacts with Mr. Miller shortly before the homicide, his attempts at treatment, the reason that treatment was not successful, and other aspects of Mr. Miller's mental and emotional issues and his poly-substance abuse. Mr. Eler failed to investigate and present relevant and compelling evidence to either the trial court or the jury. Mr. Eler did not demonstrate "good common sense"- it does not appear that any sense played a role in the decision to forgo the presentation of compelling mitigation evidence. The record in this case demonstrates a failure on the part of Mr. Eler beyond that shown in *Cave*. Mr. Eler's lack of preparation and failures in the penalty phase satisfy both prongs of *Strickland*. Reversal is required.

ISSUE II

> THE TRIAL COURT ERRED IN REJECTING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OFFER EVIDENCE TO MINIMIZE THE AGGRAVATING FACTOR OF PRIOR VIOLENT FELONY ARISING FROM APPELLANT'S PRIOR CONVICTION FOR SECOND DEGREE MURDER.

In the penalty phase the State relied upon the Appellant's 1983 North Carolina conviction for second degree murder to provide the basis for the establishment of the aggravating circumstance of prior violent felony. The State offered into evidence only the judgment and sentence for this conviction. No additional testimony as to the underlying facts of this conviction and subsequent sentence were introduced as evidence before the jury or trial court. In sentencing Mr. Miller to death, the trial court paid particular attention to this conviction:

> The defendant's prior conviction for murder is most appalling and has been given great weight. The court cannot imagine a greater aggravateing factor unless it pertains to the method of the prior murder or the nature of the victim. This second murder by the defendant occurred approximately four years from the date of the defendant's early release from prison after serving a mere seven years of his twenty-five year sentence. The Supreme Court of Florida has previously held that the death sentence is appropriate, not mandatory, but appropriate, in cases wherein one of the aggravating factors

> proven is the defendant's prior conviction for murder. [citations omitted]

The trial court had earlier assigned this aggravating factor great weight in the sentencing order.

Trial counsel Eler testified that one critical role of defense counsel is to rebut or diminish the aggravating factors relied upon by the State. Eler also testified that in this case his goal was to obtain a life recommendation, as he perceived few issues relating to guilt. Thus, a reasoned and effective approach to this case would have been to mitigate or diminish the strength of the prior conviction as an aggravating factor. With that focus in mind, Eler offered the following excuses for his complete failure to present evidence to the jury and trial court which substantially mitigated the prior conviction:

Mr. Eler testified that his method of minimizing the prior conviction was to "gloss over it" and not allow the State to present more evidence on it. Eler acknowledged that the State had only introduced the judgment and sentence and had no other witnesses available to testify about any potentially negative factors relating to the conviction. Eler was not able to identify a single fact that he believed the State would bring out that would be

any more negative that the existence of the conviction. When further questioning showed the unsoundness of his decision, Eler then claimed that he didn't want to get into any of the mental health issues that existed at the time of the prior conviction which mitigated it because he thought that the VA records would show that Mr. Miller pushed another patient. Once again, the decision was fatally flawed because no such information is contained in the medical records.

The trial court found that Eler made a tactical decision to minimize the amount and depth of information concerning the North Carolina convictions presented to the jury. (V,R845) The trial court's conclusions regarding the reasonableness of this decision and that it was tactical is error.

This Court has recognized for thirty-four years that a death sentence is a unique punishment reserved for the most aggravated and least mitigated of first-degree murder. State v. Dixon, 283 So. 2d 1,7 (Fla. 1973). Logic requires and Mr. Eler agreed, that defense counsel has two primary duties to perform in the penalty phase: (1) to attack/mitigate the aggravation in order to demonstrate that the present case is not the most aggravated of murders

and (2) to demonstrate and present evidence establishing mitigation. In failing to attack/mitigate Mr. Miller's prior conviction, Mr. Eler wholly failed to effectively represent Mr. Miller. Such a failure meets both prongs of Strickland v. Washington, 466 U.S. 668, 687, 694 (1984), which requires that omissions of defense counsel are "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment" and that the defendant was prejudiced by the deficient performance such that confidence in the outcome of the proceeding is undermined. Monlyn v. State, 29 Fla. Law Weekly S741 (Fla. December 10, 2004).

The aggravating circumstance of Previously Convicted of a Felony Involving the Use or Threat of Violence (Prior Violent Felony) is one of the "most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So. 2d 882 (Fla. 2002). It has been well-established by this Court that even this most weighty of aggravators can be mitigated by the presentation of evidence which minimizes the weight attributable to this factor. Repeatedly this Court has reversed sentences of death where the Prior Violent Felony aggravator existed, but where the underlying facts of that conviction reduced the weight that should be accorded to

that factor.

The defendant in Jorgenson v. State, 714 So. 2d 423 (Fla. 1998), was convicted of first degree murder. The jury recommended death by a margin of 11-1. The State relied upon the defendant's prior conviction for second degree murder to establish the prior violent felony aggravator. In determining whether the sentence of death was proportionate, this Court reviewed the facts of the previous conviction, the length of time between the offenses, and the mitigation present. This Court reversed the sentence of death.

In the case of Johnson v. State, 720 So. 2d 232 (Fla. 1998), the State relied upon the defendant's prior conviction for aggravated assault to establish the prior violent felony aggravator. The defense presented testimony during the penalty phase which mitigated the circumstances of the prior conviction. This Court, in reversing the sentence of death, held that the weight accorded to that most serious of factors should be minimized based upon the explanation of the factual circumstances. This Court also noted the absence of HAC or CCP, the present substantial mitigation, and reversed the sentence of death. See also, Larkin v. State, 739 So. 2d 90 (Fla. 1999).

The principles of Johnson and Jorgenson were clearly established at the time of Mr. Miller's trial. In Terry v. State, 668 So. 2d 954 (Fla. 1996), a case contemporaneous to this case, the State relied upon the defendant's prior conviction for aggravated assault to establish the PFV aggravator. This Court held that the underlying facts, which established Terry's guilt as a principal mitigated against the weight assigned to this factor. In Chaky v. State, 651 So. 2d 1169, 1173 (Fla. 1995), the defendant had a previous conviction for attempted murder while he was serving in Vietnam. The underlying circumstances of the case caused this Court to assign significantly less weight to this aggravator. In Mahn v. State, 714 So. 2d 391 (Fla. 1998), the defendant had a prior conviction of robbery. However, the facts in that episode established prior that the defendant drove a get away vehicle after a woman's purse was snatched. Again, lessor weight was afforded the aggravator.

Mr. Eler's claim that his strategy was to "gloss over" the conviction and not dwell on the negative coupled with his belief that inaction would shield the jury from further detrimental information was not a sound strategic decision based upon a competent analysis of the law. Mr. Eler's

reasoning was flawed for two reasons: (1) unmitigated prior violent felony aggravators often result in the sustaining of a death sentence and (2) failing to mitigate the aggravator by ignoring it would not prevent the State from offering evidence relating to the prior conviction.

Recognizing the serious nature of the prior violent felony aggravator, this Court has sustained death sentences where no mitigation of the aggravator was present, and specifically in some cases where the prior felony was for second degree murder. For example, in Ferrell v. State, 680 So. 2d 390 (Fla. 1996), this Court sustained a sentence of death imposed upon the defendant following his conviction for the shooting of his live-in girlfriend. The sole aggravator was the defendant's prior violent felony conviction for the second degree murder of his previous girlfriend. The death sentence was affirmed due to the striking similarity between the prior conviction and the present murder. Ferrell was ultimately relied upon by this Court in affirming Mr. Miller's death sentence. See also, King v. State, 436 So. 2d 50 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S. Ct. 1690, 80 L. Ed. 2d 163 (1984) (death sentence affirmed for shooting live-in girlfriend where prior conviction was for axe-slaying of former common-law

wife). Given the existence of these two cases at the time of Mr. Miller's trial, Mr. Eler's decision to forgo an attack on the prior second degree murder conviction where facts which mitigated it clearly existed fell below reasonable standards for capital counsel.

Mr. Eler's second excuse for failing to mitigate the prior conviction was that he wanted to prevent the State from introducing more evidence about that conviction that could be detrimental to Mr. Miller. This belief is contrary to what the law permits.

In any case where the State seeks to use the prior violent felony aggravator, the State is allowed to present the underlying facts of the prior incident subject to the limitation that the prior conviction cannot be retried. Elledge v. State, 346 So. 2d 948 (Fla. 1977). The State is also precluded from using prejudicial evidence which is not necessary to establish the conviction or outweighs any probative value. Lockhart v. State, 655 So. 2d 69 (Fla. 1995). This principle of law was firmly established at the time of Mr. Miller's trial. Whether or not the State would be permitted to introduce negative facts was not dependent on whether Mr. Eler presented the findings of the North Carolina judge and the mental health findings which so

clearly mitigated this most serious aggravator. The State was legally allowed to present the factual circumstances of the prior conviction irrespective of what Mr. Eler chose to present in mitigation of the aggravator. Mr. Eler also admitted to knowing, from having received the witness list from the State, that the State had not disclosed any witnesses who were going to testify about the North Carolina conviction. There was no State witness who would have testified negatively to any presentation of evidence or records by Mr. Eler which would have mitigated the prior conviction. Mr. Eler admitted that he knew prior to penalty phase that the State had not secured the presence of any witnesses from North Carolina. The State's strategy was obvious- Why would they wish to present additional evidence about the prior conviction when that evidence would mitigate the prior conviction? The fact of the conviction was the strongest weapon the State had. Any additional testimony other than the judgment and sentence weakened this aggravator to the disadvantage of the State. Given the rule of law permitting the State to introduce the underlying facts of the prior conviction, it is ludicrous to believe that if those facts would have strengthened the State's case they would not have been presented. Obviously

it would not have helped the State to have the North Carolina judge's conclusion regarding the mitigation in that case to come before the current judge.

Due to Eler's failure to explain and mitigate the prior conviction, Mr. Miller was significantly prejudiced at trial. Mr. Eler acknowledged that he believed the single most important factor in the jury recommendation was the prior North Carolina conviction. This factor was certainly the most important sentencing consideration to the trial judge as reflected in the sentencing memorandum. Previous decisions of this Court clearly set forth the great weight that is afforded to this aggravator during proportionality analysis. If the jury had knowledge of the underlying facts of the conviction revolving around self-defense, especially the findings of the North Carolina judge that Mr. Miller acted with diminished capacity due to his mental illness and addictions, and the enormous amount of remorse that Mr. Miller felt even 10 years later, it is probable that the sentencing recommendation would have been different. Given that death was recommended by a vote of 7-5, the slimmest of questionably legal margins, it is more than probable that the same jury would have rendered a life recommendation. If the jury had been apprised of the

circumstances of the prior conviction, the findings of the mental health evaluators in that case, and ultimately, the ruling of the North Carolina judge which found significant mitigation present in that case due to the mental health impairments, emotional impairment, and addictions of Mr. Miller, it is probable the recommendation would have been for life. This Court's affirmance of the death sentence imposed in this case was premised upon a lack of relevant information which has been sufficient in other cases to significantly diminish the weight assigned to this aggravator in proportionality review. Had Mr. Miller been provided with effective assistance of counsel at the trial level there is more than a possibility that the outcome would have been different, both in the recommendation returned by the jury and in the review afforded to Mr. Miller by this Court in his direct appeal.

ISSUE III

THE TRIAL COURT ERRED IN REJECTING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO CLEARLY ERRONEOUS, IMPROPER AND PREJUDICIAL CLOSING ARGUMENT BY THE STATE.

The trial court determined that Mr. Miller was

procedurally barred from arguing prosecutorial misconduct in the post-conviction proceedings as that issue should have been raised on direct appeal. (V,R847) The trial court found that any claims of ineffective assistance of counsel arising from Eler's failure to object to the prosecutor's closing argument fell within the wide range of professional judgment to make a tactical decision not to object and did not amount to ineffective assistance of counsel. (V,R859) The trial court's ruling is erroneous and relief should have been granted to Mr. Miller.

As in Issues I and II, the two-pronged test of Strickland applies. The standard of review is plenary- this Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact. Factually, there is no dispute as to whether or not trial counsel Eler objected. He did not. This Court must determine whether the trial court was correct in determining that the decision of trial counsel to remain silent fell within the reasonable bounds of competent representation of Strickland.

Over the last several years this Court has indicated a willingness to reverse death cases based upon prosecutorial misconduct in closing arguments. Ruiz v. State, 743 So. 2d

1 (Fla. 1999). In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), this Court noted that the proper role of closing argument in a criminal case is to serve as a review of the evidence and the inferences which may be reasonably drawn from them. Closing argument is not for the purpose of inflaming the minds and passions of the jury.

It is the responsibility of trial counsel to object to improper argument. Failing to make a contemporaneous objection to improper argument not only allows impropriety in the trial to go unchecked, it also waives the issue for appellate review. Fundamental error is rarely found in the direct appellate review of claims premised on prosecutorial misconduct. See, Doorbal v. State, 837 So. 2d 940 (Fla. 2003).

At the evidentiary hearing Mr. Eler was questioned about his lack of response to numerous instances of improper argument by the prosecutor. Mr. Eler was asked to respond to the following instances of prosecutorial misconduct:

I. Alleging Mr. Miller Would Have Committed a Second Homicide but for the Intervention of a Third Party.

During closing arguments the prosecutor argued to the jury that this case would have been a double-homicide

because Mr. Miller would have killed Ms. Fullwood but for the actions of a third-party. This argument was used on six different occasions during the closing argument, an argument that even Mr. Eler termed “very zealous”. Mr. Eler opined that he didn’t object because “for whatever reason at the time, using my best professional judgment, I didn’t think it was significant.” At the evidentiary hearing Mr. Eler agreed the comments were pretty bad (but good for the victim Fullwood). Mr. Eler opined that he thought this argument was losing points with the jury.

Section 921.141, Florida Statutes (1997), sets forth the statutory aggravating circumstances that the State may rely upon in seeking the death penalty. This Court has consistently held that it is improper for the State to argue nonstatutory aggravation as a reason for a jury to recommend a death sentence. Allen v. State, 662 So. 2d (Fla. 1995), cert. denied, 116 S. Ct. 1326 (1996); Drake v. State, 441 So. 2d 1079 (Fla. 1983); Miller v. State, 373 So. 2d 882 (Fla. 1979).

The argument of the prosecutor which exhorted the jury to return a death sentence because Mr. Miller would have killed someone else if not stopped was asking the jury to base a death sentence on a nonstatutory aggravating factor.

This argument was made no less than six times. Defense counsel's performance fell below an objective standard of reasonableness when he failed to ensure by proper objection that either a mistrial was granted or appellate review would be possible for these repeated instances of prosecutorial misconduct.

II. Improper Vouching for the Credibility of a State Witness.

Mr. Eler was read portions of the State's closing argument wherein the prosecutor told the jury that convicted felon and unsavory state witness Jimmy Hall was telling the truth. Mr. Eler offered his opinion that he wasn't sure if that type of assertion constituted vouching. Mr. Eler could not offer a more direct example of vouching, but he did admit that he did not believe that an attorney is allowed to state to the jury whether a witness is lying or telling the truth. Mr. Eler then retracted somewhat, admitting that he may have been wrong about whether or not vouching had occurred. (V,R815-816)

A prosecutor may not vouch for the credibility of a witness by expressing an opinion as to whether or not the witness is telling the truth or otherwise imply that a witness is telling the truth. Kelly v. State, 842 So. 2d

223 (Fla. 1st DCA 2003); DeLuca v. State, 736 So. 2d 1222 (Fla. 4th DCA 1999); Irving v. State, 627 So. 2d 92 (Fla. 3rd DCA 1993). Prosecutorial comments that a state witness told the truth are improper and such comments have been recognized throughout the district courts of Florida as constituting reversible error. Johns v. State, 832 So. 2d 959 (Fla. 2nd DCA 2002) (*improper bolstering required reversal when coupled with other instances of prosecutorial misconduct)*; Brown v. State, 787 So. 2d 229 (Fla. 2nd DCA 2001)(*prosecutor committed reversible error when he vouched for the credibility of his witness, coupled with other cumulative error in the argument)*; Williams v. State, 747 So. 2d. 474, 475 (Fla. 5th DCA 1999) (*reversible error for prosecutor to argue that a witness was telling the truth)*; Fryer v. State, 693 So. 2d 1046 (Fla. 3rd DCA 1997) *(reversal required where prosecutor referred to witness as a "truthful man")*; May v. State, 600 So. 2d 1266 (Fla. 5th DCA 1992) (*prosecutor argued that witness would tell the truth*).

Mr. Eler's failure to recognize the impropriety of this prosecutorial argument is deficient performance for capital counsel under Strickland.

III. Argument Invoking Victim Sympathy/Jury Sympathy

The prosecutor made the following argument to the penalty phase jury: "The defendant didn't care that Albert Floyd had a wife, he didn't care that Albert Floyd had children, he didn't care that Albert Floyd had any grandchildren, he didn't care that he had a family and friends who loved and cared for him. He didn't care. Now he wants you to car for him, he wants you to recommend a life sentence for him." (V,R817-818)

Mr. Eler stated that whether or not he would object to this type of improper argument would depend on whether it had been done during guilt phase or penalty phase. According to Mr. Eler, there wasn't as much leeway for argument in guilt phase, but this prosecutorial argument appeared to be a comment on the fact that the defense was asking for mercy. (V,R816) When told that the argument was made at the beginning of penalty phase, Mr. Eler stated he didn't know if he would have "gotten up there. Maybe, upon reflection, but, once again, I didn't think it was significant at the time." (V,R816)

The prosecutor then continued on with his argument to the jury, stating: "…The defendant wants you to only hear that there are people who love and care for the defendant.

He wants you to hear and focus on his life, his family, his problems. Doesn't really want you to hear about Albert Floyd, that he had a wife, children, grandchildren, wants you to forget that. He was a hard-working man who worked to support his family, doesn't want you to think about the people who loved and cared for Albert Floyd." Mr. Eler stated he didn't find these comments objectionable because "what I will do is I will turn that around and use that in mitigation in my closing argument against them and so while nothing- I'm not saying everything he said helped me, be-cause obviously it didn't. They had their case, but a lot of times what I will do as a strategy or technique is allow them to argue and then take- because they don't get a rebuttal, in the penalty phase at least, and take what they're arguing and turn it around to my benefit. I don't have the transcript in front of me. I hope I would have addressed some of those and turned them around against them to argue and then take- because they don't get a rebuttal, in the penalty phase at least, and take what they're arguing and turn it around to my benefit. I don't have the transcript in front of me. I hope I would have addressed some of those and turned them around against them." Mr.

Eler admitted, upon reflection he should have objected. No evidence was introduced to demonstrate that Mr. Eler, had in fact, "turned" anything around in his closing argument.

Mr. Eler also acknowledged that a standard jury instruction exists which advises the jury that they are not to hold the objections made by the lawyer against the client.

Arugments which seek to take a mitigating circumstance (such as that the defendant has a family and others who care about him) and turn it into an aggravating circumstance is patently improper argument. In Hamilton v. State, 703 So. 2d 1038 (Fla. 1997), the defense had presented evidence that the defendant was a father and husband. The prosecutor then argued that the victim was also a wife and mother and the defendant had not refrained from killing her. This Court found the argument improper.

The incendiary rhetoric used by the prosecutor in this case had the intended purpose of improperly inflaming the jury. Argument which appeals to the sympathy of the jury is improper. For example, in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), reversible error occurred where the prosecutor argued that the jury should show the same level of mercy to the defendant that he had showed to the victim. The

argument in this case essentially also urged the jury to show the same level of mercy to Mr. Miller that he had shown to Mr. Floyd. See also, Richardson v. State, 604 So. 2d 1107 (Fla. 1992)(*improper for prosecutor to ask the jury to show the same pity and mercy to the defendant that he had shown to the victim*); Urbin v. State, 714 So. 2d 411 (Fla. 1998)(*prosecutor improperly concluded argument by asking jury to show same mercy to the defendant that he had shown to the victim*).

Mr. Eler admitted that he was familiar with the use of motions in limine. Mr. Eler will usually file a motion in limine if he anticipates a problem, but his normal course isn't to file them in anticipation of closing arguments.

Mr. Eler failed to object to any of the aforementioned errors. His reasoning for doing so was premised upon a convoluted and ultimately incorrect understanding of the concept of fundamental error. Mr. Eler indicated that he only objects in closing argument when the error was so egregious that it was fundamental. Mr. Eler was willing to acknowledge that it was "…Probably pretty rare" or "very rare" for an appellate court to reverse a case based upon a finding of fundamental error.

The legal definition of fundamental error is error

which is unobjected to, yet "reaches down to 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." McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999). This legal standard was the same at the time of Mr. Miller's trial. Mr. Eler apparently failed to grasp the ramifications of only objecting to error deemed "fundamental" because the very nature of fundamental error is that it requires no objection in order to be preserved for appeal. A strategy of objecting to only fundamental error wholly fails to preserve what would otherwise be reversible error on appeal and reversible error needs an objection. This method of trial defense espoused by Mr. Eler fails to satisfy the most basic of trial level skills- the duty to object to protect the record and to object to ensure that the defendant receives a fair trial. Mr. Eler's woefully deficient understanding of the basis and need for objection fell below the Strickland standard which requires at least minimal understanding of the fundamentals of record preservation. Mr. Eler's "tactical" decisions to remain silent in the fact of clear-cut impropriety were based upon his ignorance of the rule of law regarding objections, record

preservation, and the concept of fundamental error. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance. Brewer v. Aiken, 935 F. 2d 850 (7th Cir. 1991) Thus, the trial court's conclusion that the failure to object was reasonable was error.

Mr. Eler's second questionable strategy for not objecting was due to his concern about appearing in a negative manner in front of the jury. Mr. Eler doesn't object to "irrelevant issue[s] or minutia" because he doesn't like to anger the jury. Mr. Eler felt that objecting to any "gray" areas [a gray area, according to Mr. Eler, is anything that is not fundamental error] would convey a negative influence on the jury to the client. Mr. Eler felt that objecting would harm his credibility and he when he was trying to get "cloaked with truth, justice, and honesty on this side of the table because so many times juror… don't trust defense attorneys…" Mr. Eler tries to get juries to trust him by showing "courtesy to counsel", which includes not objecting. Mr. Eler's rationale for not objecting out of fear of angering the jury overlooked the standard jury instruction which advises the jurors that it is proper for an attorney to object and that a juror should not hold an objection against an attorney or the defendant.

Mr. Eler acknowledged his awareness of that jury instruction, but opined that jurors may or may not hold objections against the lawyer and he always errs on the side of caution- "…like I said, unless it is something significant and cumulative, I will not, unless it's fundamental in my opinion, object."

Once again, Mr. Eler's cure to his concern of credibility and jury bond was worse than the illness he perceived by failing to lodge proper, fundamental objections. Mr. Eler permitted error terminal to a fair trial to infect the proceedings.

The second prong of Strickland requires a showing of prejudice. Mr. Miller was significantly prejudiced by Mr. Eler's failure to object. He was prejudiced at the trial level due to the cumulative effect the improper argument would have had on the emotions and passions of the jury. The repeated warnings that Mr. Miller would have killed two people coupled with the denigration of mitigation and the urge to reject leniency or mercy led to an environment condemned in numerous cases from this Court. The "neutral arena" contemplated in Ruiz, 743 So. 2d at 4 vanished in favor of a courtroom where emotion ruled the day. Defense

counsel's failure to object also prejudiced Mr. Miller in his direct appeal. The issue of prosecutorial misconduct was not preserved for appellate review.

The cumulative effect of the repeated and inflammatory arguments of the prosecutor on the jury cannot be ignored. The ruling of the lower court should be reversed with the cause remanded for, at minimum, a new penalty phase.

ISSUE IV

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL DUE TO NUMEROUS JURY INSTRUCTIONS WHICH FAIL TO ENSURE THAT DEATH IS NOT IMPOSED ARBITRARILY.

The Florida Death Penalty sentencing scheme is constitutionally infirm. It is predicated upon unconstitutional jury instructions which improperly shift the burden of proof to the Defendant to establish mitigating circumstances and then show that they outweigh aggravating factors. The jury instructions minimize and denigrate the role of the jury in the penalty phase and fail to properly instruct the jury as to the nature, meaning, and effect of mitigation. The trial court erred in denying relief on claims 6, 7, 8 and 11. (V,R866-868)

A. The Penalty Phase Jury Instructions Improperly Shift the Burden of Proof to the Defendant to Establish Mitigating Factors and Then Show That the Mitigating

Factors Outweigh the Aggravating Factors in Violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

Under Florida law a capital sentencing jury must be told that:

> …the State must establish the existence of one or more aggravating circumstances before the death penalty could be imposed…
>
> [S]uch a sentence could be given if the State showed the aggravating circumstances out-weighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973); Mullaney v. Wilbur, 421 U.S. 684 (1975). This straight forward standard was never applied to the sentencing phase of Mr. Millers' trial. The jury instructions in this case were inaccurate and provided misleading information as to whether a death recommendation or a life sentence should be returned. In Ground X of the Amended Motion for Postconviction relief Mr. Miller asserted that defense counsel rendered ineffective assistance of counsel by failing to object to these errors. See, Murphy v. Puckett, 893 F. 2d 94 (5th Cir. 1990). The jury instructions shifted to Mr. Miller the burden of proving whether he should live or die by instructing the jury that it was their duty to render an opinon on life or death by deciding "whether sufficient

mitigating circumstances exist to outweigh any aggravating circumstances found to exist." In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard jury instructions shifted the burden to the defendant as to the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis. In failing to object to these errors, defense counsel rendered ineffective assistance of counsel. See, Murphy v. Puckett, supra.

The jury instructions given in this case required that the jury impose death unless mitigation was not only produced by Mr. Miller, but also unless Mr. Miller proved that the mitigation outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Miller to death. This standard obviously shifted the burden to Mr. Miller to establish that life was the appropriate sentence and limited consideration of the mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard jury instruction given to this jury violated Florida law. This jury was precluded from "fully considering" and "giving full effect to" mitigating

evidence. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). This burden shifting resulted in an unconstitutional restriction upon the jury's consideration of any relevant circumstance that it would use to decline the imposition of the death penalty. McClesky v. Kemp, 481 U.S. 279, 306 (1987); Lockett v. Ohio, 438 U.S. 586 (1978); and Hitchcock v. Dugger, 481 U.S. 393 (1987).

The unconstitutional burden shifting violates the principals of the Eighth Amendment and Florida law. A death sentence which results from erroneous instructions is arbitrary and capricious. McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990). [Kennedy, J., concurring]. Mr. Miller was forced to prove to the jury that he should live. This violated the Eighth Amendment and due process under Mullaney. The effect of these jury instructions is for the jury to conclude that it need not consider mitigating factors unless they are sufficient to outweigh the aggravating factors and from evaluating the totality of the circumstances as required under Dixon. Counsel's failure to object to these erroneous instructions is deficient performance under the principles of Harrison v. Jones, 880 F. 2d 1277 (11th Cir. 1989).

B. The Penalty Phase Jury Instructions Improperly Minimize and Denigrate the Role of the Jury in the Penalty Phase in Violation of *Caldwell v. Mississippi*, and Trial Counsel's Failure to Object Constitutes Ineffective Assistance of Counsel.

In Ground XI of the Amended Motion for Post-Conviction Relief, Mr. Miller challenged defense counsel's failure to object to jury instructions as given in this case as being in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Caldwell prohibits the giving of any jury instruction which denigrates the role of the jury in the sentencing process in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. The penalty phase jury instructions in Florida violate not only Caldwell, but also Article I, Sections 6, 16 and 17 of the Florida Constitution. The decision of this Court in Thomas v. State, 838 So. 2d 535 (Fla. 2003), and others rejecting this claim should be reversed.

By repeatedly advising the jury that their verdict is only advisory and a recommendation and being told that the decision as to sentence rests solely with the court, the jury is not adequately and correctly informed as to their role in the Florida sentencing process. The jury instructions suggest that the decision of deciding the appropriateness of a death sentence rests with the court

and not them. These instructions minimize the jury's sense of responsibility for determining the appropriateness of a death sentence.

B. The Penalty Phase Jury Instructions Fail to Properly Instruct the Jury Regarding the Nature, Meaning, and Effect of Mitigation in Violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution and Trial Counsel's Failure to Object to These Instructions was Ineffective Assistance of Counsel.

The standard jury instruction in penalty phase proceedings fail to instruct the jury regarding the nature, meaning, and effect of mitigation in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and of Article I, Sections 9, 16 and 17 of the Florida Constitution. The jury instructions fail to instruct the jury that mitigation evidence must be considered under Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982) ("The sentencer …may determine the weight to be given to the relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration.") "The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigation factor, any aspect of the defendant's

character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence… It is not enough to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry, 492 U.S. 302.

Florida jury instructions fail to adequately define for the jury what mitigation is. The Court in Spivey v. Zant, 661 F. 2d 464 (5th Cir. 1981) offered a definition of mitigating evidence and what its function should play in jury deliberations. Spivey advises that the jury should be told that mitigating circumstances do not justify or excuse the offense, but should in fairness or mercy, be considered as extenuating or reducing the degree of moral culpability and punishment. The United States Supreme Court has adopted similar language in defining mitigating circumstances in Woodson v. North Carolina, 428 U.S. 280, 304 (1976) as "anything about the

defendant or the crime which, in fairness and mercy, should be taken into accounts in deciding punishment. Even where there is no excuse or justification for the crime, our law requires consideration of more than just the bare facts of the crime; therefore, a mitigating circumstance may stem from any of the diverse frailties of human kind." This Court has approved the giving of an expanded jury instruction patterned after both Woodson and Spivey in Jones v. State, 652 So. 2d 346, 351 (Fla. 1995). Trial counsel was ineffective in failing to request an expanded jury instruction as to the nature, meaning and effect of mitigating circumstances in the death sentencing process.

Florida jury instructions also fail to advise the jury that unanimity is not required as to mitigating factors. Unanimity requirements have been stricken in other states. See, Mills v. Maryland, at 486 U.S. 367, and McKoy v North Carolina, at 494 U.S. 433. Since no standard jury instruction exists for this issue, trial counsel was ineffective in failing to draft and request a special instruction on this issue under the principles of Harrison v. Jones, at 880 F. 2d 1277 (11th Cir. 1989).

ISSUE V

A SENTENCE OF DEATH IS NOT APPROPRIATE IN THIS CASE.

A defendant is entitled to relief for constitutional errors which result in a death sentence when he can show innocence of the death penalty. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). Innocence of the death penalty constitutes a valid claim for post-conviction relief. Scott v. Dugger, 604 So. 2d. 465 (Fla. 1992).

In this case the trial court relied upon two aggravating circumstances: (1) prior violent felony premised upon the contemporaneous conviction for aggravated battery and the prior conviction for second-degree murder, which was assigned great weight and (2) the homicide was committed for pecuniary gain and during the course of an attempted robbery (merged) and assigned considerable weight. Miller v. State, 770 So. 2d 1144 (Fla. 2000). In this case trial counsel failed to provide sufficient background, including the factors relied upon by the trial judge in North Carolina, in relation to the prior conviction for second-degree murder. Trial counsel failed to inform the court that the murder was one which occurred

in mutual combat, that Mr. Miller was committed to a mental health institution pending resolution of that case, and that significant mitigating factors were found to exist at the time of that offense which included the trial court's findings that Mr. Miller's culpability was significantly diminished due to mental health mitigation.

Substantial mitigation evidence was presented at the evidentiary hearing that was not presented at the penalty phase. The trial court in sentencing Mr. Miller rejected the mitigating factor of an abusive and dysfunctional family because the incidents of abuse by the father ceased at age 13, didn't result in hospitalization for Mr. Miller, and because other siblings in the family had led productive lives. This Court affirmed the trial court's decision based upon the record as it stood before the trial court. However, this finding cannot stand after the testimony presented at the evidentiary hearing is considered. Trial counsel Eler failed to present the testimony of Dr. Krop as summarized in Issue I, which addressed the significant psychological impact the abusive familial structure had on Mr. Miller and explained the inability of Mr. Miller to recover from such an environment when other siblings were

able to do so. Mr. Eler failed to present factual detail and background to explain the significant mental health and emotional issues Mr. Miller lives under.

Trial counsel Eler also failed to establish for the trial court sufficient evidence to demonstrate the long-standing drug and alcohol addictions suffered by Mr. Miller. The trial court rejected this mitigating factor as well because the alcohol abuse did not begin until Mr. Miller was age 18 and it did not appear that he had sought treatment for it. Readily available, but not used by trial counsel, were voluminous records supporting a life-long addiction to drugs and alcohol, treatment attempts by Mr. Miller as reported in both medical records and as testified to by Ms. Lee, and compelling testimony from Dr. Krop about the inherent failures of such treatment for an individual such as Mr. Miller without tremendous support from institutional and personal resources. The testimony presented at the evidentiary hearing completely contradicts the basis by which the trial court rejected this mitigating factor and substantially undercuts the application of the harmless error analysis used by this Court in the direct appeal.

The trial court’s assignment of weight to certain

mitigating factors is also subject to question in light of additional evidence presented at the penalty phase. The trial court gave little weight to mitigating factor #11, which addressed the impact that the suicide of his sister and cousin had on the Appellant. The court's assignment of weight was based upon a lack of evidence produced at trial or the guilt phase which established any trauma beyond the norm associated with such events. However, at the evidentiary hearing the testimony of both Ms. Lee and Dr. Krop established the significant emotional impact these events had on Mr. Miller.

Defense counsel Eler also failed to fully develop and corroborate the extent of the frontal lobe brain damage suffered by Mr. Miller. The testimony of Dr. Wu and the resulting evidence produced by the PET scan not only corroborated the neuropsychological testing, but further amplified the presence of the schizoid personality disorder and the behavioral and emotional deficits such damage results causes in individuals, especially when aggravated by long-term poly-substance abuse. The amplified and additional testimony provided by Dr. Krop, Dr. Wu, and Ms. Lee demonstrated the diminished abilities that Mr. Miller had exercising appropriate impulse control and making

responsible and reasoned choices. This testimony and evidence contained in the previous mental health records of Mr. Miller substantially discredits the trial court's finding that Mr. Miller deliberately chose his course of conduct.

Consideration of the additional mitigation evidence combined with mitigation of the prior conviction for second-degree murder which the trial court characterized as appalling and one which the court could "not imagine a greater aggravating factor" would render this sentence of death disproportionate. Thus, under Florida law and the opinions of this Court, the sentence must be reduced. This Court's prior finding of proportionality was grounded on a deficient and woefully inadequate record. Manifest injustice would occur if adherence to that finding continued as law of the case. State v. Owen, 696 So. 2d 715 (Fla. 1997), rev. denied, 118 S. Ct. 574, 139 L. Ed. 2d 413 (1997); White Sands, Inc. v. Sea Club v Condominium Ass'n., Inc., 591 So. 2d 286 (Fla. 2nd DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)

ISSUE VI

FLORIDA'S CAPITAL SENTENCE PROCEDURE IS UNCONSTITUTIONAL BECAUSE A JUDGE

RATHER THAN JURY DETERMINES SENTENCE.

In ground 15 of his Motion for Postconviction Relief, Mr. Miller asserted that the Florida capital sentencing procedure is unconstitutional. The trial court denied relief. (V.R871)

Florida's capital sentencing procedure is unconstitutional under the holding of the United States Supreme Court in Ring v. Arizona, 122 S. Ct. 2428 (2002). The Court, in Ring, struck the death penalty statute in Arizona because it permitted a death sentence to be imposed by a judge who made the factual determination that an aggravating factor existed. Absent the presence of aggravating factors, a defendant would not be exposed to the death penalty. While recognizing that this position has not been ruled upon favorably by this Court in Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 123 S. Ct. 657 (2002) and other cases, Mr. Miller asserts that the Florida capital sentencing statute suffers from the same flaws that led to Ring and would urge that this Court adopt, at minimum, the reasoning expressed in the dissenting opinions of Justice Anstead and Pariente, which would require unanimous death recommendation by the jury. Under Florida law, a defendant cannot be sentenced to death unless the

judge- not jury- makes the ultimate findings of fact as to the aggravators and mitigators. The jurors in Mr. Millers' case certainly grasped this conclusion as evidenced by their comments to the press. Because Florida requires fact finding by the judge, it is unconstitutional under Ring. The use of the advisory jury recommendation does not change this analysis. The Florida capital sentencing procedure is unconstitutional.

ISSUE VII

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON IT'S FACE AND AS APPLIED IN THIS CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

In ground 14 of his Motion for Post-Conviction Relief Mr. Miller asserted that Florida's capital sentencing statute is unconstitutional because it is predicated on an unconstitutional automatic aggravating circumstance of murder in the course of a felony. The trial court denied relief. (V.R871)

Florida's capital sentencing scheme denies Mr. Miller his right to due process of law and constitutes cruel and unusual punishment on its face and as applied. Florida's

death penalty statute is constitutional only if it prevents the arbitrary imposition of the death penalty and narrows the application of death to only the worst offenders. See, Profit v. Florida, 428 U.S. 242 (1976) Florida's death penalty statute fails to meet these constitutional guarantees and is therefore unconstitutional.

Florida's death penalty statute fails to provide any standard of proof for determining that aggravating factors "outweigh" mitigating factors (Mullaney v. Wilburn, at 421 U.S. 684) and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating factors listed in the statute. Aggravating factors are applied in a vague and inconsistent manner and the jury receives unconstitutionally vague instructions on the aggravating factors. See, Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to an arbitrary and capricious imposition of the death penalty, as in Mr. Millers' case, and thus violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

Florida's capital sentencing procedure does not have

the independent reweighing of aggravating mitigating factors as envisioned in Profitt v. Florida, at 428 U.S. 242.

Florida law creates a presumption of death where even only one aggravating factor applies. This creates a presumption of death in every felony murder case and in almost every premeditated murder case. Once a single aggravating factor is present, Florida law presumes that death is the appropriate punishment and that it can only be overcome by mitigating evidence strong enough to outweigh the aggravating factor. The systematic presumption of death cannot be squared with the Eighth Amendment requirement that death be applied only to the worst offenders. See, Richmond v. Lewis, 113 S. Ct. 528 (1992); Furman v. Georgia, 408 U.S. 238 (1972). To the extent trial counsel failed to preserve these issues, defense counsel rendered prejudicially deficient assistance.

CONCLUSION

Based upon the foregoing arguments, citations of law, and other authorities, the sentence death must be set aside, a new penalty phase conducted, or a sentence of life in prison be imposed.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the type font used in this brief is 12 Point, Courier New and prepared in Word.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, The Capital, Tallahassee, FL 32399, this _____ day of March, 2005.

ROBERT A. NORGARD
Attorney at Law
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fla. Bar No. 322059