

IN THE SUPREME COURT OF FLORIDA

DAVID MILLER,  
Appellant,

vs.

CASE NO. SCO4-892

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_/

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

**REPLY BRIEF OF APPELLANT**

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PRELIMINARY STATEMENT

The Appellant, David Miller, will address Issues I, II, and III in this Reply Brief. He affirms his reliance upon the arguments and citations of law contained in the Initial Brief for these issues, as well as Issues IV, V, VI, and VII.

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, LONGSTANDING 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, at the evidentiary hearing, and in his written closing argument Mr. Miller argued to the lower court that trial counsel was ineffective in failing to thoroughly investigate and present evidence at his trial that would have fully developed his abusive childhood, longstanding alcohol and drug abuse, the failure of his previous substance abuse and mental health treatment attempts, the psychological impact these events/conditions had on his life, and to fully

develop testimony as to the psychiatric history of Mr. Miller. Each of these areas was and is the proper subject for mitigation.

The State's argument that these issues were not presented to the trial court is error. Had these issues not been presented, there would have been no testimony from Ms. Lee, Dr. Krop, and Dr. Wu at the evidentiary hearing. The trial court recognized that these issues had been presented, as they were addressed in his order denying the request for relief.

In his responsive pleading, the State does not seriously contest the testimony of Ms. Lee or Dr. Krop. The State instead contends that the decisions of trial counsel Eler to forgo the presentation of Mr. Miller's psychiatric history through Dr. Krop at trial, additional testimony about Mr. Miller's drug and alcohol history and treatment attempts in the time period immediately preceding this homicide from Ms. Lee, and to have instead only presented evidence of his alcohol and drug usage through brief testimony by his family were strategic decisions. The State further argues that even if there was deficient performance by Eler, there is no prejudice to Mr. Miller because the evidence presented at the post-conviction

evidentiary hearing was not different from that at trial or it was cumulative. Neither argument is sustainable under the record before this Court.

A strategic decision to forgo mitigation evidence must be an informed judgment. The decision to forgo the presentation of mitigation evidence must be made after careful investigation and analysis. Wiggins v. United States, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003). The preparation and presentation of the penalty phase cannot be overlooked, as it is an integral part of the capital case. State v. Lewis, 838 So. 2d 1102 (Fla. 2002). The record before this Court does not demonstrate that Eler adequately performed a careful investigation and analysis of his case before foregoing the presentation of compelling mitigation evidence that was subsequently presented at the post-conviction evidentiary hearing.

Eler failed to adequately investigate and prepare the penalty phase, particularly as regards Dr. Krop and evidence relating to Mr. Miller's mental health, mental health records, and the nexus between Mr. Miller's mental state and the events of his childhood and additions. While Eler had a mental health expert, by his own admission, he relied upon Dr. Krop to tell him what should be presented

in mitigation. According to Eler, the problem in this case wasn't his fault, but that of Dr. Krop. Eler maintained that Dr. Krop didn't alert him to the need for detailed testimony about Mr. Miller's mental state, the effects his background had on him, the effects that alcohol and drug abuse had on him, and his previous diagnosis and treatments, so he didn't pursue those areas of mitigation. By failing to conduct his own investigation and by failing to adequately consult with Dr. Krop, Eler improperly delegated to Dr. Krop the responsibilities of legal counsel. By failing to thoroughly discuss with Dr. Krop the case prior to penalty phase in order to familiarize himself with the opinions of Dr. Krop regarding Mr. Miller and the importance of his background and history and then determine what areas of mental health mitigation to focus on, Eler failed to ascertain critical areas of mitigation that Dr. Krop could have established if he had only asked the questions. Eler abandoned his legal responsibility to Mr. Miller, and instead foisted it on Dr. Krop. Dr. Krop could not be expected to have the skills, training, and thorough understanding of the Eighth Amendment jurisprudence at both the state and federal level that counsel is expected to possess. It is counsel's job to be

cognizant of the state of the law on mitigation, review the reports of his experts, confer and consult with his experts to develop mitigation, and then conduct the presentation of evidence in such a manner as to ensure that facts to support mitigation are admitted as evidence before the jury and trial judge. It is simply not the duty of the doctor or other lay witness to tell the lawyer what is mitigating and then somehow make sure it gets out in the courtroom. Rompilla v. Beard, 162 L.Ed 2d 360, 125 S. Ct. 2456 (2005). The Eighth and Fourteenth Amendments to the United States Constitution require that a sentencer "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death". Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978). Trial counsel's failure to present a complete presentation of Mr. Miller's background, history, and psychological state violated this principle. The jury and trial judge in this case were not provided with compelling evidence of mitigation which might well have warranted a different recommendation from the jury as to the appropriateness of a death sentence. Neither was the trial



judge provided with crucial information necessary to a constitutionally sound review of the mitigation to determine which mitigation was proved by a preponderance of the evidence and what weight it should be assigned.

The State relies upon the case of Henry v. State, 862 So. 2d 679 (Fla. 2003), to support their position that Eler was not ineffective in failing to present testimony detailing Mr. Miller's psychiatric history, including his hospitalizations, treatment attempts, and drug and alcohol abuse. Henry is distinguishable from this case.

In Henry, the defendant had two trials prior to the post-conviction proceedings. In the first trial, psychiatric testimony from two mental health doctors was presented. Both mental health doctors found that the murder occurred when Henry was in a psychotic state and both opined that the two statutory mental health mitigators were present. The jury recommended death by a unanimous vote and the trial court imposed a death sentence, rejecting the mental health mitigators. This Court reversed the first conviction and sentence due to the improper admission of evidence of a second homicide and ordered both a new trial and new penalty phase. At Henry's second penalty phase, defense counsel chose to exclude any

presentation to the jury from the mental health experts that had testified at the first trial. Instead, defense counsel called Henry's girlfriend and her daughter to testify about his kindness. Henry argued in his motion for post-conviction relief that the counsel rendered ineffective assistance of counsel when he failed to present the testimony from the mental health experts. This Court found that counsel's decision to forgo that testimony was reasonable as a means of keeping damaging information from the jury and in light of the previous negative results from the first trial. This Court noted that both doctors would have testified that the defendant was a very dangerous man, as they did in the first trial when subject to cross-examination. In fact, in the first trial where both doctors testified, the State was able to very effectively turn their testimony against Henry. Most importantly, this Court reasoned that second trial counsel had the benefit of knowing the relative success of using the testimony from the mental health experts as evidenced by the result in the first trial: a unanimous death recommendation and the rejection of mental health mitigating factors by the trial judge. Defense counsel had carefully considered the fact that the previous strategy to introduce the doctor's

testimony had failed. Thus, the decision to forgo the mental health testimony was a sound and reasonable strategic decision.

These two factors of damaging testimony and a negative prior result which were critical to the decision reached in Henry are not present in this case. First, Dr. Krop did not testify at the evidentiary hearing that Mr. Miller was a "very dangerous man" and nothing in his testimony could be construed as such. This case is much different from cases where the mental health testimony serves only to portray the defendant in an unsympathetic light or as a dangerous individual. See, Haliburton v. State, 691 So. 2d 466, 471 (Fla. 1997)(no error to forgo presentation of mental health testimony where doctor would have testified that the defendant was dangerous and would kill again).

Second, there had been no previous trial in this case to afford Eler an opportunity to compare the result if mental health mitigation was presented. It cannot be said that the vote of 7-5 for death in this case would not have been different had the jury known the full extent of Mr. Miller's psychological history, including testimony detailing the effects of his earlier life and substance abuse had on him.

The question that this Court must focus on is whether or not Mr. Miller was deprived of a reliable penalty phase. Rose v. State, 675 So. 2d 567, 572 (Fla. 1996). This Court must ask why the testimony presented at the evidentiary hearing from Ms. Lee and Dr. Krop was not presented during the penalty phase. Several decisions offer guidance as to how to address this question and support Mr. Miller's claim that counsel was deficient and prejudice resulted due to that deficiency.

In Ragsdale v. State, 798 So. 2d 713 (Fla. 2001), this Court determined that defense counsel was ineffective in failing to investigate and present mental health testimony and mitigating evidence. Ragsdale's jury recommended a death sentence with a vote of 8-4. The trial court imposed a sentence of death, finding no mitigation and three aggravating factors: pecuniary gain, HAC, and that the defendant was on parole at the time of the murder. Ragsdale asserted that trial counsel was ineffective in failing to present mitigation evidence of an abusive childhood and head trauma from family members and in failing to present mental health mitigation evidence from expert witnesses. Similar to this case, Ragsdale's attorney was the second attorney on the case. Similar to this case, the

first attorney had done enough work that the second attorney did little more than review the materials he received. Similar to this case, the first attorney had consulted a mental health expert and his report which contained favorable evidence was in the court file.

Ragsdale's attorney made a few phone calls to the family and called only one family member at the penalty phase, who gave limited testimony about his childhood. Again, this is similar to Mr. Miller's case, where several family members were contacted and testified only briefly. Although Ragsdale's attorney did not present any mental health evidence, limited mental health testimony was presented in Mr. Miller's case. More importantly, however, is that significant issues relating to Mr. Miller's mental health were not addressed during penalty phase.

This Court reversed in Ragsdale, finding that counsel was ineffective in failing to fully develop mitigation as demonstrated by the testimony from family and the post-conviction mental health expert at the evidentiary hearing. This Court recognized the critical importance of expert testimony to explain the effects of head trauma, child abuse, and other mental health issues to the jury beyond simply having family members recite instances of abuse.

In this case trial counsel Eler did little more than review the file he received from the public defender. Eler testified that he was a "very fortunate attorney" because most of his work had been done for him. Eler may have been "fortunate", but Mr. Miller was certainly not. Eler did not thoroughly review Mr. Miller's medical records, he did not thoroughly investigate or even complete the investigation begun by the public defender as related to Ms. Lee, and he did not adequately consult or question his mental health expert, Dr. Krop, prior to trial, and he did not adequately utilize his mental health expert at trial by having him explain the effects of an abusive childhood, alcohol and drug addiction on Mr. Miller and the importance of the interplay between the frontal lobe disfunction suffered by Mr. Miller and these events. Eler was responsible for the same failures that this Court determined to be worthy of relief in Ragsdale. Eler failed to present testimony from Dr. Krop which would have established mitigation rejected by the trial judge due to a lack of proof. The value of Dr. Krop's testimony was diminished by the failure of counsel to ask him questions about the effects the circumstances of Mr. Miller's life had upon him psychologically and failing to allow Dr. Krop

to explain the significance of the medical records, family testimony, and other incidents that were an integral part of who Mr. Miller was. The absence of this testimony failed to provide the individualization in capital sentencing contemplated under the Constitution.

In Orme v. State, 896 So. 2d 725 (Fla. 2005), this Court reversed trial court's finding that trial counsel was not ineffective in failing to develop and present evidence of the defendant's bipolar disorder. In Orme the defendant was originally represented by two lawyers who secured the services of a psychologist and psychiatrist for diagnosis and medication of Orme's suicidal ideation. Due to the departure of those lawyers from the public defender's office, trial counsel Smith took over Orme's case. Contained in the file were the preliminary reports from the first two mental health professionals indicating Orme was bipolar.

Trial counsel Smith had two different doctors testify at Orme's trial, but failed to provide either of them with adequate background materials, including the mental health reports from the first two doctors and information from family members. Neither new doctor testified at trial nor in the penalty phase that Orme was bipolar.

Trial counsel testified at the evidentiary hearing that he did not present testimony of bipolar disorder because he didn't think there was anything to back up the diagnosis. Orme's defense at trial was that he was too intoxicated to have formulated a premeditated intent to kill.

The jury recommended death by a vote of 7-5. The trial court found three aggravating factors: HAC, pecuniary gain, and that the homicide was committed in the course of a sexual battery. The trial court found the two statutory mental health mitigators, but gave them only some weight. The trial court rejected the age, love for family, unstable childhood, potential for rehabilitation, and good jail conduct as mitigating. The trial court then sentenced Orme to death.

At the evidentiary hearing, both doctors who had testified at trial were called as witnesses. Both stated that they would have diagnosed Orme as bipolar had they been provided with additional information that trial counsel had available to him. Both testified that this was significantly different from their previous testimony in that there was a critical link between bipolar disorder and



substance abuse. Two additional doctors testified at the post-conviction evidentiary hearing that they concurred in the bipolar diagnosis.

This Court reversed the trial court's order denying relief, finding that counsel was deficient and that prejudice resulted from the lack of evidence about Orme's mental health issues. This Court noted that had the jury heard of the interplay between the mental illness and the addictions, the resulting weighing of the aggravating factors and mitigating circumstances would have been different in light of the 7-5 death recommendation. The Court further noted that the trial court's decision to assign only some weight to the mental health mitigators was subject to question in light of the additional evidence. This Court determined that confidence in the reliability of the penalty phase proceeding had been undermined and ordered a new penalty phase.

Just like counsel in Orme, Eler inherited a case with red flags as to the need for additional investigation into mental health issues. Just like counsel in Orme, Eler failed to follow through in his investigation and just like counsel in Orme, Eler failed to present critical testimony

at trial that established the link between lay testimony about alcohol/drug abuse and childhood abuse and the resulting effects on Mr. Miller.

Prejudice is also clearly present in this case. Like Orme, the jury recommended death by a vote of 7-5. Had Mr. Miller's jury heard of the depths of his alcohol and drug addiction, how this interacted with his mental problems, his history of hospitalization, and testimony establishing that his problems were not of recent fabrication in an attempt to get out of trouble, the recommendation could well have been different. The judge's rejection of mitigation could well have been altered by the inclusion of thorough mental health testimony.

Eler failed to recognize the interplay between expert testimony and lay testimony. Lay testimony provides the factors that provide the basis for the expert opinion, but lay testimony is not a substitute for expert testimony in a case such as this. Without the testimony of the expert witness, the jury is left without the tools necessary to perform an individualized sentencing.

Eler's decision to forgo testimony about Mr. Miller's previous commitments to mental health hospitals and his previous inpatient treatment for drug alcohol abuse is not

sound strategy. Psychiatric mitigating evidence "has the potential to totally change the evidentiary landscape". Middleton v. Dugger, 847 F.2d 491, 495 (11<sup>th</sup> Cir. 1988). Prejudice is clear where the attorney failed to present evidence that the defendant spent time in a mental hospital. Stephens v. Kemp, 846 F.2d 642, 643 (11<sup>th</sup> Cir.), cert. denied, 488 U.S. 472, 109 S.Ct. 189, 102 L. Ed. 2d 158 (1988).

The State argues that the evidence contained in Mr. Miller's medical records, his psychiatric history, and detailed testimony about these factors from Dr. Krop would have convinced the jury that Mr. Miller was a "bad" man. There is no evidence to support this argument. On the contrary, had this evidence been admitted, it would clearly have demonstrated to the jury that Mr. Miller suffered lasting psychological scars from his childhood and long-term substance abuse. Complimentary to this evidence from Dr. Krop and Ms. Lee was the testimony of Dr. Wu. Dr. Wu testified at the evidentiary hearing that he conducted a PET scan on Mr. Miller. The results of that scan confirmed the diagnosis of frontal lobe dysfunction found by Dr. Krop. This testimony from Dr. Wu, in addition to that of Ms. Lee would have also unequivocally demonstrated to the

jury that Mr. Miller's mental health and substance abuse were long-standing problems and not merely something manufactured at a convenient time in order to help Mr. Miller escape a death sentence. The evidence presented at the evidentiary hearing provided the missing nexus that the trial court found lacking to establish the mitigating circumstances of an abusive childhood. The combined testimony of Dr. Wu, Ms. Lee, and Dr. Krop would have also established other mitigating circumstances that the trial court did not consider at the original penalty phase/sentencing.

The State makes the argument that Mr. Miller is "not severely mentally ill". (State's Answer Brief at p.42) This assertion is contradicted by the testimony of Dr. Krop, who testified that the term "major mental illness" is a term of art as opposed to a diagnosis. Dr. Krop testified that Mr. Miller has serious psychological and emotional problems which were operating at the time of the homicide. Mr. Miller has never suggested, at any stage of the proceedings that Dr. Krop misdiagnosed him. The error in this case arose from trial counsel's failure to properly present the testimony of Dr. Krop, to ask the appropriate questions, to permit Dr. Krop to provide a detailed and

comprehensive review of the emotional and psychological factors that contributed to Mr. Miller's mental state at the time of the offense, and to testify as to the psychological effects that Mr. Miller's childhood had upon him. The error in this case arises from trial counsel's failure to present the testimony of Ms. Lee, an independent witness who corroborated the psychological state of Mr. Lee just prior to the homicide, who could independently document his treatment attempts, and who could have testified to her opinion as a trained social worker as to the failure of treatment under the circumstances that existed at the time of the homicide. Ms. Lee further provided independent corroboration of Mr. Miller's remorse over his prior conviction. Dr. Wu's testimony corroborates the testimony of Dr. Krop and Ms. Lee and confirms the accuracy of the previous diagnosis, quelling any issues as to malingering or fabrication.

In Rose v. State, 675 So. 2d 567 (Fla. 1996), this Court found that defense counsel failed to meaningfully investigate mitigation. The failure of counsel to present such mitigation was prejudicial, despite an 11-1 death recommendation where the trial court found no mitigation and three aggravating factors: prior violent felony

conviction, under sentence of imprisonment, and homicide committed during the commission of a kidnapping. In the case at bar the jury recommended death by a vote of 7-5. The court found two aggravating factors: prior violent felony and that the homicide was committed during an attempted robbery. The trial judge found several mitigating factors, yet imposed a death sentence. Logically, if the absence of mitigation in Rose caused the reliability of the penalty phase to be brought into question, the reliability of the penalty phase in the case at bar is also brought into question due to the failure of trial counsel to present compelling mitigation evidence.

The trial court's rejection of Mr. Miller's claim of ineffective assistance of counsel was error. Reversal is necessary for a new penalty phase which meets the standards set forth in the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution.

#### 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 his Initial Brief, Mr. Miller argued that trial counsel Eler was ineffective in failing to submit evidence to the jury and trial court which would have minimized Mr. Miller's prior conviction for second-degree murder in North Carolina. Eler was aware of this conviction and believed to it be a very serious aggravator. Eler was also aware of mitigating factors surrounding that conviction and sentence. Eler knew that the trial judge in North Carolina had significantly reduced Mr. Miller's sentence due to mitigating factors relating to his mental health and made judicial findings to that effect. Eler knew that the State intended to present the existence of this conviction to the jury in order to establish the aggravating factor of prior violent felony conviction. Eler also knew that the State had not listed any witnesses from North Carolina who would provide testimony any facts or negative information, save the existence of the conviction.

Despite Eler's recognition of the very serious implications of this aggravator and despite his belief that his only hope in this case was to secure a life recommendation, Eler did nothing to minimize the seriousness of this prior conviction by presenting evidence of the North Carolina judicial findings regarding Mr.

Miller and the appropriateness of a lesser sentence. Ultimately, the existence of the aggravating factor of prior violent felony conviction was a significant, if not the most significant, factor relied upon by the trial court to sentence Mr. Miller to death.

The State, in the Answer Brief, argues that Eler's strategy was reasonable and no prejudice resulted from the failure to mitigate or minimize this aggravator. The State, however, provides this Court with no authority to support this position.

The United States Supreme Court recognized the need for investigation and attack on the prior violent felony aggravator. In Rompilla v. Beard, 162 L. Ed. 2d 360, 125 S. Ct. 2456 (2005), decided on June 20, 2005 in a case from Pennsylvania, the U.S. Supreme Court was asked to determine whether or not trial counsel was ineffective in failing to investigate and review the file of the defendant's prior conviction. Rompilla's two trial attorneys had consulted with numerous family members about the defendant prior to penalty phase. They had received the reports of three mental health experts who had been asked to evaluate Rompilla for competency and to determine his mental health status at the time of the offense prior to penalty phase.



Trial counsel testified at the evidentiary hearing that none of this information from the family or the mental health experts was particularly useful. Neither was the Rompilla himself useful in the mitigation investigation as he maintained that he had a relatively uneventful childhood.

Defense counsel had clear notice that the State intended to rely on Rompilla's extensive prior record to establish the aggravator of significant history of felony convictions involving the use of threat or violence, and more specifically a prior conviction for rape. The prior rape conviction was very similar to the instant homicide. Defense counsel also knew that the State intended to use some portion of the prior rape victim's prior testimony in the sentencing phase.

Despite this knowledge, defense counsel did not review the files from the prior convictions. At penalty phase a few family members testified on Rompilla's behalf and essentially made a plea for mercy. The jury found two factors in mitigation from this testimony.

The State, on the other hand, was able to secure three aggravators and the jury sentenced Rompilla to death.

Post-conviction counsel raised several claims of

ineffective assistance of counsel, among them the failure of trial counsel to investigate and present mitigation evidence of the mental health status of Rompilla, his abusive childhood, and his alcohol addiction. Much of post-conviction counsel's sources for this mitigation had been found in the prior conviction file and in other records that trial counsel failed to review.

The United State's Supreme Court reversed all lower court holdings and found that trial counsel's failure to investigate and present mitigating evidence, especially related to the prior conviction, constituted deficient performance under Strickland. The U.S. Supreme Court further found that Rompilla had demonstrated prejudice. As noted in Justice O'Conner's concurring opinion, three key elements led to the decision of the Court: (1) the prior violent felony conviction was a key element of the State's case in aggravation; (2) evidence of the prior conviction threatened to eviscerate one of the primary mitigation arguments; and (3) the decision to forgo investigation was not reasonable.

In reaching this ruling, the Court noted that defense counsel's job is to counter the State's evidence of aggravated culpability established through the aggravating

factors with evidence in mitigation. In turning to defense counsel's failure to examine the prior conviction file, the Court found counsel's performance was deficient.

As the Court noted, defense counsel knew without question that the State would seek the death penalty with heavy reliance on the prior violent felony conviction. The State argued that counsel was not deficient in failing to review the file because the fact of the prior conviction spoke for itself and would be admitted regardless of defense counsel's actions. The Court rejected this position, stating "We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue the circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest". Rompilla v. Beard, 162 L.Ed 2d Fn.5. This reasoning is directly applicable to Mr. Miller's case.

In this case Eler knew without a shadow of a doubt the State intended to rely upon a very serious aggravator- prior violent felony. As in Rompilla, whose prior conviction was for a sexual battery similar to the homicide, Mr. Miller's prior conviction was for murder. In

this case clear evidence was available that could have been used to make the State's characterization of the prior conviction less damning.

The three key elements enunciated by Justice O'Conner are present in this case. Again, the prior violent felony aggravator was key to the State's case for aggravated culpability against Mr. Miller. The use of the prior murder threatened to eviscerate the mitigation strategy of Eler of focus on the "good" and gloss over the bad. At the same time, Eler wanted to show the jury that Mr. Miller had some brain damage, but not too much. This jury could well have discounted the defense mitigation testimony because of the prior homicide, instead believing that Miller had come up with weak evidence of brain damage and alcohol use just to avoid a death sentence. Third, Eler's decision to forgo an attack on the aggravation in the State's arsenal was not reasonable. Eler's rationale for forgoing this was his belief that he would never want a jury to know that any client had previous mental health hospitalizations.

According to the Rompilla majority, the proper analysis is not to say that the jury would have reached a different sentence if they had heard the omitted evidence,

but whether the untestified to evidence, as a whole "might well have influenced the jury's appraisal of [Rompilla's] culpability." Rompilla, 162 L.Ed.2d 364. In this instance, had the jury heard of the findings of the trial court in North Carolina relating to the previous conviction and to Mr. Miller's mental state, their appraisal of the appropriateness of the death penalty might well have been influenced and the recommendation returned have been for life instead of the barest minimum for death of 7-5. Eler's testified that he believed his only reasonable goal was to attack the death penalty and to secure a life sentence. Eler's decision to forgo an attack on the State's most powerful aggravator makes no sense. Eler's performance was clearly deficient and Mr. Miller was prejudiced by this inaction under Rompilla and the cases cited in the Initial Brief. Reversal of the order denying a new penalty phase is required.

### 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.

Mr. Miller will rely upon the arguments contained in

the Initial Brief for the first two areas of improper argument, but will comment further on the third area, that portion of the prosecutor's argument which invoked victim sympathy/jury sympathy.

The State asserts that no error occurred because of statutory provisions permitting victim impact evidence. Section 921.141(7) permits the introduction of victim impact evidence to demonstrate "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." The actions of the prosecutor in this case did not fall within the purview of this statute, and thus, Eler was ineffective in failing to object to them.

First, it should be noted that the prosecutor did not present any victim impact evidence, he engaged only in argument. That argument denigrated Mr. Miller's presentation of mitigation evidence and urged the jury to reject a life sentence because Mr. Miller didn't care about the victim and his family. The prosecutor's argument was improper because it urged the jury to reject mercy because Mr. Miller had rejected mercy. The prosecutor's argument in this case was not victim impact evidence within the statutory exception, but was instead a blatant attempt to

inflame and improperly stir the sympathies of the jury.

Had the prosecution introduced victim impact evidence, it would have been appropriate for that factual evidence to be argued to the jury- but it would still not be proper for the state to argue that the jury should recommend death for Mr. Miller because he had not shown the victim mercy. The argument for vengeance is not proper victim impact argument and should have been objected to. The State fails to recognize the difference between evidence/argument designed to fulfill the purpose of demonstrating the victim was a unique individual and argument which urges the jury to recommend that the defendant die because he showed no mercy or also possessed some of the same attributes as the victim, such as a family who cared for him.

CONCLUSION

Based upon the foregoing arguments and citations of authority in both the Initial and Reply Briefs, the order of the trial court denying relief should be set aside and a new penalty phase granted.

CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the Office of the Attorney General, Assistant Attorney General Curtis French, The Capital, Tallahassee, FL 32399, this \_\_\_\_ day of September, 2005.

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STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_ /

REQUEST FOR ORAL ARGUMENT

Appellant, DAVID MILLER, respectfully requests that oral argument be set in the above-styled cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the Office of the Attorney General, Assistant Attorney General Curtis French, The Capital, Tallahassee, FL 32399, this \_\_\_\_ day of September, 2005.

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