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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-516

LIONEL MILLER

Appellant,

v.

STATE OF FLORIDA

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA, (CRIMINAL DIVISION)

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Lionel Michael Miller, was the defendant at trial and will be referred to as the "Defendant" or "Miller". Appellee, the State of Florida, the prosecution below will be referred to as the "State." References to the records will be as follows: Direct appeal record - "R" or "T"; Postconviction record - "PCR"; any supplemental records will be designated symbols "SR", and to the Appellant's brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Lionel Miller was indicted on May 16 and was arraigned on May 31, 2006 on charges of first degree murder, burglary, attempted murder, and attempted robbery with force. [ROA: 334-337, 334-345] He filed a motion to suppress his statements to the police on which the court held an evidentiary hearing on May 21, 2007. [ROA: 779-80;T: 131-189] The trial court issued a written order denying that motion. [ROA: 1010-11]

On November 20, 2007 the jury found Miller guilty of first degree murder, burglary with a battery, attempted first degree murder with a knife, and attempted robbery with a deadly weapon. [ROA: 1241-45; T: 1305-06] The penalty phase trial took place on November 26-27, 2007 and resulted in a jury recommendation for death by a vote of eleven to one. [ROA: 1268;T: 1616-19] The hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993) occurred on December 21, 2007. [T: 285-290] In a written order dated February 1, 2008 the trial court sentenced Miller to death. [ROA: 1406-27] He appealed his conviction and sentence, raising six issues[1]; this

[1] 1)Whether the trial court properly excused a venireman for not being death qualified; 2) Whether Florida's death penalty system is Constitutional; 3) Whether the Miranda warnings given Miller were adequate and whether the trial court properly denied his motion to suppress his confession; 4) Whether the trial court abused its discretion in allowing certain testimony; 5) Whether the trial court abused its discretion in allowing testimony regarding Miller's prior violent felony conviction; and 6) Whether there was competent, substantial evidence to support the instruction on the aggravator of avoiding arrest.

Court affirmed both. Miller v. State, 42 So.3d 204 (Fla. 2010). The United States Supreme Court denied his petition for a writ of certiorari on January 10, 2011.[2]

On direct appeal, this Court found:

> The evidence presented during the trial revealed that on April 14, 2006, Miller requested the assistance of his roommate to locate the mailman in Miller's former neighborhood. Miller was attempting to intercept his employment check, which had been mailed to his prior address where he no longer had access to the mailbox. During this excursion, Miller and his roommate drove through Delaney Park in Orlando and observed 72-year-old Jerry Smith standing in her front yard.
>
> Miller stopped and inquired of Smith as to whether the mail had been delivered to her residence that day. Smith was friendly and spoke with Miller for approximately thirty minutes. During this discussion, Miller noticed that Smith experienced memory lapses because she repeated the same story several times. During trial, the medical examiner testified that Smith suffered from Alzheimer's dementia, which caused her to easily forget things and repeat herself during conversations.
>
> While conversing with Smith, Miller also noticed her jewelry. After the conversation concluded and the men drove away, Miller noted that Smith would be an easy target for a robbery because of her memory lapses. Miller solicited the assistance of his roommate in a plan to rob Smith, but his roommate would not join in the crime. The men eventually acquired Miller's check and spent the money on drugs and alcohol. During the next two days, Miller repeatedly asked his roommate to transport him to the Smith residence, but the roommate avoided Miller and continued to refuse to join the crime.
>
> On April 16, 2006, which was Easter Sunday, after being with her family during the day, at approximately 7:45 p.m., a neighbor observed that Smith had returned home and was seated on her front porch. While

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[2] Miller raised one issue: Whether it is a violation of the Fifth and Fourteenth Amendments to the United States Constitution for the police to employ psychological strategies to appeal to a defendant's desire to talk after they have properly given his Miranda warnings which he expressly waived?

Smith was sitting on her porch, Miller arrived after walking approximately five miles to her residence. Unknown to Smith, Miller had smoked crack cocaine while he walked and carried a filet knife. Smith invited Miller inside and provided him with a glass of water. Miller left the plastic cup on a table, and his fingerprints were later identified on the cup.

Initially, Smith removed an embroidered jacket she was wearing and placed it on a chair in the front room. While in the living room, the two chatted about Smith's travels to Key West until Smith became concerned. At that point, Smith opened the blinds on her front window but Miller then threw her on the couch and attempted to steal her jewelry. As Smith screamed and resisted, Miller attempted to prevent her screams by covering her mouth with his hand.

As the struggle ensued, Larry Haydon was in the area walking his dog when he noticed that Smith's blinds were open, and through the window he observed a man, whom he identified as Miller during trial, struggling with Smith inside her home. Haydon heard Smith scream and cry out, "Leave me alone." In response to this distress, Haydon approached the house. Miller called through the window that there was no problem inside the house, but Haydon proceeded to open the unlocked front door.

Miller stated that he was frightened by both the thought of returning to prison and the screams as Haydon was approaching. As Haydon entered the house, Miller retrieved the filet knife from the back of his pants and stabbed Haydon below his rib cage. While Haydon and Miller were struggling in the living room, Smith escaped into the backyard. Upon observing the escape, Miller disengaged from Haydon and followed Smith into the backyard.

When Smith saw that Miller had followed her, she again began to scream. Miller could hear neighbors talking, and ordered Smith to be quiet, but she continued to scream. Miller admitted that he was high on crack cocaine and the screaming was "driving [him] crazy." He "just lost it" and stabbed Smith three times. Upon being stabbed, Smith first fell to the ground momentarily but then regained her footing and ran along the side of her house to the front yard.

After Smith had escaped from the backyard, Miller entered the house again. When he realized that he had cut himself during the altercation, Miller retrieved Smith's embroidered jacket from a chair in the front room to use as a bandage before escaping through the back

door. As he ran from the Smith residence, Miller discarded the knife in the bushes of a nearby house. The knife was recovered later, and ultimately Miller's DNA was identified on the knife.

As Miller left the scene, a neighbor heard screaming and observed Haydon run to the home beside the Smith residence. The neighbor then saw Smith emerge from the backyard screaming for help. Smith informed the neighbor that a man had broken into her house. Both Haydon and Smith, covered in blood, sought refuge in the residence next door. After contacting emergency services, both Haydon and Smith were transported to the hospital. Haydon survived, but Smith died in the hospital after undergoing emergency surgery.

As he escaped, Miller crossed Delaney Park, which was approximately one block from the Smith residence. Between 8 and 8:15 p.m., a witness observed an anxious and disheveled man walking strangely across Delaney Park holding his right side. Miller confessed that he discarded the knife sheath on a bench as he walked through the park which the police later recovered from the location Miller described.

Later that evening, Miller arrived unexpectedly at an acquaintance's house, which was located less than a mile from the Smith residence. The acquaintance was asleep, so Miller waited in a chair on the back patio. While he waited, Miller cut the arm off the jacket he had taken from the Smith residence to fashion into a bandage.

At approximately 8:30 p.m., the acquaintance discovered Miller on the porch and allowed him to use the phone to contact his roommate for a ride home. He requested his roommate to bring him a clean shirt to replace the shirt he was wearing. Before the roommate arrived, Miller asked the acquaintance to loan him gas money and requested bandages for his arm. Miller discarded the white jacket that he had used as a bandage which was later recovered from the porch and identified as the jacket Smith had been wearing on the day of the murder.

Shortly after the phone call, the roommate arrived and the pair departed. During the drive home, Miller informed his roommate of the stabbing and commented that anything that could have gone wrong did go wrong. He also stated that a man had "tried to be a hero," but that "his hero days were over." Miller admitted he was worried that both Smith and Haydon were dead.

After reading a description of Miller in the newspaper on April 18, 2006, the acquaintance called a crime hotline and informed them that Miller was a possible suspect. Based on this tip, Miller was arrested the

following day and transported to the Orlando Police Station.

After Miller was advised of his legal rights he proceeded to confess to stabbing Smith and Haydon. He informed law enforcement where the knife and sheath were discarded, and identified a picture of Jerry Smith as the victim. When arrested, Miller was wearing the same jeans he had worn during the murder. Blood was found on the jeans and DNA analysis disclosed that some of the blood matched Miller's while two other blood samples revealed the DNA of another who could not be precisely identified.

At some point during the struggle with Smith or Haydon, Miller had dropped a pipe that he admitted he had utilized to smoke crack cocaine. The crime scene technicians recovered the pipe from the floor of the Smith residence, and later analysis revealed that the pipe contained Miller's DNA. Moreover, blood from both Haydon and Miller was found in Smith's house.

The jury found Miller guilty as to each count. During the penalty phase, the medical examiner testified that Smith suffered from Alzheimer's dementia, and identified the cause of death as multiple stab wounds. The medical examiner also testified that Smith was conscious during and after the attack and likely felt great pain.

The State presented the testimony of Miller's parole officer in Oregon, who stated that Miller was currently on parole for armed robbery and had failed to attend his parole meetings. The State also presented the testimony of several witnesses to establish the underlying details of Miller's prior armed robbery and manslaughter convictions.

Miller presented the testimony of an investigator who conducted a family background investigation on Miller. In addition, Miller presented a psychologist who testified with regard to Miller's family background and substance abuse history. The psychologist diagnosed Miller as having an antisocial personality disorder. In rebuttal, the State presented the testimony of a psychiatrist who also diagnosed Miller as having an antisocial personality disorder in conjunction with polysubstance dependence and dysthymia, which is a long-term, low-level syndrome of depression. The jury recommended a death sentence for the murder of Jerry Smith by a vote of eleven to one. The trial court held a SpencerFN1 hearing where Miller presented documentation of his military service.

FN1. *Spencer v. State*, 615 So.2d 688 (Fla.1993).

Miller, 42 So.3d at 209-212.

Miller filed his motion seeking postconviction relief under Florida Rule of Criminal Procedure 3.851 on December 21, 2011. The State filed its response on March 20, 2012. After a case management hearing, the lower court granted an evidentiary hearing on all claims save the last one. The evidentiary hearing was held between December 17, 2012 and December 19, 2012. That court issued a written order denying relief on February 24, 2013. This appeal follows.

Susan Finnegan, a probation officer, testified about the notes kept by David Dempsey's probation officer which indicated that he was never violated in 2007-2008 for anything other than a positive drug test and absconding. An allegation of a robbery would have been far more serious a basis for violation. (PCR 6:807-823) Janice Dempsey next testified that her son David was on probation in 2007 for a theft from her previously. She stated that he never took anything from her by force or threat. He routinely used her car but she would not allow him to do so with a suspended license like he had in 2007. (PCR 6:825-832) She saw him pick up the keys so she tried to grab them back. He did not release them so she called the police while they both had hold of the keys. The police refused to intervene. She eventually let the keys go and he left. At no point during this incident did he strike, shove, or threaten her. He asked for money at the same time but she refused to give him any. (PCR 6:834-36) The next witness was David Dempsey who said that he had taken his

mother's car keys without permission many times but never had a struggle with her over them. He never hit her. (PCR 6:837-40) He told his probation officer he was testifying because it was necessary since he would come into contact with law enforcement officers. (PCR 6:819, 840) He denied ever taking anything from Deborah Hood by force or that she ever chased him out of her house with a baseball bat. (PCR 6:841-42) He said that he was very traumatized after this murder, was depressed, and tried to kill himself. (PCR 6:843-44)

Deborah Hood testified that Miller was living at her home in 2007 when the murder took place. Dempsey did not live there but would occasionally sleep on the couch. She and they were crack heads. (PCR 6:846-50) After the murder she moved to a different address and left the state the summer before the trial without telling anyone what she was doing. (PCR 6:853-54, 858) She does not remember when she chased or hit Dempsey with the bat but if she did, he had to have provoked it. The two of them argued over drugs and said that he slapped her a couple of times. (PCR 6:855-57) She was always high during that period of time and does not recall the situation when she was slapped. The drugs affected her perceptions and memory. She recalls maybe two times that she chased Dempsey with the bat when he used drugs but did not pay her "rent." Another time she used the bat on him when she became irritated after he ate too much soup. She thought he was scared of the bat and never tried to strike at her. She reiterated that she was high during those times. (PCR 6:860-

61)

Frank Wood, a neuropsychologist, testified that he evaluated Miller twice, about a year apart, and did brief testing. He believed that Miller had changed between the two interviews, going from an euphoric and expansive person to one who was apathetic. His test results showed a decline in his ability to retrieve words going from the 5th percentile to the 1st. Miller did fine remembering stories but had trouble learning new lists of words and fell into the 1st percentile there as well. (PCR 6:883-86, 893) Wood reviewed Drs. Saddler's and Cambridge's reports from 2007 and believed that Miller's mental functions were declining. (PCR 6:887) Saddler had found two brain abnormalities in 2007, some hippocampal sclerosis on the left side and some Virchow-Robin spaces (spaces of fluid where brain matter should be).[3] Wood related that Cambridge found mild memory deficits and concluded the hippocampal sclerosis was not the result of epilepsy. He said there was no evidence of acquired brain damage and recommended further testing to verify and quantify any memory problems. (PCR 6:890-92, 7:1001-2)[4]

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[3]The Virchow-Robin spaces form around arteries and result from vascular disease. (PCR 7:1020)

[4]Cambridge's actual report states: "On gross memory examination, he demonstrated only mild memory loss. Overall, his mild memory loss could be consistent with brain damage secondary to long term drug and alcohol abuse/dependence, even though there was no evidence of acquired brain damage on the MRI of the Brain. Formal neuropsychological testing would be required to verify, quantify and localize this problem.) (Def. Ex. 3, p. 4) "Acquired brain

Wood reviewed the PET scan conducted on Miller in 2011 and the MRI done in 2007. He noted that Miller's brain atrophy had gone from the normal range in 2007 to the low normal range in 2011, with the Evan's ratio of 3 being the start of the abnormal range and Miller's was 3.16 in 2011. (PCR 6:901-7) Wood stated that the hippocampus is related to behavior and memory and Miller at some atrophy on his left side. (PCR 6:959-60) Miller also had some atrophy in his anterior cingulate area of the brain (involved with empathy), a portion that is involved in problem solving, which had progressed somewhat from 2007. His metabolic peaks in the PET scan in that area were in the 1st percentile. (PCR 6:959-60, 965, 967) The same was true in his frontal orbital area. (PCR 6:963) Wood stated that the best probable diagnosis was behavioral variant frontotemporal dementia ("FTD") given that Miller exhibited three symptoms and had brain atrophy shown in the MRI and PET scans. (PCR 6:968-69) Dr. Cotton, the physician who ran the PET scan, stated that the atrophy was only mild to moderate in 2011. (PCR 7:1036)

Wood opined that Miller had FTD in 2007 and has it now as well; he may also suffer from cerebrovascular disease. "This is not really my expertise to finally make a ruling on frontotemporal dementia to the exclusion of the others. This is a consensus across many fields that has to be reached. What I can say with clinical

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damage" means damage from head trauma or some other insult to the brain. (PCR 7:1037)

certainty very satisfactory to myself is that he has declining metabolism in the frontal areas, specially. That he has atrophy outside normal limits for his age and that his behavior has also declined rather substantially, to the extent that I know he must have had these symptoms in 2006 and '07." Wood also said: "But what is certain to my satisfaction is that he is declining in brain function." (PCR 6:971-72) Since Miller had memory impairment and hippocampal sclerosis, an early sign of FTD, in 2007, he was substantially under the influence of it at that time. (PCR 6:973)

Wood believed that two of the statutory mitigators would have applied to Miller given a diagnosis of FTD. Miller could not conform his behavior to the law due to the damage in the frontal orbital areas which act as "brakepads" for behavior. He could not fully evaluate the consequences of his actions or stop his actions. Miller's statement to the police that he "lost it" is indicative of this. (PCR 6:976-77) Miller also suffered from extreme mental or emotional disturbance as a result of FTD. (PCR 6:975)

Wood did not believe Miller's social history as related by Miller during the initial interview with Wood. Wood believed that the lies and wild assertions were evidence of a brain disorder. Even though he thought Miller was making things up, Wood did no testing for malingering when he gave the neuropsychological tests. (PCR 7:1009-10) Wood admitted that he never spoke to any of the doctors who examined and tested Miller in 2007 nor did he review Miller's Oregon prison records

which included psychological examinations. Wood never spoke to anyone in prison or elsewhere about how Miller interacted with people or how he behaved and navigated the rules and trials of daily life. He relied solely on the police reports, trial transcripts, and the interview of Miller to see behavioral manifestations of FTD. (PCR 7:1012-17) Wood acknowledged that Miller was able to cogently explain the events to the police. He never spoke to Caddy about what Miller said about the crime. (PCR 7:1019)

Glenn Caddy, a neuropsychologist, testified that he evaluated and tested Miller. He got a social history from Miller himself who related that he was raised by an alcoholic mother and an abusive father who, Miller said, was later revealed to be his step-father according to his dying alcoholic mother eighteen years later. Miller said he was thrown out of the house for days at a time when he was four years old and had to live under houses or in the basement. It was a very traumatic early life. When he was about 7 he went to live with his grandmother but she died when he was 12. Save for her, all of his other adult role models were dysfunctional. (PCR 6:911-16)

As a child, Miller had no routine nor any knowledge of socially appropriate morals or ethics. His father beat his mother. After age 12, Miller spent most of his time in pool halls, stealing to feed and clothe himself. He was essentially a feral child who ended up in reform school by the age of 14. He could not relate well to other children and was routinely kicked out of classrooms. (PCR 6:917-18) He had a

survivor mentality and evolved into a person who is dis-social, not a sociopath, since he had no social context for theft and robbery. His condition is more complicated than merely being labeled a sociopath. (PCR 6:931-32)

Miller had substantial alcohol and drug abuse problems, including the use of inhalants. (PCR 125-26) Caddy diagnosed him, in part, with poly-substance abuse. (PCR 6:931)

Miller told Caddy that he went from one pedophile to another before he went to reform school. Miller had impulse control problems and became enraged when homosexuals approached him. He was raped by his friends in reform school and no adult intervened. Consequently, Miller trusted no one and thought all men were scum. (PCR 6:919-20) The sexual trauma Miller experienced in the prisons led to his escape attempts and dissociative experiences which he developed by his late teens as a coping mechanism; he had a tendency to fantasize. (PCR 6:925-26)

Miller eventually ended up in a Texas prison and put on a chain gang where a fellow prisoner hit him in the head with a pickax; he was injured but not knocked unconscious. He also had problems with a captain who put him in solitary confinement with no food or water. The captain went on vacation and no one let him out. Miller said he almost died after not having food or water for "several weeks." (PCR 6:921-23) He also related that he suffered a back injury as a result of being attacked by a guard on a horse. Miller told Caddy nothing about a motorcycle

accident in the late 1960's which caused the injury. Caddy acknowledged that Miller had never related the horse story to any other psychologist or probation/parole officer in Oregon although he had given his social history repeatedly to such individuals. (PCR 6:940-42)

In Oregon he met a woman and fell in love. That relationship was destroyed by a jealous gay man; when Miller found out, he exploded and killed the man. (PCR 6:925-26) Miller said that he killed Mrs. Smith because she could identify him. (PCR 6:943) His description of that crime was logical and consistent with the other reports Caddy reviewed. (PCR 6:951)

The three neuropsychological examinations Caddy gave Miller showed that he was mildly impaired in the areas of conceptual learning and his processing speeds which caused Caddy to recommend a brain scan. Miller's PET scan showed significant impaired brain functioning with progressive degeneration. Caddy stated: "[H]e has an impaired brain function and that it is likely that his brain functioning has deteriorated abnormally over time and probably as a direct consequence of the impact of the substances that he has used, especially the inhalants. But that it's reasonable that a part of that process, at least as it's taken place, is a result of various times that he's had head injury, and in particular the time when he was knocked senseless by a pick axe." (PCR 6:928-30, 934-36) Miller's impairment is mild but Caddy thought it significant. (PCR 6:948) "I mean that as a result of the toxic consequences of his

use and perhaps also some injuries, especially one, um, his neuropsychological functioning is par -- is for the norm and that below par functioning is continuing to deteriorate. Now, we all show progressive decline of cognitive functioning with age." (PCR 6:943) Caddy could not say that Miller's present condition is due to a decline in the past five and a half years. (PCR 6:948) Caddy did not administer any validity tests, nor did he speak to the other doctors who evaluated Miller in 2007 and before. Miller did have elements of sociopathy, a condition which included a high degree of manipulativeness. (PCR 6:928-30, 946) He admitted that it was important to verify information when dealing with a psychopath. (PCR 6:941-42)

Gerod Hooper was Miller's trial attorney who handled the guilt phase trial. (PCR 7:1046-48) He did not handle the voir dire of the jury panel regarding the penalty phase. He did file the motion to suppress Miller's statement and would have included any issue of his competency to waive his rights if he had a basis for it. (PCR 1110-11) No doctor or expert told him that Miller was incompetent to waive his rights and give a statement; they had Miller undergo both neuropsychological testing, a psychiatric evaluation, and a MRI. Hooper told Mings in January 2007 to test Miller for competency and he would have considered both the experts' reports in preparing for the motion to suppress. The MRI only showed mild memory loss, probably attributable to long-term drug use. The reports did not indicate how any hippocampal sclerosis would have affected his understanding of the Miranda warnings. Miller

himself really hurt the motion to suppress by his gratuitous statement that he was aware of and understood his rights but wanted to talk to the police nonetheless. (PCR 7:1113-18, 1149) Hooper did not see the need for a PET scan for the guilt phase. He generally needed a reason to order such a test and here no expert suggested getting one. (PCR 7:1119-20) The attorneys did have time to get the test between the MRI and the trial but they relied on their experts to tell them what tests needed to be done. (PCR 7:1120-22) He would not have used FTD in support of his motion to suppress since there was no doctor to testify that Miller was incompetent and explain why. (PCR 7:1123)

Hooper would not have approached either Mings or Danziger to ask if Miller suffered from FTD because a more open-ended and general questions would allow the experts to explore a far wider range of possible problems. He relies on the experts to tell him what the problems are; he does not direct them to a specific diagnosis from the beginning. Hooper himself did not detect any mental health or competency issues from his interactions with Miller. (PCR 7:1124) He only did all the work-ups on Miller because it was a death case and he was being careful. Miller was articulate, bright, aware, a chess player full of stories, outgoing, and remorseful. (PCR 7:1150) He did not have any doctor telling him Miller had improper brain functioning. (PCR 7:1126)

Hooper felt that he had to address, to the court, his office's prior representation of Dempsey. He asked Miller if he had any problem with his office representing him given that former representation. There was no actual conflict involved and Hooper had no intention of behaving in any way other than a conflict attorney would. He planned to and did go after Dempsey as vigorously as any other witness and use anything available to a conflict attorney to impeach him. He may have known Dempsey was on probation but did not order his file; he had never ordered someone's probationary file. (PCR 7:1133-38)

Joni Johnston was the mitigation investigation for Miller's case. She prepared a social history and kept investigative notes. Miller was intelligent and calm, always knowing how he wanted the trial to proceed. He had perfectly fine social skills, was polite, and answered all her questions appropriately. (PCR 7:1157-60) He did not appear to have any cognitive defects and she would have noted and reported any problems she saw. She never saw any evidence that he had memory problems and he followed the ideas and plans regarding the trial and their interactions from one meeting to the next. (PCR 7:1162-63) He was manipulative with her at times. (PCR 7:1161).

Henderson testified at the evidentiary hearing that he represented Mr. Miller in the trail together with Hooper. He explained that he handled the penalty phase while Mr. Hooper handled the guilt phase. Henderson testified that he had several

experts appointed to evaluate Miller both for competency and for mitigation. He said that Dr. Mings found Miller competent, intelligent, and that he had some mild impairment. Henderson and Mings discussed some of the specific things that could have caused that. [PCR 8:1235]. Subsequently, Mr. Miller underwent an MRI scan which the doctors said showed some abnormalities which were not substantial. No expert ever indicated that Miller had a form of dementia. [PCR 8:1246-47]. He did not recall whether Dr. Mings advised that Mr. Miller suffered from hippocampal sclerosis.

Henderson and Hooper also hired Dr. Danziger as a confidential expert, and after consultation, listed him as a witness on October 23, 2007. Henderson testified that, in comparison to Dr. Mings, Dr. Danziger brought unique testimony, skills, and abilities to the case. With Dr. Danziger, who was a medical doctor, Henderson could get into the illnesses being suffered by Miller, including his hepatitis and other problems. He would also have the option of presenting the testimony of a medical doctor as opposed to a psychologist. [PCR 8:1183]. He believed Dr. Danziger would "present evidence that Mr. Miller - or opinion testimony that Mr. Miller had antisocial personality disorder. He suffered from polysubstance abuse and that he had had a dysfunctional childhood." [PCR 8:1183]. Henderson explained that antisocial personality disorder is "probably the most common diagnosis of our clients from a defense standpoint." [PCR 8:1183]. However, it is typically not favorable to the jurors

in mitigation. He testified that he was presenting antisocial personality disorder in Mr. Miller's case because it is "a common feature that has been recognized as a mitigating circumstance. That is pervasive. That is - cannot be changed and it affects defendants daily throughout their lives. And it's not a matter of choice, it's just who they are." [PCR 8:1184]. Henderson thought Dr. Danziger's testimony might provide some life votes although it would not compel one. [PCR 8:1187]. He did advise Miller that anything he said to Dr. Danziger could be used against him in the penalty phase, saying that the initial evaluation would remain confidential until Dr. Danziger was listed as a witness. The defense would only list him after notifying and discussing it with Miller, which they did before they listed him. [PCR 8:1193].

Henderson did discuss having a PET scan done on Miller with Dr. Danziger because of the mild deficits in his frontal lobe and in his cognitive processes. The doctor did not think those impairments would rise to the level of a substantial impairment but he recommended some imaging. They discussed the types of tests that could be done. A PET scan used radioactive material to do the imaging which is more invasive. Since Miller had a prior MRI and a doctor didn't think a PET scan would be that productive, they decided to do a MRI. [PCR 8:1198-99].

Henderson sent Johnston to Oregon and North Carolina to develop possible mitigation in the event that Miller decided that he wanted to "mount an all-out attempt for a life recommendation from the jury." [PCR 8:1220]. Henderson did not,

however, provide Dr. Danziger with Miller's complete social history because Miller's version of the Oregon murder conflicted with the records of that case. Henderson preferred to have Dr. Danziger have an overall picture about Miller's history than focusing on the specifics. [PCR 8:1222].

Henderson explained that one of his considerations in listing Dr. Danziger as a witness was whether the State called Dr. Frank Colistro, who evaluated Miller in reference to release on parole from the Oregon Department of Corrections. Subsequent to listing him as a witness in October of 2007, the State deposed Dr. Danziger - Henderson characterized Dr. Danziger's testimony during that deposition as "favorable to the State." [PCR 8:1181]. Henderson explained that, after Dr. Danziger's deposition, he wanted the State to call him so he would have the opportunity to cross-examine him rather than the State. He wanted the last thing the jury to hear was Dr. Danziger admitting that antisocial personality disorder is mitigating, which Henderson could get him to say since he would ask leading questions.

Henderson obtained a social history for Miller although he did not present a complete social history in order to "obtain some life recommendation - some life votes of the jury, but not a life recommendation." [PCR 8:1195]. Those things in Miller's social history that could have led to a life recommendation included "childhood abuse and [his] dysfunctional childhood." [PCR 8:1195].

Henderson and Johnston both noted that Miller complained of having some memory deficits and possibly having Alzheimer's, which they then communicated to Dr. Mings. Henderson did not notice, however, during his interactions with Miller, memory deficits of any sorts. Henderson actually noted that Miller was more familiar with the law than was common with criminal defendants and that he acted as an official paralegal in a correctional facility. [PCR 8:1224-25].

As to his strategy during voir dire, Henderson explained that the whole case was peculiar. They sought jurors, who legally qualified, were open to the notion that life in a Florida prison for a particular individual would be a harsher punishment than the death penalty. Henderson asked each juror such a question. [PCR 8:1243].

Henderson testified that once Mr. Miller was convicted, he did not attempt to obtain the most favorable recommendation from the jury regarding the death penalty, because Miller wanted to "receive a death sentence" so that he would be "housed on death row." [PCR 8:1171, 1214]. "Mr. Miller never wavered in wanting to live. He simply wanted the death penalty as a housing decision on his part. He was familiar with Florida prisons. He did not want to go back to a Florida prison and that was his position." [PCR 8:1216]. Henderson explained that he had a "number of meetings with Mr. Miller to try and dissuade him from following this course," but was ultimately unsuccessful. [PCR 8:1217]. He repeatedly advised Miller that the best position would be to get a death sentence where there were votes for life. Overall, it

was Miller's choice whether he wanted a life or death verdict. In seeking a life sentence, Henderson could present all sorts of evidence but if Miller wanted a death verdict Henderson was limited in what he could present. [PCR 8:1217]. Despite this trial strategy, Henderson explained that he "tried to position Mr. Miller so that if he at any point changed his mind throughout the proceedings and wanted to avoid a death recommendation, then [they] could do [their] best to obtain a favorable jury recommendation." [PCR 8:1173]. Henderson said nothing to the court about this strategy since it was privileged attorney-client communication and was not an illegal client request. In only the event that Miller might have said to present nothing at all would Henderson be obligated to inform the court. The tactic that they used was to achieve Mr. Miller's desire that he receive a death sentence with as many legal issues as could possibly be there to prolong any carrying out of the execution. [PCR 8:1244, 1172].

Alan Waldman is a neuropsychiatrist and a doctor in cognitive neurology. While he is not an expert on PET scans, they are part of his practice. (PCR 8:1257) He does routinely read and order MRI and CAT scans in his practice. (PCR 8:1265) PET scans are not common in the clinical field and are mainly used for forensic purposes; MRI and CAT scans are the most commonly used tests. (PCR 8:1270) He has sufficient experience to determine what a scan should look like in relation to a diagnosis and pictures of the scans are replicated in reference works to demonstrate

a condition. (PCR 8:1267)

FTD is an uncommon dementia and has three different forms: Pick's disease; primary progressive aphasia type; and semantic type. All three cause shrinkage of the entire lobe, not shrinkage in small, disconnected spots. Waldman knows this syndrome as a physician who looks at or for symptoms and used the scans in conjunction with those to determine if the condition is present. (PCR 8:1259-62) FTD is a syndrome since its cause and cure are unknown. It produces a drastic change in personality with a marked increase in disinhibition, euphoria, stimulus-bound perseveration (either motor or verbal), Parkinson-like symptoms, abulia, and hyper-oral and hyper-sexual behaviors (including pica). (PCR 8:1274-75) In the semantic type a person develops language problems (anomias). With primary progressive aphasia a person's speech pattern is broken and he may understand language but be unable to speak properly in response. (PCR 8:1276) A sufferer loses the ability to abstract although the memory is largely spared. The first thing families notice with FTD is that the person is not acting right, getting too angry too easily and exhibiting inappropriate behavior. (PCR 8:1277) The behavioral variant is known as Pick's Disease. FTD has a minimal effect on memory although the semantic memory is affected in the semantic variation.[5] Waldman stated that, according to Adams-Victors

[5]"[S]emantic memory is defined as the ability to utilize one's fund of knowledge and make inferences from that fund of knowledge. So when in a sense

book on neurology, the essential neurology manual and reference book, FTD has a normal course of death after two to five years from the onset of the disease and is progressive in nature; some individuals have survived longer. (PCR 8:1278)

Waldman reviewed numerous records and transcripts regarding Miller's history and trial including his medical records for the last five years from the Florida Department of Corrections and Miller's Oregon prison records covering the years from 1976 to 2004. Miller's medical records show no hint of neuropsychiatric problems within the last several years. (PCR 8:1281) Further, there are no notations of any of the symptoms of FTD in Miller's records; no personality change, no perseveration, no apathy, and no oral fixation. (PCR 8:1285) From Waldman's review of the trial record in 2007 he saw the exact opposite of what one would expect to see from an individual suffering from FTD. Waldman noted that Miller was coherent and organized in his letters to his attorneys directing them in a logical manner on how to proceed in the trial. The same was true in the in-camera sessions with Judge Perry - Miller was articulate and cogent in his presentation and arguments, showing his ability to use his memory and fund of knowledge to draw inferences and conclusions. There were absolutely no signs of perseveration, apathy, inappropriate behavior or

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that would affect some memory, that's what you see in the semantic type, an individual's inability to utilize their fund of knowledge in making inferences. And, again, I mentioned the anomia and the problems with word comprehension." (PCR 8:1279)

language, or a lack of understanding of words that would have been present if Miller had FTD. (PCR 8:1288-89)

Waldman showed a CAT scan of a person's brain with FTD, taken from Adam's-Victor's, and pointed out the extreme atrophy of the entire area of the frontal and temporal lobes that was not present in Miller's scan. (PCR 8:1290-94) Waldman stated that Miller's 2011 CAT scan was not consistent with FTD and that any hypometabolism Wood testified to would also not be consistent with FTD since it should have been throughout the entire lobe. Waldman also reviewed the 2007 MRI along with the reports from Saddler and Cambridge and opined that those were also inconsistent with FTD although he did note that there was a small amount of temporal lobe atrophy in spots but not of the whole lobe. A scan of a brain with FTD would have the sulci significantly larger and the gyri would have been more pronounced. Waldman did note the hippocampal sclerosis. If Miller had FTD, his brain atrophy would have been much further progressed. (PCR 8:1295-97)

Waldman stated that Miller had been evaluated by numerous psychologists while in prison in Oregon. His prison records included eleven separate psychological evaluations. (PCR 8:1258-59, 1281) Waldman noted that ten of those psychologists diagnosed Miller as having an anti-social personality disorder ("ASPD") and the eleventh diagnosed him with a mixed personality disorder with antisocial and narcissistic features. A person with ASPD is also known as a sociopath or a

psychopath although those terms are not diagnostic terms. Someone with ASPD if, after the age of 18, has a history of pervasively violating the rights of others, lying continually, committing crimes, does not maintain stable employment, is impulsive, and had a conduct disorder before the age of 15. Miller's records supports the psychologists' assessment that he had an ASPD. Miller had a long history of thieving and lying reported in his records beginning at the age of 5. Miller routinely told contradictory stories to the psychologists. Miller lied, not confabulated as Wood stated. Confabulation is when a person supplies missing information to save face when he cannot remember what really happened. For instance, Caddy was the only one to whom Miller said he was put out of the house at the age of 4. Waldman noted that a 4 year old could not have survived alone and could not even find water. (PCR 8:1282-84) In all the documents he reviewed he only found one instance of sexual abuse reported by Miller although he told Caddy that he had been habitually abused. Miller never told anyone else that he had sex with Ray Crock's wife and had never said that he had been hit with a pickax. Miller had reported a back injury from a motorcycle accident but told Caddy that a Texas guard had run him over with a horse. These are examples of lies and manipulation from a sociopath. (PCR 8:1285-87) Miller's impulsivity is found throughout his history and is, in fact, the hallmark of his life and not the result of FTD in the last six or seven years. (PCR 8:1297) Even if everything Wood said were correct, the damage to Miller's brain does not equate to

FTD. (PCR 8:1334)

Dr. Eric Mings, a forensic psychologist, was the last witness. He interviewed, tested, and evaluated Miller in 2007 in preparation for the trial. He saw Miller on four different occasions for a total of over ten hours, in January, March, April, and November 2007. He never had any problems communicating with Miller and Miller followed directions with no problems. The defense attorneys asked him to focus on developing mitigation for the penalty phase and Miller's competency to proceed and to waive Miranda for the guilt phase. He communicated with the attorneys throughout the period and discussed the options with them. He recommended a brain scan be done and they chose an MRI. (PCR 8:1334-38, 1350-51) Mings focused on Miller's social history as it was relevant to his cognitive functioning. Miller did not report prolonged sexual abuse as a child or multiple rapes while in prison. He did report an extensive history of poly-substance abuse, including the use of inhalants, so Mings expected that he might have some cognitive deficits because of it. A possible concussion when Miller was hit on the head with a piece of metal might also cause cognitive problems. These factors were the basis for the neuropsychological testing and brain scan that Mings recommended. (PCR 8:1339-40)

Mings conducted numerous tests on Miller. He gave the Wechsler Adult Intelligence Scale where Miller received a score of 102 which is in the average normal range. (PCR 8:1341) He also gave the Wechsler Memory Scale which

concentrated on Miller's memory. All of his scores were in the average range. Mings said he did quite well on the memory tests and the results were consistent with his intelligence. Mings's statement at trial that Miller might have a slight intellectual decline was based upon a review of the tests done in Oregon where Miller scored between 110 and 118 on the intelligence tests. (PCR 8:1342-44) This test also tested the semantic memory and Miller's ability to use his fund of knowledge. (PCR 8:1353) Mings gave several tests to measure the functioning of Miller's frontal lobes, which are involved in executive functioning, including the Wisconsin Card Sorting test. "It is one of the most well-revered longstanding measures of that in the neuropsychological literature. It is even referred to as a gold standard in some texts." (PCR 8:1345-46) Miller did all six sorts without problems. His score was 107 which is in the average range. Id. He administered the Trails A and B tests which also test the frontal lobe functioning. Miller scored a 94, a little lower than his intelligence test; it was still an average score which did not indicate any gross impairment. (PCR 8:1347) In November 2007 Mings gave Miller the Booklet Category Test in order to be thorough in testing Miller's frontal lobe functioning. Again, the results were within the normal range and showed no gross impairment. (PCR 8:1350-51)

Mings also gave Miller a Miranda test to measure his ability to understand the concepts and questions. Miller made few, if any, errors, understood all the questions, and answered them all properly. (PCR 8:1347) The Rey Osterrieth Complex Figure

test indicated Miller had mild memory problems with his visual-spatial memory. (PCR 8:1348-49) Overall, Mings found no gross impairment with a possible slight decline in general intellect which was still within the normal range. Mings also administered a malingering test on which Miller did fine. Mings saw no indication of dementia and the test results did not indicate FTD since Miller did not suffer any deficits such a condition would create. (PCR 8:1355-56)

Mings reviewed the Cambridge report which said: "[o]n gross memory examination, demonstrates only mild memory loss. Overall his mild memory loss could be consistent with brain damage secondary to long-term drug and alcohol abuse/dependence. Even though there was no evidence of acquired brain damage on the MRI of the brain, formal neuropsychological would be required to quantify, verify and localize this problem." Mings never spoke to Cambridge and did not share his neuropsychological testing results with him. Mings believed that Cambridge probably did not know that testing had been done. (PCR 8:1359) Mings stated that he and the defense attorneys did all the testing that was appropriate. Miller's mild memory loss was covered by the memory tests given which showed there was no indication clinically of significant memory impairment. Mings said there was no where to go with that. Neither he nor Cambridge recommended a PET scan to the attorneys. None of the tests, reports, or scans indicated the need for further testing. (PCR 8:1360-61)

SUMMARY OF THE ARGUMENT

I - Trial counsel was not ineffective for failing to get brain imaging when it was not recommended by the experts and properly listed its experts on the witness list since counsel had planned to call that expert prior to his deposition. Counsel did properly investigate mitigation evidence and presented it at trial.

II - Trial counsel properly relied on the experts, which included a neuropsychologist, in deciding to have a MRI done rather than a PET scan. Miller had no dementia at the trial and voluntarily waived his Miranda rights. Counsel's actions in following Miller's wishes for the penalty phase were not ineffective.

III - Miller is presently competent and there is no death warrant so his claim that he is incompetent to be executed is not ripe.

IV - Dempsey had no probation violation so the State did not commit error under Brady or Giglio, counsel was not ineffective for failing to discover one, nor did counsel have a conflict of interest because of Dempsey.

V - The jury was properly instructed in the penalty phase.

ARGUMENT

This Court employs different standards of review when it evaluates claims that follow an evidentiary hearing than those that are summarily denied based on the

record alone. This Court defers to the postconviction court's factual findings following its denial of a claim after an evidentiary hearing. See Connor v. State, 979 So. 2d 852, 858 (Fla. 2007) (citing McLin v. State, 827 So. 2d 948, 954 n.4 (Fla. 2002)). "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' " Id. (quoting Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)). The postconviction court's legal conclusions, however, are reviewed de novo. Id.; see also Sochor, 883 So. 2d at 771-72. When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is 'legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record.' " Reynolds v. State, 99 So. 3d 459, 471 (Fla. 2012) (quoting Connor, 979 So. 2d at 868), cert. denied, 133 S. Ct. 1633 (2013); Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000).

ARGUMENT I

TRIAL COUNSEL WAS NOT INEFFECTIVE IN THE PENALTY PHASE. (Restated)

Miller's first issue on appeal is that his trial counsel was ineffective in the penalty phase for his unreasonable choices of experts, listing Dr. Danziger as a

witness, and for failing to object to the State calling the doctor as its own expert. He further contends that counsel was deficient for failing to put on more mitigation and for not hiring a mitigation expert to conduct a complete social history and evaluation for mental mitigation. He argues that he suffers from brain damage and memory loss brought on by his substance abuse and trauma which prevents him from processing abstract information. He further argues that counsel was ineffective for not seeking neuropsychological testing and a PET scan and for not presenting that evidence to the jury. The lower court granted an evidentiary hearing and properly denied this claim; that denial should be affirmed.

Claims of ineffective assistance of trial counsel are reviewed under the two-pronged standard established in Strickland v. Washington, 466 U.S. 668 (1984). The defendant must first establish that counsel's performance was deficient. See id. at 687. To do this, the defendant has the burden of identifying specific acts or omissions that demonstrate counsel's performance was unreasonable under prevailing professional norms. See Duest v. State, 12 So. 3d 734, 742 (Fla. 2009). "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). In essence, the defendant must show that "counsel made errors so serious that

counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. As noted by this Court,

> There is a strong presumption that trial counsel's performance was not deficient. *See Strickland*, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

Johnston v. State, 63 So. 3d 730, 737 (Fla. 2011) (parallel citations omitted). The defendant must next establish that counsel's deficient performance prejudiced the defense. See Strickland, 466 U.S. at 687. Strickland does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' " Porter v. McCollum, 558 U.S. 30, 44 (2009) (quoting Strickland, 466 U.S. at 693-94).

This Court employs a mixed standard of review when evaluating Strickland claims because such claims present mixed questions of law and fact. See Anderson v. State, 18 So. 3d 501, 509 (Fla. 2009). This Court defers to the postconviction court's factual findings that are supported by competent, substantial evidence, but

reviews the court's legal conclusions de novo. Id.; see also Simmons v. State, 105 So. 3d 475, 487 (Fla. 2012) (citing Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004)).

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on what efforts were undertaken and why a strategy was chosen. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 ("[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

The postconviction court made the following factual findings on this claim after the evidentiary hearing.

> After reviewing and considering the evidence presented, observing the demeanor and assessing the credibility of the witnesses, and relying upon these observations and evaluations in resolving disputed issues of fact, the Court finds Mr. Miller has failed to establish deficient conduct or prejudice.
>
> Mr. Hooper and Mr. Henderson made a decision to list Dr. Danziger as an expert witness because of his unique testimony, skills, and abilities, and because Dr. Danziger would allow them to present evidence of Mr. Miller's dysfunctional childhood, polysubstance abuse, antisocial personality disorder, and cognitive impairments through a medical doctor. During Dr. Danziger's November 2007 deposition, Mr. Hooper and Mr. Henderson recognized that his testimony was favorable to the State. Accordingly, they decided it would be beneficial for the State to call him as a witness, so they would have the opportunity to cross-examine him. Mr. Henderson explained this strategy allowed him to ask leading questions and required Dr. Danziger to admit that antisocial personality disorder is mitigating, moreover, this tactic allowed Mr. Miller's counsel to control the conclusion of Dr. Danziger's testimony. The Court finds this was a reasonable strategic decision, and will not second-guess it on collateral attack. ...
>
> Florida Rule of Criminal Procedure 3.220(d)(l)(A) obligates a participating defendant to furnish the prosecutor with a written list of the names and addresses of all witnesses whom the defendant expects to call "at the trial or hearing." Mr. Miller participated in this procedure during his trial, and accordingly, listed Dr. Danziger as a witness. The fact that the State deposed him after the exchange of discovery does not violate the attorney-client privilege since it is essentially waived by participating in the process. At the time he was called to deposition, Dr. Danziger was no longer a confidential witness, and Mr. Hooper and Mr. Henderson could not object to such. The Court finds Mr. Miller's counsel cannot be found ineffective for failing to make a non-meritorious objection. ...
>
> Ms. Johnston worked on Mr. Miller's case as a mitigation

> specialist to assist in the development of evidence for the penalty phase of his trial. The social history she prepared included information obtained from Mr. Miller's medical records, juvenile and criminal records, and prison records from Florida, Oregon, and North Carolina. The mental health experts who later evaluated Mr. Miller utilized this information as part of their diagnosis, and during the penalty phase of his trial, the jury heard extensive testimony regarding his dysfunctional childhood and polysubstance abuse. The social history described by Dr. Caddy at the evidentiary hearing is significantly bleaker than that presented during the penalty phase. However, Dr. Caddy relied on only one source of information —- Mr. Miller. The Court finds Mr. Miller's counsel fully investigated and presented available mitigating evidence regarding Mr. Miller's social history, and that he was not deprived of a reliable penalty phase proceeding. ...
>
> As to Mr. Miller's assertion that he should have undergone a PET scan. the Court finds Mr. Hooper and Mr. Henderson reasonably relied on Dr. Mings' and Dr. Danziger's professional opinions that it was not necessary for Mr. Miller to undergo such a procedure, as the Court explained in its denial of claim one.
>
> Finally, any assertion that Mr. Hooper and Mr. Henderson provided ineffective assistance as to the allegations outlined above by complying with Mr. Miller's directive that they seek a death recommendation in the penalty phase of his trial is without merit. ...

[PCR 9:1527-29] The court's findings are supported by competent, substantial evidence and should be affirmed.

At the evidentiary hearing Miller had Caddy testify about Miller's social history based solely on self-reporting by Miller himself. Caddy did not review past criminal or prison records before meeting and testing Miller nor did he speak to anyone other than Miller. He did no validity test either although he acknowledged that it was important to verify information when dealing with a person with ASPD

which Miller has. (PCR 6:934-36, 940-45) He believed that Miller was forthright with him. As noted earlier, Miller reported multiple rapes and other embellishments to Caddy that had never been reported or documented ever before. Even given those, Caddy's testimony is largely cumulative to that given by Mings at the trial. The jury knew that: his mother abandoned the family; his father was abusive; his early life was unstable; he was thrown out at 4 or 5 years of age; he lived with his grandmother who loved him and provided him with some stability; she died when he was twelve; he went to foster homes; went to reform school by 14 or 15; and had a very serious and extensive history of poly-substance abuse. Caddy's conclusion was consistent with what Mings and Edwards presented to the jury, that Miller's long drug use affected his memory. "I mean that as a result of the toxic consequences of his use and perhaps also some injuries, especially one, um, his neuropsychological functioning is par -- is for the norm and that below par functioning is continuing to deteriorate. Now, we all show progressive decline of cognitive functioning with age." (PCR 6:943)

The defense did prepare for the penalty phase despite the fact that Miller wanted to receive the death penalty. Joni Johnston is a mitigation investigator who worked with Henderson in preparing for the penalty phase trial. She went out to Oregon to interview everyone out there who knew Miller and she tracked down his past convictions and prison files. She prepared a detailed social history on him both

from numerous interviews with Miller as well as family members in North Carolina. (PCR 7:1157-63, State's Exhibits 3 & 4) Miller refused to allow Henderson to present a lot of the details of his childhood to the jury although Henderson explained to him that it could be very powerful evidence in mitigation. (PCR 8:1195)

The penalty phase jury heard that Miller was at least five years younger than his brothers and that he lived with his grandmother and aunt between the ages of seven and thirteen, contrary to what he told Caddy. The defense chose to have a psychologist, Eric Mings, tell the jury about Miller's social and substance abuse history as well as the problems he had with his memory stemming from an aberration in his hippocampus. (T. 19:1443-70) Mings told how Miller was thrown out of the house for the first time when he was 4 or 5 years old. (Id. 1446) He said that Miller spent the vast majority of his life in prison and that he committed his first crime at the age of five. (Id. 1447, 1456) A large portion of Mings's testimony revolved around Miller's anti-social personality disorder. (Id. 1448-50, 1459-61) As noted by Waldman, every mental health expert in Oregon, as well as Mings and Danziger, said that Miller was a sociopath who had ASPD. (PCR 1282-84) In many respects, Mings's testimony mirrored that of Danziger's about which Miller contends was harmful. As Mings testified at the evidentiary hearing detailed above and incorporated here that he conducted a battery of neuropsychological tests including

a number focused on the frontal lobe functions and memory. He and Danziger discussed various options for brain scans with Henderson.

An expert in substance abuse, Drew Edwards, testified about the brain impairment cocaine causes, making a person impulsive and tense. He told of how Miller used a huge amount of drugs but could still reason at the time of the trial. (T. 19:1471-1505) Consequently, the jury did hear about Miller's purported memory problems, brain impairment, and polysubstance abuse from each of the three experts. (Id. 1514-15) Trial counsel consulted multiple experts based upon the information supplied to him through Miller and followed through with an MRI which showed the brain irregularity. The PET scan simply repeated that finding. Henderson spoke to Danziger about getting a PET scan and consulted with other doctors on which type of scan to get to investigate the memory problems. Based on the experts' advice, he chose the MRI, in part because it was less invasive than a PET scan. (State Exh. 5, PCR 8:1197-1200) Miller has failed to show deficient performance. Asay v. State, 769 So. 2d 974, 984 (Fla. 2000)("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."); See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). He has also failed to meet the prejudice prong of Strickland since all the information came out to the jury.

Danziger had essentially the same opinion as Mings, that Miller had poly-substance abuse disorder and ASPD. Henderson hired Danziger because he had worked with him in the past and thought that he could present ASPD through him and Mings as a mitigating factor since they would tell the jury that Miller is just that way and cannot change. He was also a medical doctor so the jury could hear about Miller's medical problems. He thought Danziger could be a source for life votes since Danziger would tell the jury that Miller wanted a death recommendation and jurors might vote for life to deny him that wish. He spoke with Danziger a number of times before the State deposed him and had covered all the questions the State asked. (PCR 8:1180-87) Henderson spoke to Miller on more than one occasion about calling Danziger as a witness and informed him about waiving any privilege once he was put on the witness list. Miller understood and agreed to have him on the list. (PCR 8:1192-93) Henderson planned on calling him before the deposition. (Id., State Exh. 5) Danziger's deposition testimony was couched in terms favorable to the State so Henderson knew the prosecution wanted to call him. He was also aware that the prosecutor had contacted Dr. Colistro from Oregon who prepared a damning report on Miller and knew all the details about Miller's prior convictions and actions in prison. Henderson wanted to avoid any possibility of having Colistro testify; he decided that Danziger would be safer and he would deal with him on cross-

examination. (PCR 8:1209-11, State Exh. 5 & 15) Henderson clearly had strategic reasons for hiring Danziger and listing him as a witness, as he for preferring him to Colistro. That conduct was not deficient performance by his counsel but a reasonable professional judgement. Valle v. State, 778 So.2d 960, 965-66 (Fla. 2001); Pietri v. State, 885 So. 2d 245, 252-55 (Fla. 2004); Asay, 769 So. 2d at 984 ("The defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."); See Patton, 784 So. 2d 380; Cherry, 659 So. 2d 1069. Miller has failed to demonstrate deficient performance on part of his attorneys and the claim should be denied.

Once Henderson had decided to call Danziger as a witness he was obligated to disclose his name to the State and have him available to be deposed. Florida Rule of Criminal Procedure 3.220(d)(1)(A) obligates a participating defendant to furnish the prosecutor with a written list of the names and addresses of all witnesses whom the defendant expects to call “at the trial or hearing.” The phrase “or hearing” should be interpreted to include sentencing. In a capital case, the penalty phase is similar to the guilt phase in that evidence is presented before the jury, including expert testimony. Defense expert witnesses in the penalty phase are often deposed by the state prior to sentencing in capital cases. See, e.g., Gore v. State, 614 So.2d 1111 (Fla. 4th DCA 1992). Discovery helps the state in preparing for cross-examination and in deciding

whether to obtain its own expert witnesses. Discovery also helps the defense in preparing a response to the state's evidence of aggravating factors. To minimize surprise, Florida's criminal procedure permits extensive discovery from both sides. Miller participated in this procedure during his trial. As noted by Miller, he listed Danziger as a witness in his Notice under Fla.R.Crim.P. 3.220. Depositions are routinely conducted after the exchange of discovery and conducting one does not violate the attorney-client privilege since it is essentially waived by participating in the process. Miller and trial counsel could not object to the prosecution taking Danziger's deposition nor was Danziger a confidential defense witness at the time he was called as a witness. Based upon Miller putting his mental health and condition at issue in the *penalty* phase, the State had a right to rebut or counter that evidence. The State could have chosen to have another expert appointed, possibly one who would not be as favorable to Miller as Danziger was. Buchanan v. Kentucky, 483 U.S. 402, 422-423 (1987); Kearse v. State, 770 So.2d 1119, 1126 (Fla. 2000). Here, the State decided to use the expert who had already examined Miller. Again, counsel is not ineffective for failing to make a non-meritorious objection. King v. Dugger, 555 So. 2d 355, 357-58 (Fla. 1990); Teffeteller v. Dugger, 734 So. 2d 1009, 1020 (Fla. 1999).

Miller's situation is distinguishable from the cases he cites. In Ursry v. State, 428 So.2d 713 (4th DCA 1983) the expert was called in the guilt phase of the trial regarding defendant's insanity defense. In Sanders v. State, the defense had the expert appointed confidentially and provided him with confidential records. The defense never listed him as a witness and did not provide him to the State to be deposed. Further, the State in Sanders did not act with clean hands once the expert expressed reservations about being a witness for the State. In Miller's case, the defense listed the expert as a witness, the State deposed him and only called him in rebuttal in the penalty phase when only the sentencing was at issue. Further, there is no indication in the record that Danziger was appointed confidentially. Finally, as argued above, there was no prejudice since Danziger testified to substantially the same diagnosis and information as Mings.

In addition to listing Danziger as a witness in the discovery notice, trial counsel also supplied his name, along with those of Mings, Johnston, and Edwards, to the jury at the beginning of voir dire. (T. 12:456) Clearly, trial counsel was considering calling Danziger after the trial started and it was part of his trial strategy to do so even if he later reconsidered his decision. Since this was a strategic decision, it was not ineffective. Patton, 784 So. 2d at 380 (precluding reviewing court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v.

State, 675 So. 2d 567, 571 (Fla. 1996)(holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry, 659 So. 2d at 1073 (concluding standard is not how current counsel would have proceeded in hindsight). Finally, a review of all the expert testimony shows that counsel did bring out Miller's memory problems, brain impairment, and substance abuse history. Miller has failed to show the necessary prejudice under Strickland since the jury and the court were provided the information. The denial of this claim should be affirmed.

Finally, Henderson chose not to object to Danziger's use of the term sociopath, an antiquated term for ASPD, because he decided to deal with the comment on cross examination rather than by an objection. He did not think the State asking Danziger if he had first been retained by the defense was objectionable. He chose not to object to everything because he wanted to maintain credibility with the jury and not be seen as an obstructionist or objecting to trivial matters. (PCR 8:1190-91, 1199-1200) Again, Henderson exercised a strategy in confronting the objections and cannot be deemed deficient.

Since Miller failed to prove either deficiency or prejudice in the evidentiary hearing, this Court should affirm the post-conviction court's denial of relief.

ARGUMENT II

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE VOLUNTARINESS OF MILLER'S CONFESSION DUE TO DEMENTIA. (Restated)

In his first claim Miller contends that his trial counsel was ineffective for not presenting expert testimony at the suppression hearing to demonstrate that he suffered from impaired brain functioning and memory loss which made his waiver of his Miranda rights unknowing and involuntary. He argues that this impairment and memory loss prevented him from recalling his past and further prevented him from asserting his right to remain silent during the interview because he might not have been able to recall the warnings given him minutes before. He also asserts that his counsel should have employed a neuropsychologist and a PET scan to underscore his impairments. This Court granted an evidentiary hearing on this claim and Miller failed to carry his burden of showing either deficient performance or prejudice.

As detailed earlier, Miller must demonstrate the following in order to be entitled to relief:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687. Again, review of counsel's performance is highly

deferential and must be done from the circumstances and perspective of counsel at the time of the trial so that there is a strong presumption of reasonableness. Id. at 689. Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton, 784 So. 2d at 380 (precluding reviewing court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose, 675 So. 2d at 571 (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry, 659 So. 2d at 1073 (concluding standard is not how current counsel would have proceeded in hindsight).

The post-conviction court made the following findings when it denied this claim:

> After reviewing and considering the evidence presented, observing the demeanor and assessing the credibility of the witnesses, and relying upon these observations and evaluations in resolving disputed issues of fact, the Court finds Mr. Miller has failed to establish deficient conduct or prejudice.
>
> First, prior to being Mirandized, Mr. Miller advised law enforcement "that he normally would not talk to police and would first to [sic] talk to an attorney, but was going to 'do something that he had never done before," evidencing that he recalled and understood "that he had a right to an attorney, which is a right he normally utilized." *Miller*, 42 So. 3d at 223.
>
> Second, prior to trial, Dr. Mings tested Mr. Miller's neuropsychological functioning extensively. His examination spanned ten hours over the course of four meetings, the results of which revealed that other than suffering from some mild memory loss, Mr. Miller did

not appear to suffer any gross cognitive impairments. ln addition, Mr. Miller underwent an MRI scan at Dr. Mings' suggestion, the results of which were also unremarkable, with the exception of a slight shrinkage of the left hippocampal. Dr. Mings explained that this shrinkage can sometimes be indicative of frontotemporal dementia, however, based on Mr. Miller's performance on the various tests he administered prior to the MR1 scan, Dr. Mings concluded that further testing for frontotemporal dementia was not necessary. Similarly, Dr. Danziger opined that a PET scan would be unproductive. In addition to Dr. Mings' and Dr. Danziger's professional opinions as to Mr. Miller's cognitive functioning, Mr. Hooper, Mr. Henderson, and Ms. Johnston had significant interactions with him, and never had any indication that he suffered from a cognitive impairment.

At the evidentiary hearing, Dr. Wood explained that while there was evidence of brain atrophy in the 2007 MRI scan, it was within the normal limits. Both Dr. Wood and Dr. Caddy opined that Mr. Miller is currently suffering from Behavioral Variant Frontotemporal Dementia. Significantly, however, neither doctor could offer a conclusion on how much of Mr. Miller's present condition is due to deterioration in the five and a half years since trial. in stark contrast to the opinions of Dr. Wood and Dr. Caddy, Dr. Waldman opined that Mr. Miller's social history and 2006, 2007, and 2011 medical history is not suggestive of Behavioral Variant Frontotemporal Dementia.

The Court finds Mr. Miller's trial counsel reasonably relied on Dr. Mings' and Dr. Danziger's mental health evaluations of Mr. Miller, and that their reliance on such is not rendered ineffective because, four years later, Dr. Wood and Dr. Caddy reached a contrary conclusion concerning Mr. Miller's present cognitive impairment. ...

Moreover, given the overwhelming evidence presented at trial as to Mr. Miller's guilt, the Court cannot find that, absent his confession, the outcome of the trial would have been different.

Finally, any assertion that Mr. Hooper and Mr. Henderson provided ineffective assistance as to the allegations outlined above by complying with Mr. Miller's directive that they seek a death recommendation in the penalty phase of his trial is without merit. *See Dessaure v. State*, 55 So. 3d 478, 484 (Fla. 20l0) (holding counsel is not ineffective for following the wishes of a competent defendant, even if

> that wish is to not present mitigation to a penalty phase jury); *Spann v. State*, 985 So. 2d 1059, I071 (Fla. 2008) (the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions); *Grim v. State*, 971 So. 2d 85, I00-01 (Fla. 2007) (defendant instructed his counsel not to argue for lesser included offenses, and thus, counsel did not render ineffective assistance by complying with defendant's wishes); *Brown v. State*, 894 So. 2d I37, I46 (Fla. 2004) ("An attorney will not be deemed ineffective for honoring [his or her] client's wishes").

[PCR 9:1520-22] Competent, substantial evidence supported those findings which must be affirmed.

Both the trial and evidentiary hearing records refute this claim. Hooper testified that he and Henderson had two experts, a neuropsychologist and a psychiatrist, appointed to evaluate Miller for competency to waive Miranda and to proceed to trial as well as for mitigation purposes. (PCR 7:1149) Miller seemed competent and intelligent to Hooper and he had the testing done to verify that since it was a death penalty case. (PCR 7:1124, 1150) Mings did the bulk of his testing, including a test for Miranda, in the months before the hearing on the motion to suppress in May 2007. (PCR 7:1336-38) He found Miller competent to proceed to trial as well as to have waived his rights and communicated that to the attorneys. (PCR 7:1347, 1113-14) Danziger also specifically ruled out dementia or any cognitive dysfunction. (State Exh. 10, p. 4) Hooper could not base his motion to suppress on Miller's competency to waive his rights since he had no expert who would support such a position. (PCR

7:1120, 1123-24, 1126) He relied on the experts to guide him to any potential issues and did the tests that they recommended. (PCR 7:1119-22) Buzia v. State, 82 So.3d 784 (Fla. 2011) (Counsel not ineffective for relying on expert opinion regarding brain damage.); See Darling v. State, 966 So.2d 366, 377 (Fla. 2007). Mild memory loss is not incompetency and was not a basis to challenge Miller's statement. (PCR 7:1156)

Mings recommended getting a brain scan based on Miller's complaint of memory loss and his finding of a possible slight decline in intellectual functioning although Miller had scored within the average range on all of his neuropsychological tests. Mings specifically administered numerous tests designed to assess the frontal lobe functioning and found no gross impairment, including on the memory tests. (PCR 8:1336-38, 1341-53) The MRI was largely unremarkable save for minor shrinkage in the left hippocampal region. Neither that scan nor Miller's test results indicated that any dementia or FTD existed. (PCR 8:1354-56) The only impairment anyone found was a mild memory loss. Mings stated that he, Danziger, and the defense attorneys did all the tests and scans which were appropriate given Miller's results. (PCR 8:1359-61) Mings testified that he had no problems communicating with Miller nor did Miller have any difficulty in following directions and completing the tests. (PCR 8:1350-51)

Miller's gratuitous statement itself to the police that he knew his Miranda rights and wanted to waive them for the first time really undermined any chance to argue that he did not understand the warnings. (T. 312-13, 317) As Waldman pointed out, Miller's dialogues with the court were cogent and logical and refuted any claim that his ability to understand concepts and language was in any way impaired. (PCR 8:1288-89) The court held a hearing on the motion to suppress on May 21, 2007. Miller refused to attend. (T: 105) The court ordered him to appear by phone. Speaking with the court on the phone, Miller refused to come. The court told Miller it was unusual for him not to be present. The judge went on to say:

> Do you understand, also, Mr. Miller, that since it was only you and the police officers there, that you have an absolute right to be here to consult with your lawyers about the testimony of the officers to make sure they're testifying correctly and you also have a right to testify yourself as to what happened? Do you understand that?

The court then took a waiver of his presence as well as his right to testify given that his was the only other testimony about the events of his interview. (T: 149-53) Miller's comprehension and ability to understand were not an issue.

The Orlando police arrested Miller on April 19, 2006 and took him directly to the interview room in the police station. Officer Andre Boren ("Boren") escorted him and stayed with him until the lead detectives arrived. Boren never asked Miller any questions; he only provided the drink and cigarette Miller requested. Miller informed

him that he wanted to talk to the police for the first time in his life. He asked if he could have a single cell and his cell phone. (T: 132-33) Boren only replied that he would tell his superiors; he made Miller no promises. (T: 134) Miller was put in the room at 5:40 PM. (T: 140)

Wright and Moreschi entered the room at 6:50 that same day. Wright read him his rights from a standard card used by the Orlando Police Department. Those rights were:

> You have the right to remain silent. Do you understand?
> Anything you say may be used against you in court. Do you understand?
> You have the right to talk to a lawyer before and during questioning. Do you understand?
> If you cannot afford a lawyer and want one, one will be provided for you before questioning without charge. Do you understand?
> Has anyone threatened you or promised you anything to get you to talk to me?

(T: 146-47) Miller waived all of these rights after he said he understood them. He said he wanted to talk and at no time during the interview did he ask to speak to an attorney. (T: 146-48, 154, 175) The officers and Miller had a discussion on his request for a single cell where the officers explained they had no power over housing decisions in the jail or prison. This conversation took 14 minutes after which Wright recorded Miller's statement. (T: 154-55) Wright and Miller passed some reporters on the way to jail. Miller responded to questions and admitted his guilt. (T: 167-69) The

defense presented no evidence at the hearing regarding any issue that Miller really did not understand the Miranda warnings. The trial court found Miller's statements to Boren and Wright free and voluntary, as did the Florida Supreme Court. (T: 187-189)

> Furthermore, Miller has prior experience with the law and exposure to the Miranda warnings. "The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights." *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir.1967). Miller's background and knowledge of law enforcement demonstrate that he understood the warnings with regard to his rights. In fact, he expressly stated to law enforcement that he normally would not talk to police and would first to talk to an attorney, but was going to "do something that he had never done before." Thus, Miller expressed a willingness to talk that was premised on his prior understanding that he had a right to an attorney, which is a right he normally utilized. When the warnings given to Miller are considered in context with his age, background, and intelligence, they imparted a "clear, understandable warning of all of his rights." *Coyote*, 380 F.2d at 308.

Miller, 43 So.3d at 223.

Miller argues that his counsel was left with little to argue for the suppression of his statement after the hearing. That resulted, in part, from Miller's own decision not to participate in the hearing in any way. As noted by both courts, Miller actually told the police he remembered his rights and wanted to speak to them anyway; the police, however, fully informed him of his Miranda rights anyway.

Wood opined that Miller had FTD in 2006 and 2007 based upon his assessment of the 2007 MRI and the 2011 PET scan, although the brain atrophy was within normal limits in 2007. (PCR 6:971-73) He stated that the memory loss Miller reported as well as his statement to the police that he "lost it" were symptoms of FTD. (PCR 6:977, 1016) Wood conceded that "This is not really my expertise to finally make a ruling on frontotemporal dementia to the exclusion of the others. This is a consensus across many fields that has to be reached. What I can say with clinical certainty very satisfactory to myself is that he has declining metabolism in the frontal areas, specially. ... But what is certain to my satisfaction is that he is declining in brain function." Id. Wood never spoke to any of the experts who evaluated Miller in 2007 and before nor did he speak to any lay person who dealt with Miller then so he had no basis to ascertain if Miller had communication difficulties or inappropriate behaviors at the time of the crime. (PCR 7:1013-14, 1018)

Waldman disputed that memory is a symptom of FTD and stated that memory is largely spared while deficits in language and behavior occur with FTD. Someone with Pick's disease, the behavioral variant of FTD, has difficulty using and inferring from their fund of knowledge; he would also have disruptions in his speech and word comprehension. (PCR 8:1274-77, 1279) Waldman reviewed Miller's medical records since 2007 as well as his Oregon prison records and the psychological evaluations

done on him over the years and saw no hint of neuropsychological problems or aberrant behaviors. (PCR 8:1281, 1318-19) As mentioned above, Waldman said that Miller's letters to his attorneys and his interactions with them and the court show that he was coherent, organized, articulate, and logical in his actions. He was able to plan and draw conclusions from facts which he could not have done with FTD. He was not apathetic, had no perseveration, behaved appropriately, and understood language. (PCR 8:1288-89) Finally, Waldman said that even given Wood's finding of brain atrophy in certain areas, that damage does not equate to FTD. (PCR 8:1334)

Miller failed to prove that Miller has or had FTD. He failed to show how his attorney was ineffective in his preparation for the motion to suppress since Hooper had no basis to argue that Miller was incompetent to waive his Miranda rights given that no expert would support that contention. Finally, Hooper was not ineffective for failing to present a PET scan as evidence at the suppression hearing since no expert recommended that he get one done and that the MRI was unremarkable save for mild left hippocampal sclerosis pointing to mild memory loss. Miller has not met his burden under Strickland.

Miller also has not met the requirements of Strickland's second prong since he suffered no prejudice by the admission of his confession. There was overwhelming evidence of Miller's guilt. Dempsey testified about how and where Miller met Smith.

He told about Smith's jewelry and memory problems and how Miller wished to rob her. Miller left on his own Sunday morning after he tried to get Dempsey to help him. Miller called him later that night to pick him up. When Dempsey arrived, he saw Miller's cuts. Miller later told him that everything went wrong and that he had to stop a hero. Miller also repeatedly warned him not to say anything to the police. (T: 863-914)

Haydon saw Miller in Smith's house struggling with her. Miller attacked and stabbed him before following Smith out the back. Smith showed up moments later at her neighbor's house, stabbed and covered in blood. (T: 621-673) Miller left his crack pipe, fingerprints, and blood in Smith's house. (T: 937, 961, 1039, 1057, 1062) Ramee saw a man rushing oddly through the park just after the time of the crime. (T: 916-923) Miller left Smith's jacket in Prange's house after leaving shortly after the crime. (T: 845-49, 1004-21) The police found his knife sheath in the park. (T: 925) Smith's body had defensive cuts and bruising on it as well as bruising from where her jewelry had been pulled at. (T: 1082-1114) Given the amount of evidence against Miller, he cannot show the required prejudice under Strickland. Additionally, as shown above, the details of the planning and the execution of these crimes was provided in substantial part by other witnesses. In his statement Miller was self-serving, trying to minimize his culpability when describing how he tried to take her

jewelry and then how he stabbed both Haydon and Smith. Since Miller has failed to show either deficiency or prejudice, this Court should affirm.

Despite the evidentiary hearing, the State still contends that this claim is procedurally barred because the voluntariness of Miller's waiver was brought up on direct appeal and was denied by this Court. Miller is not permitted to use a claim of ineffectiveness to overcome the bar. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"). Based on this, Miller may not claim ineffectiveness of counsel to gain a second review. "Claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel." Sireci v. State, 469 So.2d 119, 120 (Fla.1985). In Jones v. State, 845 So.2d 55 (Fla.2003) the defendant claimed his trial counsel was ineffective for failing to challenge his Miranda waiver on competency grounds. Counsel had sought the suppression of the statement for lack of voluntariness which did not succeed. This Court found:

> It appears that, in the end, Jones's claim of ineffective assistance of counsel is an expression of frustration concerning the result of his trial. Such frustration is not a viable basis for granting postconviction relief. *See Teffeteller v. Dugger*, 734 So.2d 1009, 1019-20 (Fla. 1999).

Id. at 66.

The post-conviction court properly denied this claim and this Court should affirm.

ARGUMENT III

MILLER IS PRESENTLY COMPETENT AND THERE IS NO DEATH WARRANT SO THIS CLAIM IS NOT RIPE FOR REVIEW. (Restated)

Miller next asserts that his death sentence should be vacated because of his Behavioral Variant Frontotemporal Dementia which he alleges will eventually render him incompetent to be executed by the time a death warrant will be signed. The lower court properly summarily denied this claim because it is not ripe for review since Miller is currently competent and there is no death warrant for him.

> This Court has repeatedly found that no relief is warranted on similar claims. *See State v. Coney*, 845 So.2d 120, 137 n. 19 (Fla.2003) (rejecting Coney's claim that he was insane to be executed where he acknowledged that claim was not yet ripe and was being raised only for preservation purposes); *Jones v. State*, 845 So.2d 55, 74 (Fla.2003) (finding claim that defendant may be insane to be executed "not ripe for review" where defendant was not yet found incompetent and death warrant had not yet been signed and noting that defendant made the claim "simply to preserve it for review in the federal court system").

Anderson v. State, 18 So.3d 501, 522 (Fla. 2009); Nelson v. State, 43 So.3d 20, 33 (Fla. 2010)(same); Barnhill v. State, 971 So.2d 106, 118 (Fla.2007) ("Barnhill concedes that his claim involving competency to be executed is not ripe for review

as he has not yet been found incompetent and a death warrant has not been signed.”). The lower court’s ruling should be affirmed.

ARGUMENT IV

THERE WAS NO VIOLATION BY THE STATE OF EITHER BRADY OR GIGLIO AND TRIAL COUNSEL WAS NOT INEFFECTIVE IN THE GUILT PHASE NOR DID HE HAVE AN ACTUAL CONFLICT OF INTEREST. (Restated)

In his next issue Miller asserts the trial court erred in denying his claim that an alleged probation violation for Dempsey triggered a number of errors including: claims under Giglio v. United States, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963) arguing the that the State failed to turn over information on the probation violation and failed to correct Dempsey’s testimony that he was not a robber; that his counsel was ineffective for failing to discover and to use this “impeaching” information; and that trial counsel suffered from an actual conflict of interest which Miller had not knowingly waived. Miller failed to prove any of theses allegations at the evidentiary hearing and the lower court properly denied relief.

After the evidentiary hearing, the trial court found:

> After reviewing and considering the evidence presented, observing the demeanor and assessing the credibility of the witnesses, and relying upon these observations and evaluations in resolving disputed issues of fact, the Court finds Mr. Miller has failed to establish either a *Brady* or *Giglio* violation, or deficient conduct or prejudice.
> ...

The Court finds Mr. Dempsey did not violate the terms of his probation as Mr. Miller alleges in his Motion. As Ms. Finnegan explained, the incident where Mr. Dempsey allegedly became violent and demanded Ms. Dempsey's money and car keys did not form the basis for a probation violation. Evidence of this alleged robbery would not have been admissible at trial because this incident was ancillary to the substance of Mr. Dempsey's testimony and the issues before the jury, and because it did not result in a conviction. Mr. Dempsey apprised his Probation Officer that he was testifying in the above-styled case because he was obligated to keep him informed of his whereabouts and dealings with law enforcement — this was not an attempt to curry favor with the State. Similarly, evidence of Mr. Dempsey's alleged attempt to rob Ms. Hood would have been inadmissible for the same reasons — this incident was ancillary to the substance of Mr. Dempsey's testimony and the issues before the jury, and it did not result in a conviction. Moreover, even if Mr. Dempsey was impeached with evidence of these alleged robberies, the Court finds there is no reasonable probability it would have affected the outcome of the trial, as Mr. Dempsey's credibility was significantly undermined through evidence of his probationary status and multiple convictions for theft and drug related crimes.

Additionally, Ms. Hood moved to Michigan in the summer of 2006, and did not make any attempt to notify authorities in Florida of her whereabouts -~ by her own admission, it would have been difficult to find her during this period of time. Mr. Miller's counsel cannot be found ineffective for failing to investigate or call Ms. Hood to testify at trial because of her unavailability. 20

In the instant case, Mr. Hooper advised Mr. Miller that the Office of the Public Defender for the Ninth Judicial Circuit represented Mr. Dempsey in the past, and that Mr. Miller understood and waived any conflict. Mr. Hooper's representation of Mr. Miller was limited only in the respect that he could not pull Mr. Dempsey's closed file and read confidential communications between Mr. Dempsey and his counsel, nor could he ask Mr. Dempsey's counsel to disclose their confidential communications. Mr. Hooper treated Mr. Dempsey as he did any other witness. Any limits this conflict created in Mr. l—looper's representation of Mr. Miller are equivalent to the restrictions that would

> have been placed on the Office of Criminal Conflict and Civil Regional Counsel. Additionally, neither Mr. Hooper nor Mr. Henderson knew whether Mr. Smith, the victim's son, was employed by the same office any time before or during their representation of Mr. Miller. Accordingly, the Court finds Mr. Miller has failed to establish either an actual conflict or an adverse performance by Mr. Hooper and Mr. Henderson as a result. *See McWatter's*, 36 So. 3d at 635 (holding counsel did not have actual conflict of interest in capital murder prosecution, though counsel had previously worked for public defender's office (DO) and counsel was appointed after DO had withdrawn based on a conflict of interest relating to witness; counsel did not become involved in defendant's case until he was in private practice, during his employment with DO he never met with defendant, never spoke to defendant's prior attorney from DO, never had any personal interaction with witnesses named in prior attorney's motion to withdraw, and never participated in witnesses' cases, and counsel had no confidential information about those witnesses).
>
> The Court notes this portion of Mr. Miller's claim is conclusory, and other than Ms. Hoods' testimony that it would have been difficult to find her during this period of time, no other testimony on this issue was elicited from any witness.
>
> Finally, any assertion that Mr. Hooper and Mr. Henderson provided ineffective assistance as to the allegations outlined above by complying with Mr. Miller's directive that they seek a death recommendation in the penalty phase of his trial is without merit. ...

[PCR 9:1523-26] The evidence supported those findings and the lower court properly denied relief.

The State respectfully incorporates here the legal standard under Strickland detailed earlier require a defendant first must identify specific acts or omissions of counsel that are deficient and that he suffered prejudice because of them. Strickland at 687, 694. Other than saying that the Public Defender's Office had

represented Dempsey in the past, Miller failed to show that a probation violation was filed before the trial began or that the information was in the attorney file. He completely fails to argue what, if any, prejudice resulted by not presenting this "impeachment" information as required under Strickland. He offers no facts or arguments on how counsel could have discovered the information on Dempsey. Consequently, Miller only presents the claim in a conclusory manner and fails to demonstrate prejudice. Conclusory allegations are legally insufficient on their face and may be denied summarily. See Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001) (stating "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden.") Freeman, 761 So. 2d at 1061 (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998)(stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record").

The standards applicable to the Brady aspect of this claim are as follows. First, to establish a Brady claim, the defendant must show that the evidence was material and favorable. Next, he must show that the State willfully or inadvertently withheld

it. Finally, he must show that he was prejudiced by the State's withholding of the favorable evidence. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999). To prove prejudice, the defendant must demonstrate "a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different verdict. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Rhodes v. State, 986 So.2d 501, 508 (Fla.2008) (quoting Green v. State, 975 So.2d 1090, 1102 (Fla.2008)); see Strickler, 527 U.S. at 290, 119 S.Ct. 1936 ("[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " (quoting Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555 (1995))). The evidence is material "if there is any reasonable likelihood" that it "could have affected" the jury's verdict. Id. at 506 (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976)). A Giglio violation is demonstrated when the prosecutor knowingly presented or failed to correct false testimony that was material to the case. Guzman v. State, 868 So.2d 498, 505 (Fla.2003). The evidence is material "if there is any reasonable likelihood" that it "could have affected" the jury's verdict. Id. at 506 (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976)). Thus, the "State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id.

Miller argues that Dempsey should have been impeached after he said that he did not rob people and wanted nothing to do with Miller's plan. (T. 15:873-75) Dempsey was impeached with his multiple convictions, including stealing from his mother, and probationary status. (Id. 871-72, 913) Miller contends that Dempsey could have been impeached with his conduct demanding keys and money from his mother and for his attempts to rob Hood, matters completely ancillary to the substance of his testimony and the issues before the jury. Dempsey testified that he did not want to rob the lady and did not participate in that robbery. Those statements were supported by the testimonies of Haydon and Ramee who said that there was only one assailant, identified by Haydon as Miller. Miller himself in his confession also said that he acted alone. The information Miller purports would impeach Dempsey would not have been relevant to the issues involved in the trial, whether it was Miller who attacked, rob, and killed Smith. This information about Dempsey allegedly trying to rob his mother and Hood would likely not have been admissible in the trial at all since these incidents did not result in convictions and, while Miller might argue that it would go to the truthfulness of Dempsey, the jury already heard that he had been convicted multiple times for theft and drug related crimes thereby making these allegations more prejudicial than probative. See Fla. Rules of Evid. §§ 90.609, 90.610, 90.403, & 90.404; Hitchcock v. State, 413 So.2d 741 (Fla. 1982) (evidence

of particular acts of misconduct cannot be introduced to impeach the credibility of a witness.).

Miller failed to prove that Dempsey had ever tried to rob either his mother or Hood and failed to prove whether a probation violation regarding a robbery even existed. Finnegan testified that Dempsey was never violated for driving his mother's car without her permission; he was violated for a dirty drug test and for absconding only. (PCR 6:820-21, 23) Dempsey was required to report any contacts with law enforcement to his probation officer so he had to relate that he was a witness in a criminal trial to his probation officer. (PCR 6:819) Mrs. Dempsey flatly stated that her son never took anything from her by force. (PCR 6:826) She said that she routinely let him drive her car but did not want him to do so while his license was suspended so she tried to prevent him by calling the police; she hoped that would stop him. (PCR 6:828, 830-32) Dempsey never struck or shoved his mother nor did he threaten her. He asked her for money and she simply said no. She let go of the keys and he left. (PCR 6:834-36)

Hood testified that she disliked Dempsey and that he was a freeloader at times. During the period when he and Miller were at her house, she was high on drugs all the time and could not specifically recall individual incidents of Dempsey robbing her since the drugs affected her memory and perception of reality. She recalled going

after him with a baseball bat on two occasions when he did not pay "rent" or ate too much of her soup; she said she used the bat because she was irritated with him. He was scared of it and never struck back at her. She also stated that she moved shortly after the murder without telling anyone where she was; about a year later, before the trial, she left the state. (PCR 6:846-62)

Neither Hood nor Mrs. Dempsey could have been used to impeach Dempsey on his statement. Hood was unreliable and not a credible witness given her drug use and vague allegations. Neither the defense nor the State had any reason to suspect that she had any information relevant to the trial much less possible impeachment of Dempsey for an unasked for and unanticipated comment. She also was moving around and out of state during the preparation for trial so that, even if the defense had a reason to interview her, it would have been quite difficult to track her down. Mrs. Dempsey plainly said that her son never tried to rob her and that the incident was not a big deal to her. She was aggravated with him so she told his probation officer when he called. Finally, the probation officer clearly did not consider the incident anything other than a family argument since he did nothing to file a probation violation based upon it. Trial counsel was not ineffective for failing to discover these incidents, especially since they were so minor and not appropriate material to impeach Dempsey with even if counsel could have guessed that Dempsey might deny robbing people.

Miller has failed to meet his burden under Strickland. Counsel is not ineffective for failing to pursue a non-meritorious issue. King, 555 So.2d at 357-58; Teffeteller, 734 So.2d at 1020.

Miller has not shown that this information is material or that it prejudiced his trial as required under both Brady and Giglio since it was cumulative, irrelevant to the substance of Dempsey's testimony, and would not have affected the outcome of the trial. He failed to present any evidence at the hearing that there was a probation violation in existence for this action or that the prosecution knew about it. Additionally, even if the probation officer's notation in a daily log could be construed as knowledge by the State of this information, since it was not exculpatory and did not provide any proper impeachment material, it does not meet the requirements under Brady or Giglio. Furthermore, Dempsey's testimony was not false or deceptive, especially regarding Miller and whether he had been given any consideration by the State for his testimony. Miller insinuates without a basis that the only reason Dempsey told his probation officer about his pending trial testimony was an attempt to curry favor, a supposition that Finnegan refuted. (PCR 18)

Nor has Miller shown any prejudice by the jury not hearing these uncharged allegations against Dempsey. As noted above, the jury did hear that Dempsey had been convicted multiple times for theft and drug charges so these would not have

undermined his credibility. Additionally, there was a wealth of evidence of Miller's guilt presented at the trial and the outcome would definitely not have changed if this information had been provided to the jury detailed in the claims above and incorporated here. Miller has failed to show the necessary prejudice under the standards of Brady and Giglio as well as failing to meet the requirements under Strickland. Competent, substantial evidence supports the lower court's denial.

Miller also failed to prove that there was any actual conflict of interest with Hooper and Henderson representing Miller. In order to show a violation of the right to conflict-free counsel, Miller must "establish that an actual conflict of interest adversely affected his lawyer's performance." Hunter v. State, 817 So.2d 786, 791 (Fla.2002); see also Bouie v. State, 559 So.2d 1113, 1115 (Fla. 1990)(same). In Hunter, the Court explained that a lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." Id. A defendant must identify specific evidence in the record that suggests that his interests were compromised in order to demonstrate an actual conflict. Mungin v. State, 932 So.2d 986 (Fla. 2006). "A possible, speculative or merely hypothetical conflict is 'insufficient to impugn a criminal conviction.' Cuyler, 446 U.S. at 350." Id. at 1001. "'[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective

assistance.' Cuyler at 350. If a defendant successfully demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation." Hunter at 792; Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

In Hunter the Court rejected defendant's allegation that an actual conflict existed because a State witness was formerly represented by the same public defender's office that represented the defendant. Since trial counsel was unaware of the public defender's previous representation of the witness and did not even know about the witness's criminal background, there was no actual conflict. Id. at 791-793. In that decision the Court relied on McCrae v. State, 510 So.2d 874 (Fla.1987) where it concluded that counsel was not required "to make inquiry into the matter in order to be considered reasonably effective and within the range of normal, professional competence." McCrae at 877. In Bouie the Florida Supreme Court found no conflict where the Public Defender's office represented the witness to Bouie's confession on the day he heard the confession but where that representation ceased before he testified at trial. Bouie at 1115.

> An actual conflict of interest that adversely affects counsel's performance violates the Sixth Amendment of the United States Constitution. *Larzelere v. State*, 676 So.2d 394, 403 (Fla.1996). "Nevertheless, a defendant's fundamental right to conflict-free counsel can be waived." *Id.* at 403. For a waiver to be valid, the record must

> show that the defendant (1) was aware of the conflict of interest, (2) realized the conflict could affect the defense, and (3) knew of the right to obtain other counsel. *Id.*

McWatters, 36 So.3d 613, 635. In McWatters there were two claims of conflict of counsel, one similar to the one presented by Miller and another actual conflict of counsel. Trial counsel in McWatters represented a prosecution witness numerous times in the past and was contacted by the witness during his representation of the defendant as well. The trial court conducted an inquiry of McWatters where he waived the conflict. This Court did the same with Miller where the conflict was explained to him and he knowingly waived it. Under McWatters Miller's waiver is valid and binding. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)(holding for issue to be cognizable on appeal, it must be the specific contention asserted below).

Miller failed to demonstrate, as required by the case law, that there was either an actual conflict or that there was adverse performance by his counsel as a result. This situation is similar to the second one presented in McWatters. There the second chair was an attorney at the Public Defender's Office when it represented the witness. He went into private practice shortly before he was appointed as McWatters's counsel. He, like trial counsel here, "never had any personal interaction with the witnesses ..., never participated in their cases, and had no confidential information

about those witnesses." Id. This Court found that there was no actual conflict of interest. Oddly, Miller argues that his trial counsel should have dug through the public defender's closed files to find confidential information with which to impeach Dempsey, clearly a violation of professional ethics at the least. Miller's trial counsel was in the same position as an attorney who never had contact with the witness. Hooper said that he alerted the court to the issue simply to be safe given that it was a serious case. There was no actual conflict and he attacked Dempsey as vigorously as he did anyone. He did not know Dempsey nor was he even in the office when it represented him. (PCR 7:1133-35) Hooper has never in his career subpoenaed the probation file of a witness. (PCR 7:1136-38) At most, this was a potential conflict of interest, not an actual one. The record supports the denial of relief. Furthermore, he fails to point to specific evidence in the record showing where his interests were compromised. Trial counsel challenged not only Dempsey but all the State witnesses in defending Miller. This Court should affirm.

ARGUMENT V

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S VOIR DIRE QUESTIONS, ITS PENALTY PHASE CLOSING ARGUMENT, OR TO THE COURT GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS. (Restated)

Miller argues that the lower court improperly denied his claim that his trial counsel was constitutionally ineffective for failing to object and ask for curative instructions when the Court and the State allegedly mis-stated the law regarding the juror's weighing of the aggravators and mitigators in reaching their recommendation. He specifically points to a number of instances during voir dire where he argues the Court and the State misinformed the jury on the law and in the penalty phase where the Court allegedly misstated the law in its opening instructions, where the State misstated the law in its closing argument, and that the standard jury instruction on this issue was improper. He also contends that trial counsel was ineffective for failing to give an opening argument in the penalty phase and for using variations of the word "weight" in his closing rather than relying on and arguing mercy for the defendant. The State still contends that these claims are all procedurally barred since they could have been raised on direct appeal but were not. Miller presented no evidence on his sub-claims regarding any of the penalty phase arguments or instructions and has thus waived them. Owen v. State, 773 So.2d 510 (Fla. 2000) (affirming denial of relief

where defendant waived claim when he failed to produce any evidence in support of it). On the issue of ineffectiveness of counsel, Miller's claims are refuted by the record and he failed to demonstrate either deficient performance by his trial counsel or prejudice. The court properly denied relief after the evidentiary hearing.

The court below made the following findings of fact, addressing all of the jurors discussed in the motion including those who did not serve:

> After reviewing and considering the evidence presented, observing the demeanor and assessing the credibility of the witnesses, and relying upon these observations and evaluations in resolving disputed issues of fact, the Court finds Mr. Miller has failed to establish deficient conduct or prejudice.
>
> At the beginning of the trial, the Court pre-instructed the venire panel regarding both the guilt phase and the penalty phase of the trial. The Court stated:
>
> > Because your verdict may lead to the imposition of the death penalty, your attitude toward the death penalty is a proper subject of inquiry by the Court and the attorneys. The fact that you have reservations against or conscientious or religious objection to capital punishment does not automatically disqualify as you a juror in a capital case. Of primary importance is whether you can subordinate your personal philosophy to your duty to abide by your oath as a juror and follow the law as I give it to you. lf you are willing to render a verdict that speaks the truth as you find it to exist, even though such a verdict may lead to the imposition of the death penalty, you are qualified to serve as a juror in this case. If, however, you are possessed of such strong opinions regarding capital punishment, no matter what those opinions may be, that you would be prevented from or substantially impaired in the performance of your duties as a juror, you are not

qualified to serve as a juror. It is up to each of you using the standard I've just described to search your conscience to determine whether you are in a position to follow the law as I give it to you and render a verdict as the evidence warrants.

Only by your candor can either the accused or the State of Florida be assured of having this extremely serious case resolved by a fair and impartial jury. In reflecting upon your ability to follow the law in this case, and render a verdict that may lead to the imposition of the death penalty, you should be aware of some law peculiar to the penalty proceeding. The law of this state permits the imposition of the death penalty only in those cases where there is shown to exist justification or aggravating circumstances. The burden rests solely upon the State to prove beyond and to the exclusion of every reasonable doubt the existence of those aggravating circumstances upon which it will base a request for recommendation of death. The accused will have the opportunity to submit to you any information deemed relevant upon the sentencing issues. Mitigating circumstances need not be proven beyond and to the exclusion of every reasonable doubt. If you are reasonably certain that a mitigating circumstance exists, you may consider it to be established. The advisory verdict needs - the recommendation must be by a majority of the jury, a recommendation of incarcement - incarceration for life with no eligibility for parole may be made either by a majority or by an even division of the jury, that is, a tie vote of six to six.

When deliberating upon the nature of the advisory verdict, the jury will consider the evidence received in the guilt phase of the trial as well as the evidence submitted during the penalty phase. It is only after weighing and comparing the sum total of all the evidence that the penalty jury will make its recommendation to the Court. As you can

rightfully conclude from the information I have given you, it is possible for a jury in a capital case to join a unanimous verdict that the accused is guilty of the crime charged and still decline to join in- a recommendation that the death penalty be imposed.

(See Trial Transcript, pps. 560-62).

Caution, every one of us have ideas and notions about certain things. We have ideas and notions about the death penalty. Some of us have ideas when it should be applied, some of us have ideas when it should not be applied. What we're gonna simply ask, and some people can do it and some people can't do it, to lay aside any of your personal opinions about the death penalty and, if we get to that point, make whatever decision you make solely on the law that I'll give you and the facts in evidence. Now, this proceeding is quite awkward because usually we do not put the cart before the horse. The horse always goes before the cart. But we have to ask these questions ahead of time just in case we get there. So because we're asking these questions, you're not to assume or presuppose anything because the cause and nature of the proceedings and the way it's done, we have to ask questions just in case we get there. We cannot wait until we get there to ask you these questions. So please do not pre-assume anything.

Now, with that in mind, we'll have - in just a few minutes, the court deputy will summons you to come up here and be comfortable and we have some questions we're gonna need to ask you. So be at ease, and we'll get through this process just as quickly as necessary. If you have to step out, please consult the court deputy, if anyone needs to go to the restroom. Okay. Attorneys, let's come up front along with the court reporter.

(The following portion of this proceeding was held out of the hearing of the prospective jurors, except the

prospective juror that was called and with whom individual voir dire was conducted.)

(See Trial Transcript, pps. 55-56). At this point, the Court and parties individually questioned each potential juror, away from the rest of the venire panel. Mr. Miller complains of improper comments made before eight of the potential jurors; however, only three of those jurors served on the panel, juror numbers 43, 268, and 275. The Court will address each juror in turn.

Juror Number 43

Mr. Miller asserts juror number 43 was misled by the State to believe that a penalty phase was simply a strict weighing process of aggravators and mitigators. However, the Court finds the complained of comments were simply an attempt by the State to clarify whether this juror would be able to put aside his religious beliefs about the death penalty and make his decision based on the evidence applied to the law as instructed by the Court:

THE STATE: All right. And you feel that you can't commit to setting aside your religious beliefs and just deciding this based on the law?

JUROR 43: I think that l can do that. l thought the question was whether it would be more difficult to do so.

THE STATE: Well, by difficult, I mean that it actually might prevent you? In other words, if you're saying I'm going to weigh the law, let me check the box for death because the aggravators outweigh the mitigators and there's no conscience there, you're just objectively doing that, it's really easy to make that check. What I'm asking you is —well, I know I have

to make the check under the law, I have these religious beliefs, but I have to follow the law, it's harder to do because you're doing that, but you've said I'm strong, I have to set aside those religious beliefs, I'm not going to incorporate those religious beliefs for me to vote a way that may be contrary to the law, and my question is — to you, is there a chance, even a small one, that you may vote contrary to the law or the State, you may give less weight to the aggravators because consciously you don't want to vote for it because of those religious beliefs?

JUROR 43: No. I think notwithstanding the increased difficulty, um, I believe I could faithfully adhere to the law in that regard.

(See Trial Transcript, pps. 530-31). The Court finds juror number 43 was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller's case.

Juror Number 268

Mr. Miller asserts the State misadvised juror number 268, and argues that, contrary to what the State suggested, the law does not mandate death where the aggravators are not outweighed by the mitigators. In its entirety, the comment complained of is as follows:

THE STATE: Regarding the death penalty.

JUROR 268: It's not something that like I really I'm so super against or I'm so super for. It's one of those things where if the evidence could prove or like, okay, it is

a possibility of either DNA or some little missing piece that could say, oh, well, he actually didn't do it or she didn't do it, then that's when I kind of lean for the whole life without parole.

THE STATE: Right.

JUROR 268: But if it's the other way -

THE STATE: All right. The question of death penalty won't come about in the first segment of the trial unless he's convicted for first degree murder. Okay. So the person is convicted of first degree murder. Then you have a decision to make. And the way that it works under our laws is the State presents certain aggravators, so things that are in support of the death penalty under the law and then defense presents what are known as mitigators, things for you to consider, and defendant's background, maybe some psychologists or psychiatrists, those kind of evidence and, again, it's not limited to that. But essentially that's how it works. And then you make a decision whether the act - you know, you'll weigh the two. We don't tell you what weight to give anything. But if the aggravators in - in ~ in this particular case are not outweighed by the mitigators, the aggravators should be given greater weight, could you vote for death and follow the law? Speak up.

JUROR 268: I could.

THE STATE: And if, in fact, you felt that the mitigators, in fact, did outweigh the aggravators and the death penalty wasn't warranted, could you vote for a life sentence, life without possibility of parole?

JUROR 268: Yes.

(See Trial Transcript, pps. 461~62). Here, the State was simply advising this juror recommendation for death is not automatic upon a finding of guilt.

Moreover, Mr. Henderson explicitly advised this juror:

So there are factors that you would be instructed on, like Mr. Lewis said, reasons to impose the death penalty and reasons not to impose the death penalty, aggravators and mitigators. And with the aggravators, the reasons are given to people just by imposition of the death penalty, those are limited, those are limited by the statute, those are very, very ~ things you can consider and you can't go outside the list ...

The list is finite, for lack of a better word. It's just a very specific list of- of- of considerations. And it's not a factor or it's not a process of finding one of those things. It's a process of first seeing if the State proves that this consideration exists and then you are free to weigh it however you want to weigh it. And the same with the mitigation.
...

The things that you see in mitigation, if you find that they exist as a matter of fact, then you're free to weigh those things however it is that you want to weigh them; do you think you can do that?'

(See Trial Transcript, pps. 466-67). The Court finds juror number 268 was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller's case.

Juror Number 275

Mr. Miller takes issue with the following statement:

> [L]et's say you're back there and I guess you've indicated that you're following some cases and you've kind of made your own and, of course, that's just based on the media's portrayal, it's not based on sitting there, which is entirely different. Let's say you get in a situation where, of course, the only time the death penalty would be a factor is if the jury has convicted of first degree murder. So assuming that that's happened and we're at the next phase, what if the Court gives you instructions, you understand the instructions, you weigh the aggravators and mitigators, clearly to you, in making that objective determination, the aggravators clearly outweigh the mitigators, but there is some mitigation there that you can see or that's been articulated and just your gut is that you don't want to do it in that situation, even though if the reading of the law, you were to follow the law, it would be absolutely that you would vote for death, because the aggravators clearly outweigh the mitigators, but your situation you don't feel right about doing it or don't want to do it, how would you resolve that conflict?

(See Trial Transcript, pps. 253-54). However, juror number 275 explained:

> Um, well, it would be, you know, a tough decision to make. Nobody wants to be put into that sort of position. But - if I had to make that decision, um, I suppose I would - I would have to follow the instructions of the jury - of the judge and - and go with - go with that as my guidance in making my decision.

(See Trial Transcript, pps. 254-55).

The Court had previously correctly instructed this juror that:

> Now, we all have our own personal ideas and notions about when the death penalty is applicable and not applicable, just like you've said. The question, and the key question, is whether or not if you're asked and we reach that point where that decision has to be made, whether or not you can lay aside or subordinate your own personal views about when it should be applied and not applied and use the law that I would give you in making that decision, do you think you could do that?
>
> ...
>
> As I told you about, you would be instructed to look at certain aggravating factors and certain mitigating factors. How you weigh them is left up to you and you alone. And once you weigh them, then you come up with a decision and that's how you do that. Would you have any problem in doing that?
>
> ...
>
> If the facts and circumstances of this case under the law would warrant a recommendation of life imprisonment without possibility of parole, could you vote to recommend that sentence, sir?
>
> ...
>
> On the other hand, if the facts and circumstances of this case under the law would warrant a sentence of death, could you vote to recommend that sentence?

(See Trial Transcript, pps. 252-53). Additionally, Mr. Henderson later emphasized to juror number 275 that:

> [T]he law is not going to - there won't be any question about you following the law because the law is not gonna say you have to do this, you have to do that. You have to follow the law, and you have to choose the appropriate punishment in the event that Mr. Miller is found guilty of first degree murder.
>
> ...
>
> The law is never going to require that you recommend to the

judge that there be a death penalty for punishment nor will it require that you recommend a life without possibility of parole. It's a weighing process, once you redo the calculation, whatever way you attribute to it, that's the recommendation as to the punishment you're supposed to come up with.

(See Trial Transcript, pps. 255, 256-57).

The Court finds juror number 275 was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller's case, and his response to the complained of statement evidences his correct understanding.

Juror numbers 16, 58, 285, 467, and 937, did not serve on the panel; however, the Court will also address the complained of comments in turn.

Juror Number 16

The Court explained to juror number 16 that:

> Okay. What I'm trying to determine is whether or not you have feelings that are against the death penalty such that you could not equally consider it with life imprisonment in the appropriate case and the appropriate case in dealing with you is where you felt that there was no question about the person's guilt or innocence, that's what I seem to hear you say, that your concern is the person may not have done it, but if there were no doubts, lingering doubts, about the person's guilt or innocence, could you consider that equally with life imprisonment?
> ...
> If the facts and circumstances of a case under the law would warrant a sentence of life imprisonment without possibility of parole, could you vote to recommend that sentence?
> ...
>
> On the other hand, if the facts and circumstances of a case

under the law would warrant a sentence of death, and you had no doubts about that person's guilt, could you vote to impose a sentence of death?

(See Trial Transcript, pps. 361-17). Additionally, the State's voir dire of this juror revealed that she was strongly influenced by the lingering doubt mitigator, and for this reason, Mr. Henderson explained he wanted her to serve on the panel. The Court finds juror number 16 was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller's case.

<u>Juror Number 58</u>

The State did not advise juror number 58 that the she was to give greater weight to the aggravators than to the mitigators. Rather, the State inquired:

> Would you automatically - in other words, the Court is gonna instruct you if you decide that he's guilty of first degree murder, then you make a decision regarding the death penalty according to certain aggravators which are reasons why that we're gonna argue that the death penalty should be imposed and certain mitigators that these two gentlemen are going to argue why the death penalty shouldn't be imposed and then what you do is weigh it out and make a determination according to the law. Can you do that?
>
> ...
>
> And that means if you feel that the mitigators outweigh the aggravators, you would vote for life in prison. Could you do that?
>
> ...
>
> And if the aggravators were not outweighed by the mitigators, you could vote - because of the weight of those aggravators, you could vote for the death penalty and you wouldn't have a problem doing that?

(See Trial Transcript, pps. 509-10).

The fact that this juror was asked whether she "would follow the

law even if it was different than [her] personal belief[s]" is not objectionable. (See Trial Transcript, p. 475). A juror may have personal beliefs about the death penalty - the State inquired as to this matter to determine whether she would be able to set aside her personal opinions and make her decision based on the evidence applied to the law as instructed by the Court.

Mr. Henderson asked this juror "In deciding which punishment to impose, do you think that mercy plays a consideration," to which she replied "Yes." (See Trial Transcript, p. 482). The State questioned her on this point to clarify that she would, in fact, be able to recommend a sentence of death if the law, as applied to the facts and circumstances of Mr. Miller's case, warranted it:

> Okay. I want to make sure of that. The other thing is mercy. Now, of course, if your decision is based on wanting to give somebody mercy and anybody that incorporated that, they would never vote for the death penalty, so I just wanted you to elaborate on that a little more because that seems to be in conflict with deciding a case according to the law and then wanting to give somebody mercy. So how - how would that affect you or do you think it might come into play during your decision?

(See Trial Transcript, p. 484). The Court finds when placed in context, the complained of comments are not improper. Juror number 58 was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller's case.

Juror Number 285

Juror number 285 explained that she very strongly believed in the death penalty. The Court advised her that if she was selected, she would have to set aside her personal opinions about the death penalty and make her decision based on the evidence applied to the law as instructed by the Court. In its entirety, the Court explained:

> But unfortunately that is not the law. You have to go

> through a weighing process and evaluate certain mitigators versus certain aggravators in reaching that decision. All we're simply asking you to do is take those factors, there is the law that I give you, and then in arriving at whatever decision you make, lay aside your own personal opinions. Some people can do that, some people can't. Do you think you can do that, ma'am?
>
> ...
>
> If the facts and circumstances of this case under the law would warrant a sentence of death, could you vote to impose that?
>
> ...
>
> On the other hand, if the facts and circumstances of this case under the law would warrant a sentence of life imprisonment without possibility of parole, could you vote to impose that sentence?

(See Trial Transcript, p. 103-04).

The Court finds when placed in context, the complained of comment is not improper. Juror number 285 was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller's case.

Juror Number 467

The Court explained to juror number 467:

> In other words, we don't want someone, just because someone is convicted of first degree murder, to automatically say life imprisonment or automatically say death, but we want you to weigh factors that will be based upon the law against you - I give you and the evidence that will be presented.
>
> ...
>
> The key question is if the facts and circumstances of this case under the law would justify or warrant a sentence of life imprisonment without possibility of parole, could you vote to recommend that sentence, sir?

> ...
> On the other hand, if the facts and circumstances of this case under the law would warrant a sentence of death, could you vote to recommend that sentence?
> ...
> Okay. The bottom line is can you fairly consider both and not favor one over the other? You know, sort of like a referee, you don't want someone that may be biased toward the Magic and they're playing the Miami Heat where they start five steps in the hole, you want somebody who is going to call the game fairly based upon the rules.

(See Trial Transcript, pps. 225—26). Thereafter, the State questioned juror number 467, and attempted to ascertain whether this juror would be able to set aside his personal beliefs about the death penalty and make a recommendation based on the law as applied to the facts and circumstances of Mr. Miller's case. The Court then questioned this juror to clarify that he would not automatically recommend a death sentence:

> A couple more questions so I can have it clear in my mind. You indicated to Mr. Henderson that if someone committed first degree murder and it was not in self-defense, that you would tend to automatically vote for the death penalty. And then after additional questioning from Mr. Henderson, you indicated in making that decision you would consider certain things like their background, whether he used drugs or was on medication or not on medication. What I'm trying to determine is whether or not if someone is convicted of first degree murder, that you're just gonna automatically vote that they receive the death penalty without considering all the factors that may be presented to you later, either in aggravation or mitigation?
> ...

The process if any defendant in a capital case is convicted of first degree murder, the State has the right to present certain limited statutory aggravating factors, things in aggravation that they say or contend makes the crime aggravated. The defense has an opportunity to present what is known as mitigation, things that would mitigate against

a possible death sentence. Then and only then can you look at the whole complete picture and make that determination. Can you do that or will you just automatically vote for the death penalty?

Juror 467 responded he "would look at the picture. [He] wouldn't just vote for the death penalty." (See Trial Transcript, pps. 232-34).

The Court finds a complete review of the voir dire of juror number 467 establishes that he was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller's case, and the record establishes that this juror was not encouraged to recommend a death sentence.

Juror Number 937

The Court explained to this juror that the law would require him to set aside his personal opinions and make a recommendation based on the law as applied to the facts and circumstances under Mr. Miller's case. The Court inquired as follows:

THE COURT: Okay. When you use the word believe so, some people think that sentence has a modifier that maybe he can, maybe "he can't. And there are two instances; either you can, you can't, or you just don't know.

JUROR 937: Well, I've never been in this situation before.

THE COURT: I know you haven't.

JUROR 937: I feel I can look at the circumstances and make and judge accordingly.

THE COURT: One of the things we ask jurors is that they consider both penalties equally -

JUROR 937: Okay.

THE COURT: - and not go in predisposed - lights keep flickering in and out which means that the lights, something may be about to blow. The question is, can you consider both equally and not go in favoring one over the other?

JUROR 937: I believe I can be impartial.

THE COURT: Okay. Do you think you would go in heavily favoring the death penalty as opposed to life imprisonment if we got to that far?

JUROR 937: No.

THE COURT: You don't think so. You can consider both of them equally?

JUROR 937: Yes.

(See Trial Transcript, pps. 122-23)

The Court finds when placed in context, the complained-of comments are not improper, and the Court was not attempting to "alienate the jurors who possibly seemed apprehensive to impose the death penalty." (See Motion, p. 48). Juror number 937 was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller's case.

Finally, the Court finds the comments Mr. Miller takes issue with are similar to those discussed in Jones v. State, 845 So. 2d 55, 67 (Fla. 2003). In that case, the Florida Supreme Court found the complained of comments were not prejudicial, and explained that:

The strongest phraseology employed by the prosecutor was

> his line of questioning in which he asked prospective jurors whether they could vote to recommend the death penalty "if the facts, circumstances, and the law warrant it." This line of questioning is not a significant deviation from the standard jury instructions. Moreover, during voir dire the trial judge properly instructed prospective jurors that their role was to "decide whether or not to recommend one of two available sentences," one being "the death penalty, which is a recommendation, the second [being] life imprisonment with a minimum of twenty-five years." Jones's counsel was not ineffective during voir dire, nor did Jones suffer any prejudice. No evidentiary hearing was warranted.

Id. at 67 (footnote omitted).

After reviewing the State's opening statement, the Court finds it was not improper - it provided a synopsis of the evidence the State intended to present during the penalty phase, and the reasonable inferences that could be drawn therefrom. The State did not suggest that death was the only penalty available for the jurors to impose. The Court finds Mr. Miller's counsel cannot be found ineffective for failing to make a non»meritorious objection. *See Teffeteller*, 734 So. 2d at 1019-20 (explaining counsel cannot be deemed ineffective for failing to prevail on a meritless issue); *King*, 555 So. 2d at 357-58 (explaining the failure to raise a non-meritorious issue is not ineffectiveness).

Likewise, the Court finds the State's closing argument was not improper. The State advised the panel to follow the law, on which they were previously correctly instructed. This comment did not insinuate that the jurors were required to recommend a death sentence. The Court finds Mr. Miller's counsel cannot be found ineffective for failing to make a non-meritorious objection. *See Teffeteller*, 734 So. 2d at 1019-20 (explaining counsel cannot be deemed ineffective for failing to prevail on a meritless issue); *King*, 555 So. 2d at 357-58 (explaining the failure to raise a non-meritorious issue is not ineffectiveness).

Mr. Miller alleges Mr. Henderson had an opportunity to inform the

jury in an opening statement that the weighing process was not stringent and inflexible as suggested by the Court and the State. Neither Mr. Miller nor the State elicited any testimony from Mr. Henderson regarding this waiver, despite which, the Court finds Mr. Miller was not prejudiced because the panel was repeatedly and correctly advised of the law by the Court and both parties. Mr. Miller's contention that Mr. Henderson was ineffective in closing arguments for addressing the weight of the various aggravators as opposed to making a plea for mercy is without merit. The Court finds he argued. each aggravator, and advised the jury that the aggravator either did not apply or that it should be given little weight. Mr. Henderson then addressed the mitigating circumstances and argued for mercy on behalf of Mr. Miller:

> [Y]ou should be ruled by logic. What's the appropriate punishment based on the baggage that Lionel Miller carried with him.
>
> You can have compassion. You can have mercy. Compassion is taking people for their flaws.
>
> ...
>
> We ask that you follow the law and the law says that you, in your own minds, your own consciences, your own background, your own experience, you weigh the circumstances that are here and you determine what the appropriate punishment is.
>
> ...
>
> It's a personal decision that each of you make. You weigh the various considerations that are there. You follow the law. You say in my mind this is the appropriate punishment.
>
> ...
>
> We ask you to think long and hard about what the appropriate punishment is, weigh those considerations, weigh the aggravation against the mitigation, consider Mr. Miller's age, consider Mr. Miller's background, consider the future. And we suggest the only appropriate punishment, really, for Mr. Miller is to spend the rest of a long natural life in general population as opposed to one more injection.

(See Trial Transcript, pps. 1601, l604-05).

> The Court gave the standard jury instructions promulgated by the Florida Supreme Court. These instructions are presumed correct, and accordingly, the Court finds Mr. Miller's attack without merit. *See Miller v. State*, 926 So. 2d 1243,1256-57 (Fla. 2006) ("[T]his Court has repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence").
>
> Finally, any assertion that Mr. Hooper and Mr. Henderson provided ineffective assistance as to the allegations outlined above by complying with Mr. Miller's directive that they seek a death recommendation in the penalty phase of his trial is without merit. *See Dessaure*, 55 So. 3d at 484 (holding counsel is not ineffective for following the wishes of a competent defendant, even if that wish is to not present mitigation to a penalty phase jury); *Spann*, 985 So. 2d at 1071 (the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions); *Grim*, 971 So. 2d at l00-01 (defendant instructed his counsel not to argue for lesser included offenses, and thus, counsel did not render ineffective assistance by comply with defendant's wishes); *Brown*, 894 So. 2d at I46 ("An attorney will not be deemed ineffective for honoring [his or her] client's wishes"). Accordingly, claim four is denied.

(PCR 9:1530-43] As can be seen by the court's order quoted above, the record contains competent, substantial evidence supporting the denial of this claim.

Initially, the State still maintains that these claims on the information given the juror regarding the appropriate weighing process during voir dire and the penalty phase are barred since the issue could have been raised on appeal. Miller is not permitted to use a claim of ineffectiveness to overcome the bar. Medina, 573 So. 2d at 295 (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal").

Miller's contentions that counsel was ineffective for failing to object and to ask for a curative instruction are without merit and he failed to present evidence to support his contentions. At the evidentiary hearing, Miller's counsel only questioned Hooper about the voir dire and, as Hooper said, he was not the attorney who conducted the penalty phase voir dire. Henderson, who did do the questioning about the death penalty, was not asked any questions on the subject during the evidentiary hearing. The State contends that Miller has consequently waived this issue. Hooper did, however, outline various strategies an attorney could use in handling such a situation, including addressing the issue on his turn at questioning. An attorney determines how to manage the situation based on whether he likes the individual juror or the panel as a whole. (PCR 7:1050-61, 1066-72) Trial counsel wants to win the trial and does not conduct the trial with his focus on an appeal. (Id., 1076) Hooper also pointed out that a number of the incidents Miller claims were error were, in fact, not improper. (PCR 7:1053-61, 1091-93, 1096-97, 1104-5) Finally, as noted below, several of the jurors Miller claims were misinformed on the law did not serve on the jury so any error in their voir dire could not have affected the trial. Miller failed to prove either deficient performance or prejudice at the evidentiary hearing as required by Strickland and the claim should be denied.

Furthermore, the trial record clearly refutes his contention that the jury was mis-

informed on the law. The Court and both parties repeatedly fully informed the jury on what the correct law was and what was required of them during their penalty phase deliberations. At the beginning of the trial the Court called in the venire panel and pre-instructed them regarding the phases of the case and their potential responsibilities. The court properly instructed the jury, as quoted above in its order, on how to weigh the evidence in the penalty phase and on reaching an individual recommendation. After introducing the parties, listing the witnesses, and inquiring about hardship, the court then explained that the jurors would be questioned about their beliefs in the death penalty. At that point the court and parties *individually* questioned each potential juror about his feelings on the death penalty away from the rest of the venire, as can be seen from the rest of the voir dire process where one potential juror was sent away and then another one brought up. Consequently, any potential error in stating the law did not affect the rest of the panel. The State maintains that the record shows that none of the jurors were incorrectly informed about the law during their individual voir dire.

The record regarding the three jurors who eventually did serve is similar and does not support Miller's claim of ineffectiveness. Counsel was not deficient since what the State said to the jurors was not objectionable and counsel did take the opportunity after that questioning to emphasize that the individual juror had to decide how to compare the factors in light of the evidence and what weight to assign them.

Juror 275 expressed a nuanced approach to the death penalty saying that it was appropriate in some cases but others deserved more sympathy. (T. 11:251-52) The court explained to him that he alone would decide how to weigh any aggravating and mitigating factors in determining his decision. The court did not stress either option. The court asked if the "facts and circumstances of this case under the law would warrant" either, first, life and, then second, death, could the juror recommend each, to which he said yes. (Id. 252-53) When questioned by the State, the juror properly said that he would use the law as guidance in reaching his decision; he did not say he would neglect the mitigators if he felt, in his own mind, that they were weighty. (Id. 254-55) The defense then explained to the juror that:

> there won't be any question about you following the law because the law is not gonna say you have to do this, you have to do that.
> ...
>
> The law is never going to require that you recommend to the judge that there be a death penalty for punishment nor will it require that you recommend life without possibility of parole. It's a weighing process, once you redo the calculation, whatever way you attribute to it, that's the recommendation as to the punishment you're supposed to come up with.

(Id. 255-57) This juror was properly instructed on the law, with the defense telling him exactly what Miller wants in this claim, and was not told that death would be the only appropriate recommendation.

The prosecutor, in his questioning, was educating the juror on the process of the

trial and what the penalty phase would be in order to countermand the juror's mistaken belief that if the defendant was guilty and tied to the crime by DNA or other forensic evidence, as Miller was, then the vote would be automatically death. The State redirected her to the evidence she would need to use to make a sentence recommendation; the State was doing the opposite of suggesting that death was mandated in any particular case. The defense then questioned her and explicitly told her that she would be free to weigh the aggravators and mitigators however she wishes. (T. 12:461-62, 466)

The prosecutor's questions and comments during voir dire in this case were similar to those in Jones, 845 So.2d 55. Jones claimed that the prosecutor informed prospective jurors that they were required to recommend a sentence of death if they found Jones guilty of murder. This Court, after reviewing the record, observed:

> The strongest phraseology employed by the prosecutor was his line of questioning in which he asked prospective jurors whether they could vote to recommend the death penalty "if the facts, circumstances, and the law warrant it." This line of questioning is not a significant deviation from the standard jury instructions.FN23 Moreover, during voir dire the trial judge properly instructed prospective jurors that their role was to "decide whether or not to recommend one of two available sentences," one being "the death penalty, which is a recommendation, the second [being] life imprisonment with a minimum of twenty-five years." Jones's counsel was not ineffective during voir dire, nor did Jones suffer any prejudice. No evidentiary hearing was warranted.

Id. at 67 (footnote omitted). The prosecutor here used language almost identical to that

in Jones and the trial court here, as in Jones, properly instructed the jury. Competent, substantial evidence supports the lower court's denial of this claim.

Miller further failed to articulate or demonstrate any prejudice stemming from the voir dire as required under Strickland so this claim was insufficiently pled. The claim is conclusory and should be affirmed on that ground. Conclusory allegations are legally insufficient on their face and may be denied summarily. See Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001) (stating "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Freeman, 761 So. 2d at 1061 (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Ragsdale, 720 So. 2d at 207 (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"). Miller has not shown, or contended, that these three jurors were biased toward death or should have been released under a cause challenge. This Court in a similar situation said:

> The jury was thoroughly questioned in regard to their attitudes toward the death penalty and whether they felt it should be automatically imposed or whether they would follow the court's instructions and make sure the circumstances were proved to support it before they would consider it. Gore has not shown that his jury was made up of one or more persons

> unalterably in favor of the death penalty or that any of the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Gore v. State, 475 So.2d 1205, 1207-8 (Fla. 1985).

Turning to the penalty phase itself, the State's opening statement was not improper and any objection would have been overruled. The prosecutor clearly was telling the jury what she thought the evidence would show and that the death penalty would be appropriate given that evidence; she did not say that there was only one penalty available, contrary to what Miller alleges in this petition. (T. 18:1325-26) Counsel is not ineffective for failing to raise a nonmeritorious issue. King v. Dugger, 555 So.2d 355, 357-58 (Fla. 1990); Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999). Miller failed to present any evidence toward this claim and hence waived it.

The lower court correctly found that the State's closing argument was not improper. As noted above, Miller waived this claim by ignoring it at the evidentiary hearing. Since the jury had been correctly instructed on the law during the voir dire process, the prosecutor's reference to their following the law was not inappropriate nor did it lead them to believe that they were required to reach a death recommendation. The Court and counsel had specifically told them otherwise as cited above. In discussing the mitigating evidence the prosecutor does not say to discount it, only that it does not have heavy weight given Miller's history and actions. She argues her

position but never says that death is mandatory in this case; she argues what the State thinks is the "appropriate" recommendation. (T. 12:1580-85) The State never told the jury that death *must* be imposed, as did the prosecutor in Henyard v. State, 689 So.2d 239 (Fla. 1996), which the Florida Supreme Court cited to in its 2009 jury instruction revision. In Henyard the prosecutor told the jury repeatedly that they *must* vote for death if the aggravators outweighed the mitigators. That did not happen here and the jury was correctly informed on the law. Since the State correctly stated the law, her argument was not objectionable. Again, counsel is not ineffective for failing to make an non-meritorious objection. King, 555 So.2d at 357-58; Teffeteller, 734 So.2d at 1020. In order to require a new trial based on improper prosecutorial comments, the prosecutor's comments must

> either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.

Spencer v. State, 645 So.2d 377, 383 (Fla.1994). Miller has not shown that the trial was fundamentally jeopardized by the prosecutor's argument so he has not met the prejudice prong of Strickland either.

The cases cited by Miller do not support his position and are distinguishable from the facts in this case. Similar to Henyard the prosecutor in Brooks v. State, 762

So.2d 879 (Fla.2000) repeatedly misstated of the law regarding the weighing process *during* her closing argument by telling the jury that they must return a death sentence if sufficient aggravators existed and that the jury had a sworn duty to come back with a determination of death. The prosecutor also told the jury that her office did not seek the death penalty in all first degree murder cases. Miller cites to Ferrell v. State, 20 So.3d 959 (Fla. 2010) to support his argument that he should be granted a new penalty phase because of the State's unobjected to questions to jurors if they could ever vote for death. In Ferrell the prosecutor, in closing argument, argued that his office only sought death in particular cases and improperly invited the jury to disregard the law saying that they had a duty to return a death verdict. In Miller's trial the prosecutor did not misstate the law during voir dire as argued above, nor did the State ever say or argue that death was required under the law. The Court and the defense stressed that both sentencing options were equally in play and the jury was the one to determine what factors the evidence showed and what weight to give each one.

Miller also asserts that his counsel was ineffective for failing to plead for mercy rather than discussing the weight of the various aggravators. Again, he waived this issue by not addressing it during the evidentiary hearing. The defense counsel did, as well, properly argue the law and he did ask for mercy. Counsel argued that each

aggravator either did not apply or should not be given great weight in the context of Miller's history and the particular circumstances of this crime. He argued that, even though the jury had found premeditation in the attempted murder charge, CCP should not really apply or should not be given much weight since this was a theft gone wrong and Miller panicked. (T. 1586-87, 1591) He argued against giving much weight to either aggravator of being on parole or the prior violent felony given the impulsive nature of this crime and the fact that the authorities had released Miller from prison on the manslaughter case. (T. 1589-90) He argued against HAC of having any weight at all since this was not a torture case. (T. 1595-96) Counsel then went through the mitigation and explained why it deserved a lot of consideration by the jury (T. 1597-1600) He clearly went through all the non-statutory mitigation and explained how it could be used. As the court quoted in its order, counsel did argue for mercy in the context of the law. The jury was informed that they could vote for life in this case. Miller failed to show that counsel was ineffective in his approach or any resulting prejudice as required under Strickland.

Miller finally attacks the standard jury instructions given. Once again, this claim was waived. The court gave the jury the standard jury instructions which are presumed correct. This Court has consistently held that the standard penalty phase jury instructions fully advise the jury of the importance of its role and correctly state the

law. See Jones v. State, 998 So.2d 573, 590 (Fla.2008); Miller v. State, 926 So.2d 1243, 1257 (Fla.2006). Furthermore, since standard jury instructions are presumed correct and are preferred over giving a special jury instructions, the proponent has the burden of proving the court abused its discretion in giving standard instruction. Stephens v. State, 787 So.2d 747, 755-56 (Fla. 2001); Elledge v. State, 706 So.2d 1340 (Fla. 1997); Phillips v. State, 476 So.2d 194 (Fla. 1985).

Furthermore, the standard instructions given did inform the jury that it had a choice of penalties and the jurors alone determined what was appropriate; in no way was the jury ever told that death was mandatory. (T. 1610) The jury also knew that non-statutory mitigation must be considered equally with statutory mitigation and that it was the each juror alone who decided what if any weight to give both the aggravating and mitigating factors. The jury is presumed to follow the court's instructions. Cf. Crain v. State, 894 So.2d 59, 70 (Fla. 2004) (assuming jury understood and properly applied instructions) See Burnette v. State, 157 So.2d 65, 70 (Fla. 1963) (stating appellate court must assume juror, if properly instructed, will comply with duty/oath and render true verdict according to law and evidence); Sutton v. State, 718 So.2d 215, 216 & 216 n. 1 (Fla. 1st DCA 1998) (recognizing and "applying the well-established presumption that juries follow trial court instructions"). Neither the Court nor the State ever told the jury that death *must* be imposed, as the

prosecutor in Henyard v. State, 689 So.2d 239 (Fla. 1996) did, which the Florida Supreme Court cited to in its 2009 jury instruction revision. In Henyard the prosecutor told the jury repeatedly that they must vote for death if the aggravators outweighed the mitigators. That did not happen here and the jury was correctly informed on the law.

The record supports the lower court's denial of this claim. Miller failed to prove that his trial counsel was ineffective and failed to show any prejudice, both of which are required under Strickland. This Court should affirm the denial of this claim.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished electronically to James Driscoll and David Hendry, Assistant CCRC-Middle, 3801 Corporex Park Dr., #210, Tampa, Florida 33619 this 25th day of November, 2013.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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