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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-516
LOWER TRIBUNAL NO.2006-CF-005222

LIONEL MICHAEL MILLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Miller lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Miller.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are of the form, e.g. (Vol. I R. 123). References to the postconviction record on appeal are in the form, e.g. (Vol. I PCR. 123). Generally, Lionel Michael Miller is referred to as Mr. Miller throughout this brief. The Office of the Capital Collateral Regional Counsel– Middle Region, representing the Appellant, is shortened to "CCRC."

STATEMENT OF THE CASE AND FACTS

Mr. Miller was charged by indictment with one count of first degree murder, one count of burglary with an assault or battery, one count of attempted first degree murder and one count of robbery with a deadly weapon. The jury found Mr. Miller guilty as charged. Mr. Miller proceeded to a penalty phase. The jury recommended death by a vote of 11 to 1.

Following a *Spencer* hearing, the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida, imposed a death sentence. This Court affirmed the conviction and death sentence on appeal. *Miller v. State*, 42 So.3d 204 Fla. 2010). Mr. Miller filed a Petition for a Writ of Certiorari to the Supreme Court of Florida. The United States Supreme Court denied the petition on January 10, 2011. *Miller v. Florida*, 131 S.Ct. 935 (2011).

Following CCRC-M's appointment, Mr. Miller filed a motion for a PET Scan. On October 12, 2011, the postconviction court granted the motion. After the postconviction court resolved the issues concerning transportation, the National PET Scan Center performed a PET Scan on Mr. Miller's brain.

Mr. Miller filed a Motion to Vacate Judgment of Conviction and Sentence pursuant to Florida Rule of Criminal Procedure 3.850 and 3.851. The State filed a Response. The postconviction court held a Case Management Conference on April 17, 2012. The postconviction court set an evidentiary hearing for the week of

August 20, 2012. Mr. Miller filed a motion to waive his presence at the evidentiary hearing, which the postconviction court denied. Prior to the April evidentiary hearing, the State filed a motion to continue and a motion for discovery. The postconviction court continued the evidentiary hearing to December 17, 2012 and later granted the motion for discovery.

The postconviction court held the evidentiary hearing on December 17, 18, and 19, 2012. At the evidentiary hearing, Mr. Miller and the State called a number of witnesses. Their testimony is discussed throughout this brief and a summary of some of the important testimony is presented here.

Dr. Glenn Ross Caddy

At the evidentiary hearing, Mr. Miller called Dr. Glenn Ross Caddy as an expert witness to provide testimony on the mitigation that the relevant sentencer's were denied at trial because of counsel's ineffectiveness. Dr. Caddy testified via satellite from Australia. (Vol. VI PCR. 911).

Dr. Caddy has a PhD in clinical psychology from the University of South Wales. (Vol. VI PCR. 9ll). Dr. Caddy received post-doctoral training at the University of South Wales Hospital. (Vol. VI PCR. 911). He has also obtained significant and ongoing professional training. (Vol. VI PCR. 911). One area that Dr. Caddy was trained in was neuropsychology which he obtained through the Reitan Institute.(Vol. VI PCR. 911;

transcript states phonetically “right hand”).

Dr. Caddy is licensed by the State of Florida in psychology and as a rehabilitation specialist. Dr. Caddy is board certified by and holds fellowship status in a number of prestigious organizations. (Vol. VI PCR. 911). Currently, Dr. Caddy’s psychology practice includes work in forensic and clinical neuropsychology and psychology. (Vol. VI PCR. 913). He has been qualified as an expert approximately 1,500 to 2,000 times. (Vol. VI PCR. 913). Dr. Caddy has never failed to qualify as an expert in his field. (Vol. VI PCR. 913). Without objection, the trial court accepted Dr. Caddy as an expert in neuropsychology and forensic psychology. (Vol. VI PCR. 913).

Dr. Caddy examined Mr. Miller’s overall psychological functioning, emotional background and development and behavioral relationships. (Vol. VI PCR. 914). Dr. Caddy reviewed documents as part of the evaluation. Dr. Caddy met with Mr. Miller on two occasions where Mr. Miller was incarcerated. (Vol. VI PCR. 914-15). He obtained a social history and learned of the trauma and deprivation that Mr. Miller suffered. (Vol. VI PCR. 915-16).

The social history that Dr. Caddy obtained was extensive. For the first five or six years of Mr. Miller’s life his mother was “profoundly alcoholic” and his step father was “extremely abusive.” (Vol. VI PCR. 915). Mr. Miller’s mother became pregnant with Mr. Miller by another man while her husband, the step-

father, was in prison. When the step-father returned he discovered that Mr. Miller was born out-of-wedlock. (Vol. I PCR. 114). This "set the stage for what became an extremely abusive and disconnected relationship." (Vol. VI PCR. 915).

Mr. Miller's mother "was incapable of managing the well-being of [Mr. Miller]." (Vol. VI PCR. 915). Mr. Miller's mother was very young, approximately 12 or 13, when she became pregnant with Mr. Miller's older brothers. (Vol. VI PCR. 915). Mr. Miller "was recurrently thrown out of the home for days on end from age four on." (Vol. VI PCR. 915). He sometimes would get to sleep in the basement but oftentimes he would have to sleep under houses. (Vol. VI PCR. 916). "[T]his was a very early traumatic early existence." (Vol. VI PCR. 916). From about age 7 to 12 he lived with his step-grandmother who showed "some love and tenderness to him, but she died when he was 12 years of age and that ended that relationship." (Vol. VI PCR. 916). Mr. Miller did not have any positive role models growing up other than his step-grandmother. The other adult role models in his life were "profoundly dysfunctional." (Vol. VI PCR. 916).

The circumstances of Mr. Miller's early life greatly affected him. Mr. Miller "did not grow up with a pattern of routine scheduling. He did not grow up with an image of appropriate ethical or moral values. He didn't know anything because the entire system that he operated within was truly

pathological." (Vol. VI PCR. 917). Dr. Caddy recounted:

> His stepfather often beat his mother. She was often unavailable or not around. She too was often out of the home . . . and so if there were any images that he had of vague normalcy, there was a period of time when he used to spend a lot of time about age 12 in pool rooms where he's spend all night. And so some of the people who were in the pool room were people he interacted with. And most of them did not abuse him.

(Vol. VI PCR. 917). It was critical for Mr. Miller's later development that growing up he had structure and learn morality. (Vol. VI PCR. 917). He was so deprived growing up that when he needed clothes he had to steal them. (Vol. VI PCR. 917). He did not have the opportunity to learn appropriate moral conduct.

Dr. Caddy described Mr. Miller's early life as "feral." (Vol. VI PCR. 918). His adolescence "had the same quality about then except when he was incarcerated in reform school." (Vol. VI PCR. 918). As Mr. Miller spent these years virtually unparented, school provided little refuge; Mr. Miller was routinely kicked out of class because he was late or because he did not have the appropriate clothes. (Vol. VI PCR. 918). Mr. Miller "did not comprehend the obligations of discipline in the classroom." (Vol. VI PCR. 918). "[B]eing in school meant nothing to him because he wasn't a normal kid and he couldn't relate to normal kids . . . he was basically a hobo as a child. And he acknowledged it. He simply didn't have many principles or ethics. It was all about how to survive. He described himself as having a survival

morality. You do whatever you have to do." (Vol. VI PCR. 918). Mr. Miller did not have adults and parents to pass on ethics and values to him. (Vol. VI PCR. 919).

Mr. Miller commented to Dr. Caddy "that he has always known that there's a lot of hate in him and that he blames his mother and stepfather for what they failed to do." (Vol.VI PCR. 919). He also blamed people "who as a child took advantage of him after he was no longer at home. He talked about going from one pedophile to another." (Vol. VI PCR. 919). Dr. Caddy explained that this affected "not just his development but his entire personality structure. Much later on his disgust at being abused by men when he wasn't homosexually oriented but when he needed something . . . would lead him to have profound impulse control difficulties when he became enraged if, as an adult, somebody tried to . . . hit on him sexually." (Vol. VI PCR. 919).Mr. Miller was sent to reform school. (Vol. VI PCR. 920). Mr. Miller was arrested in Nashville, Tennessee at about 14 years of age with some other young men. (Vol. VI PCR. 920). Mr. Miller's judgment about people was so compromised that he thought that several of them were his friends. (Vol. VI PCR. 920). He was mistaken; "several of them got on together with several other boys . . . and that was the first time that he was raped." (Vol. VI PCR. 920). Mr. Miller explained to Dr. Caddy how there was an "adult prisoner who saw what was going on and did nothing to stop it." (Vol. VI PCR.

920). This became “a pivotal point” in Mr. Miller’s life “because he realized that he couldn’t really trust anybody.” (Vol. VI PCR. 920). Mr. Miller was raped other times while incarcerated but never by people he thought were his friends. (Vol. VI PCR. 920-21).

Dr. Caddy found out that Mr. Miller spent some time in a prison in Texas and found this significant. (Vol. VI PCR. 921). While in Texas, Mr. Miller “came to understand that the Texas prisons were run as, basically, illegal operations to make a great deal of money for the men who ran the prison.” (Vol. VI PCR. 921). While incarcerated there he was placed in solitary confinement without food or water by a senior prison officer. (Vol. VI PCR. 922). The officer went on vacation and Mr. Miller was left in confinement without food or water. (Vol. VI PCR. 922). After several weeks, Mr. Miller had to be sent to the hospital until he recovered from this deprivation. (Vol. VI PCR. 922). This was an extremely traumatic event that contributed to Mr. Miller’s despising the system. (Vol. VI PCR. 922).

Another time in prison, “there was an altercation that took place between [Mr. Miller] and another prisoner while they were out working on some road gang or something of that nature.” (Vol. VI PCR. 922-23). Mr. Miller was struck in the head with a pick axe by another inmate, knocking Mr. Miller to the ground. (Vol. VI PCR. 923).

Mr. Miller suffered great sexual trauma while incarcerated. As a young person in prison he suffered "protracted sexual abuse which affected Mr. Miller in many ways. (Vol. VI PCR. 924). Mr. Miller "made every conceivable effort to escape from prison . . . and apparently did so on a number of occasions." (Vol. VI PCR. 924). Mr. Miller's "basic motivation [for escaping] was to avoid being raped. (Vol. VI PCR. 924). The repeated raping of Mr. Miller further developed his "hatred for men who would be sexual to him." (Vol. VI PCR. 924). By Miller's later teens he was having "dissociative experiences" which continued through many years. (Vol. VI PCR. 924). This was Mr. Miller's way of coping with some of the sexual and other trauma. (Vol. VI PCR. 925).

Mr. Miller explained to Dr. Caddy how the manslaughter that Mr. Miller was convicted of in the 1970s occurred. (Vol. VI PCR. 925). Dr. Caddy learned:

> [T]hat Mr. Miller had -- he was living in Oregon at the time, and he was, um, trying to work, um, to create some life for himself. And he had actually met a woman, and this is probably the only woman in his life that he -- that really cared about him and that he felt that he loved.
> At the time he was living in the home of a man who was, um -- who was gay but he was -- but Mr. Miller was very attracted to this woman and apparently the man decided that he wanted to have a sexual relationship with Mr. Miller and he sought out to undermine the relationship that Mr. Miller had or was hoping to have with this lady and he did so by telling the lady that Mr. Miller was a no good or that he had never -- he would never be capable of having a relationship with her; that, you know, he has had a long history of problems and the like. And he

> basically persuaded this woman not to have anything to do with Mr. Miller.
> And when -- when Mr. Miller understood that that's what happened, and that that -- that is, this man, in fact, told him that's what happened, um, Mr. Miller exploded and attacked the man. And that was the context in which that homicide was created.

(Vol. VI PCR 925-26).

Dr. Caddy also explained Mr. Miller's drug and alcohol history. (Vol. VI PCR 926). When he was in his early teens and not sleeping under houses he would often sleep in open cars. (Vol. VI PCR 926). While in an open car, he found a bottle of alcohol, thus beginning a pattern of alcohol use. (Vol. VI PCR 926). He soon started using a variety of drugs: LSD marijuana, cocaine or alcohol. (Vol. VI PCR 926-27). He was a polysubstance abuser and "not particularly discriminating." (Vol. VI PCR 927).

A lot of Mr. Miller's drug and alcohol abuse was to relieve his distress and "numb him out which character[ized] much of his existence." (Vol. VI PCR 927). Later, Mr. Miller "started inhaling various polyurethanes and various other products" including cleaning fluid. Mr. Miller inhaled cleaning products when he was incarcerated. (Vol. VI PCR 927). This use of inhalants caused Dr. Caddy concern. (Vol. VI PCR 927). Dr. Caddy reviewed Dr. Drew Edwards' trial testimony detailing Mr. Miller's extensive drug history and the effects it had on his life and mental health. (Vol. VI PCR 927). Dr. Caddy found that Mr. Miller was routinely self-medicating the pain he was suffering

with chemicals, drugs and alcohol. (Vol. VI PCR 927).

Dr. Caddy also evaluated Mr. Miller neuropsychologically. (Vol. VI PCR 927). As part of this evaluation Dr. Caddy administered a number of tests. Based on Dr. Caddy's evaluation and testing of Mr. Miller, Dr. Caddy recommended further testing through neuroimaging. (Vol. VI PCR 929). Dr. Caddy recommended such testing because it was clear that Mr. Miller was showing impaired functioning. (Vol. VI PCR 929). The PET Scan was reviewed by Dr. Frank Wood whom Dr. Caddy spoke with after Mr. Miller's PET Scan. (Vol. VI PCR 929). The PET Scan allowed Dr. Caddy to look at Mr. Miller's impairment from a different perspective and which indicated "significant impairment of functioning and that some of that functioning was in the frontal area and that there was . . . meaningful and progressive deterioration likely to be taking place there," (Vol. VI PCR 930). Dr. Caddy's opinion in this regard also considered Mr. Miller's history of drug abuse and head injury. (Vol. VI PCR 930).

Neuropsychologically, Dr. Caddy concluded that Mr. Miller:

> 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.

(Vol. VI PCR 930-31).

Dr. Caddy also addressed the relevance of Antisocial Personality Disorder and its meaning for understanding Mr. Miller. Dr. Caddy avoided the simple explanation and explained in detail what the experts at trial inadequately offered to the jury as “mitigation.”

> Well, I think that it's very easy to look at a person who's had a history of being a thief, basically, and a drug user. Um, and recurrently in detention and simply labeled him as being an antisocial personality disorder person.
>
> And then of course, then when we add these other two crimes, it makes it really easy to say, oh, my goodness. Of course he has antisocial personality disorder and that explains his conduct. The only problem with that is it's really circular.
>
> And what we have in this man is a personality that was formed out of survival and the -- if what we are looking at is, um, the evolution of personality, um, we need to be understanding that people who will have antisocial personality disorder, for example, start exhibiting it at typically by age 14, 15 and certainly by 16.
>
> Now, in Mr. -- in Mr. Miller's case, um, he -- his life was being shaped from age 4, um, by the reality of stealing to survive. Um, and/or trespassing to survive and/or hanging around with anybody who he could hang around with, um, in order to be able to get something, um, sometimes 8 attention, sometimes food, sometimes shelter.
>
> Um, it's -- it's difficult to simply say, well, we'll just label him a sociopath because of what he had to do to survive. There are people who do -- who conduct themselves with great sociopathy but have five greater resources to work from socially, interpersonally and familiarly than he did, and they end up sociopaths. So

> I think that there's -- there needs to be some real recognition that this man really didn't simply evolve into a sociopath. What he evolved into was a person who is dissocial. And what I mean by dissocial is he had no social context for robbery. It was all about survival. So I think that his personality structure was much more complicated than simply, um, a nice, easy label based on criminal behavior.
>
> ***
>
> Now, let me say I'm not objecting to the notion that you could make that label. I'm simply making the point that it's a much more complicated issue.

(Vol. VI PCR 931-32).

On cross-examination the State asked Dr. Caddy about validity and manipulation. Dr. Caddy explained that there were not any issues with the testing or his evaluation in this area. Dr. Caddy did not interview any of the other experts from the trial. (Vol. VI PCR. 946). The State's questioning in this area failed to mention the costs such a practice would entail and that it would be relatively meaningless. On redirect, Dr. Caddy made clear that many of the prison records involved Mr. Miller speaking with different governmental health workers as part of the parole process. (Vol. VI PCR 950). Dr. Caddy acknowledged the obvious, there is an incentive for somebody in the position Mr. Miller was in seeking parole to show "that they are functioning as normal as possible." (Vol. VI PCR 950).

After the postconviction court granted Mr. Miller's motion for a PET scan, he was transported to the National PET Scan Center where a PET Scan was completed on his brain. CCRC-M hired

Dr. Frank Wood to review the PET Scan, one of the foremost recognized and respected experts in the field of neuropsychology, more specifically the PET scan, to discuss his opinions and findings regarding Mr. Miller's PET scan. Dr. Wood testified at the evidentiary hearing. (Vol. VI R. 864).

Dr. Frank Wood

Dr. Wood received a B.A. from Wake Forest with honors and distinction in Psychology from Wake Forest. (Vol. VI R. 865). He then went to Southeastern Baptist Theological Seminary and was ordained as a Baptist minister. (Vol. VI R. 865). Dr. Wood returned to Wake Forest and received a Masters degree in Psychology and went to Duke University from which he received a PhD in Psychology. (Vol. VI R. 866). Dr. Wood received a number of large grants that allowed him to conduct very important research in brain imaging including Pet Scans and MRIs.

Dr. Wood is a practicing neuropsychologist and a Baptist preacher. (Vol. VI R. 864). He currently is a Professor Emeritus at Wake Forest University. For thirty-five years Dr. Wood was on the faculty of the Wake Forest University School of Medicine and a full-professor. Although he is a neuropsychologist, Dr. Wood was an associate of the Department of Radiology and collaborated with the department of radiology. (Vol. VI R. 864). Following his retirement from Wake Forest, Dr. Wood was a professor Liverpool Hope University in England. (Vol. VI R.

865). He also has a standing honorary appointment as a professor of behavioral medicine at the Nelson Mandela School of Medicine in Durban, South Africa. (Vol. VI R. 864). Dr. Wood is licensed by North Carolina as an Independent Practicing Psychologist and as a provider of diagnosis and treatment for brain-injured children and young adults. (Vol. VI R. 866).

Dr. Wood has published "75 or 80" scholarly articles, of which 53 or 54 were peer reviewed, mostly concentrating on neuroimaging, although "not exclusively." (Vol. VI R. 869). He has published on "brain blood flow characteristics" of mental illness and "methodological work on how to measure PET scans and get reliable and accurate results." (Vol. VI R. 869). Dr. Wood was a pioneer in the use of PET scans and participated in the ground breaking Florida case of *Hoskins*.

After the State's voir dire, the postconviction court accepted Dr. Wood as an expert neuroscience and neuropsychology. (Vol. VI R. 881). The court understood that Dr. Wood was more than qualified to look at the various scans and "testify what they mean to him" as he had done before. (Vol. VI PCR. 881). He then explained his findings regarding Mr. Miller.

Dr. Wood first met with Mr. Miller to see if a PET scan would be appropriate and to evaluate Mr. Miller. (Vol. VI PCR. 883). He consulted with Dr. Caddy (Vol. VI PCR. 882) and reviewed the previous findings of Drs. Sadler and Cambridge

detailed in the MRI reports which were admitted into evidence as Defense Exhibit 3. (Vol. VI PCR. 882, 889). Dr. Sadler found:

> Mr. Miller had two things wrong with his brain. One, he had hippocampal sclerosis and the other was he had Virchow-Robin spaces that were observable. These don't mean the same thing, but they both often mean a dementing illness of one kind or another.

(Vol. VI PCR 890). Dr. Cambridge considered Dr. Sadler's opinion and concluded that Mr. Miller's Hippocampal Sclerosis was not a matter of Epilepsy. (Vol. VI PCR 890). Dr. Cambridge tested for and actually found he had memory problems. (Vol. VI PCR. 891).

Dr. Wood explained that MRIs typically do not show brain functioning. (Vol. VI PCR. 892). He stated that had he been consulted on the case in 2007, and had he reviewed the MRI report, he "would have said that any complete examination had to include a PET scan." (Vol. VI PCR. 892).

Dr. Wood met with Mr. Miller in prison in the fall of 2011, and then again in the Orange County Jail in December of 2012. He described the changes he saw in Mr. Miller over the course of those two meetings. Regarding the second meeting, he described Mr. Miller as a "very different person" (Vol. VI PCR. 884) and that he could "say without hesitation that his mental functions are declining and that that decline is based in progressing brain disease." (Vol. VI PCR. 884-87).

Dr. Wood explained further:

> There were at least two very different types of

similar types of brain dysfunction already on the table. One of them was Cambridge's finding of a memory deficit. Not a severe one but a deficit nonetheless and he called it that. I believe that was his word. And that goes along with arguably, um, by itself the question it raises by itself, the question of a brain disorder. Then when you add to that an MRI scan that is unmistakably abnormal and described as such by the radiologist and by the neurologist, you're talking about symptoms from the MRI scan that are common in dementing illnesses. The Virchow-Robin spaces from the spaces around arteries which enlarge and get filled with cerebral spinal fluid for a variety of reasons, but they are a sensitive marker of progressing cerebral vascular disease. The hippocampal sclerosis is well known especially in Florida as a component of dementing illnesses, including frontotemporal dementia. There's a brain bank associated with the Mayo clinic in Jacksonville, and they have published their findings from their cases.

We show a considerable number of people who have dementing illnesses and one of whose earlier presentations was hippocampal sclerosis, even though these are now autopsy cases. And mainly the autopsy finding of hippocampal sclerosis they have reported as not uncommon in dementing illnesses. So, if you're faced with memory problems and with evidence of brain condition that could be impairing in the sense that's at stake in this kind of litigation, then it seems to me you have two pieces of evidence. You have the behavior. You have the brain structure. And to complete that picture and to know whether in fact the brain is not working right, a PET scan is the commonly-used tool for completing that triangle.

Q In laymen's terms, hippocampal sclerosis, what basically would be more understood in laymen's terms?

A Hippocampal sclerosis means scarring and shrinking of anything. Anything can have sclerosis if it is either scarred or shrunk. It adds more brain cells that are associated with repairing damage than are associated with actually scaring nerve impulses. And he had unilateral hippocampal sclerosis which was to say that his left hippocampus was shrunken and it is visibly much smaller than his right hippocampus. That's what hippocampal sclerosis is.

(Vol. VI PCR. 893-94).

In this particular case Dr. Wood “both spoke to and got materials that had been sent [] by Mr. Chotiner who's the nuclear medicine technician who described the procedures that they use, their standard method.” And with regards to the procedures followed during the administration of the PET scan, he noted that “everything had been done in the usual fashion.” (Vol. VI PCR. 896). Dr. Wood stated that “the CD that he sent me was dependable as a good PET-CT scan.” (Vol. VI PCR. 897). Dr. Wood stated that he has read approximately 175 scans. (Vol. VI PCR. 902). He noticed nothing that would have caused him to question the quality of the PET scan disk he received in this case, or to doubt the integrity of the information. (Vol. VI PCR. 904).

Dr. Wood described images from the PET scan that showed the atrophy in Mr. Miller’s brain was “well into the abnormal range.” (Vol. VI PCR. 908). Dr. Wood stated that the PET scan images showed that “there's more activity, more brightness in the back of the head than there is in the front of the head.” (Vol. VI PCR. 909). Dr. Wood described how the PET scan images showed “There's a dark gap in there that is usually not present, at least not in that size. More importantly, it is measurably less intense than it should be or than it normally is in people of his age.” (Vol. VI PCR. 909).

Dr. Wood displayed the PET scan images found on disk on a monitor and described the condition in an important area of Mr. Miller's brain:

> The hippocampus is a long organ on both sides of the brain. It's very prominent in memory and short-term attention, paying attention to what's been happening in the last few seconds and the last few minutes. And the hippocampus, although it runs this long, longer distance and finally curls around and goes into the area of the thalamus, not seen on this cut, is very important in behavior and in memory. And you will remember that Dr. Sadler, the radiologist, had noted on the MRI scan that there was hippocampal sclerosis in the left hemisphere. You can see it very clearly here. There's a gap between the posterior and the anterior hippocampus. There's nobody home in here. It should look like it does on the right, and that is a very distinct abnormality reflecting a degree of brain atrophy.

(Vol. VI PCR. 959-60).

Dr. Wood described another area of Mr. Miller's brain shown on the PET scan, located near the hippocampus, an area that was operating with great dysfunction:

> Now, this area of the brain is an area for paying attention. It works closely with the hippocampus to orient a person toward a task or a situation and it helps propel the person toward the solution of a new problem or to propel him away to escape it. It's a trigger mechanism. We call it the anterior cingulate. And it has many uses generally wrapped up under the subtitle of what might be called attention or attentional control. And this is as hypometabolic as the hippocampus was over on this side. The peak measurements that I get here, the ones that represent the best at his anterior cingulate can do, are below the first percentile.

(Vol. VI PCR. 961-62). Mr. Miller's brain is damaged in several

areas. Dr. Wood continued to describe the results of the PET scan of Mr. Miller's brain:

> But as we go up a little bit, we expect to see activity in this broad expanse of the orbitofrontal cortex, the cortex that's at the base of the frontal lobes that approaches and is similar to activity in the back of the brain. After all, studies show that we spend about 60 percent of our brain energy not doing things instead of doing them. It takes more energy to stop or never to start in the first place than it does to actually go out and do something thoughtlessly. So the brake pads are somewhat abnormal on the right side of the brain as compared to the left. We have some genuine activation here that's in the normal range but we don't have it over here. This is orange and even yellow. This is not.
> Q What do you mean by brake pads?
> A I mean, the part of the brain that makes you stop doing things you ought not do. This asymmetry continues for several slices where things on the right side are not as well developed as things on the left. As we go up in the brain, these areas on the very front of the frontal lobes are starting to equalize. But if we stay down on the bottom of the brain, we don't have much activity on this side. And that is, um, also not normal. It's also below the first percentile and it is age corrected. It is not a function of the man's age. Those are the two most important areas of the brain that are dysfunctional in addition to the hippocampus.

(Vol. VI PCR. 962-63).

Dr. Wood described empathic intelligence and its relation to Mr. Miller's brain condition:

> Empathy means being able to care about how other people feel. There have been functional brain imaging studies, mostly with MRI measuring blood flow, not with PET, although there have been one or two with PET. And these show that in the anterior cingulate, especially on the left side, you see activation when people are describing their empathy or sympathy toward other people. Um, it's important because loss of

> empathy is one of the major features of one brand of dementing illness called frontotemporal dementia and one of the symptoms of frontotemporal dementia is a reduction in empathy or sympathy.

(Vol. VI PCR. 967-68). Dr. Wood found behavioral variant frontotemporal dementia in Mr. Miller. (Vol. VI PCR. 968).

Dr. Wood explained how he reached the diagnosis of behavioral variant frontotemporal dementia in Mr. Miller, describing the three levels of certainty for the diagnosis:

> One level is possible. This is the result of a very large international consensus conference done just last year similar to ones that have been done earlier, um, in around 2006. This one ratified some of the things that had been done earlier and said for possible frontotemporal dementia, you need three symptoms. Like, for example, one of them would be empathy deficit. Another would be neuropsychological test findings that implicate executive and attentional control. Obviously apathy is one of them as well, and there are two or three others. If you've got enough of those, then you have, by definition, possible frontotemporal temporal dementia. Now, essential to that level of definition is the fact that there has been a decline in functioning. And so you can't really be sure about this diagnosis until there have been some repeated measurements made over time, which there now have been in this case.
>
> Secondly, you have what's called probable frontotemporal dementia. And probable frontotemporal dementia means you have the symptoms required for possible frontotemporal dementia and you have evidence of brain atrophy on the MRI, CT and/or PET. If you have brain imaging evidence to support brain atrophy in the frontal lobes, most particularly, then you can convert the diagnosis to being one of probable rather than possible. This is in every respect a multidisciplinary diagnosis already involving the disciplines of radiology and neuropsychology, of neuroimaging. And it's -- it's a diagnosis that requires several different pieces. But most

> prominently the behavioral, including the cognitive piece and the imaging piece. The only real good way with present knowledge to verify and confirm the diagnosis is by autopsy. You can take brain biopsies to measure certain proteins in the brain tissue which are associated with various forms of frontotemporal dementia but that is seldom done because it's really not appropriate to literally dig into somebody's brain and take a sample of tissue just to find out that he's got frontotemporal dementia. If he's probable, then you go ahead and manage him as such.

(Vol. VI PCR. 968-70). He explained Mr. Miller's condition:

> The presentation, the clinical presentation is not like Alzheimer's disease, one of total confusion. It's more characteristically of someone of social inappropriateness and social clumsiness if not outright serious misbehavior. Theory is, one of the early symptoms of frontotemporal dementia but not of Alzheimer's disease. And so it's the best candidate to explain [the] findings.

(Vol. VI PCR. 970).

Dr. Wood noted in that respect:

> We are talking about different slices, but we did talk about the anterior cingulate, the middle frontal lobe in the MRI scan. I'm now drawing black ellipses around it with my pen. On the CT scan I'm drawing the same in ellipses. And on at black and white PET scan, I'm drawing the same in ellipses. That area is somewhat atrophied even in the MRI scan five years ago. And one year ago, there was even more atrophy there and the corresponding paleness that I described to you up here. That. That paleness. And that is, um, behaviorally, very important.

(Vol. VI PCR. 965). Dr. Wood described the CT scan and how it showed that most of the brain damage was in the frontal area. (Vol. VI PCR. 966). He opined: "I do consider the symptoms in 2006[-]07 to have been symptoms of the disorder already present."

(Vol. VI PCR. 970-71). “Not only did he have hippocampal sclerosis and memory problems in the 2006, 2007, area, in my opinion, his behavior was not fully normal then either. I'm satisfied then to say that he was already substantially under the influence of this disease.” (Vol. VI PCR. 973).

Due to a failure to fully investigate Mr. Miller’s mental condition, the jury never heard the following evidence about his challenges in society as he struggled with his brain damage and crack cocaine addiction:

> Q. Can you describe for us what challenges Mr. Miller would have faced in his interactions with the people around him?
> A. It's called behavioral variant frontotemporal dementia for a reason because the earliest symptoms are purely behavioral and they are social dysfunction, apathy, various sorts of interpersonal problems -- or at least as the British would say, odd thinking. And, um, because he had the -- even the brain imaging early symptoms, we know those are not typically the first things to be observable. It's behavioral variant frontotemporal dementia because the very earliest symptoms a year or two before the brain symptoms. The brain atrophy or behavioral symptoms.
> Q. Would adding a layer of -- if we add to the mix of this odd behavior and this odd thinking a crack cocaine addiction, would that decrease or increase the odd thinking within Mr. Miller?
> A. Crack cocaine, um, or any cocaine is to this day not a drug that we know any safe limit for. That is, there are people who die from it with unexpectedly small doses. And there are routinely cerebrovascular findings. Cocaine is the best stimulant that we know of in nature. It's like 100 cups of coffee all at once, almost. And, um, it energizes the neurotransmitters that do a lot of things, one of which is to constrict blood vessels and pump up blood pressure. So, it is very likely that his cocaine use has also contributed to his brain disorder.

Q. What's the PET scan say about Mr. Miller's ability to control his impulses?
A. That is what I was describing with the orbitofrontal cortex at the base of the brain. It is hypometabolic and it indicates impaired ability to constrain or restrain his own behavior.

(Vol. VI PCR. 973-74).

Dr. Wood opined that Mr. Miller meets the criteria for Florida's two statutory mental health mitigators:

Q. And are you familiar with one of the statutory mitigating factors here in the State of Florida that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance?
A. Why, yes, I'm familiar with that.
Q. And does that apply in Mr. Miller's case?
A. Yes. In a brief word. I believe it's beyond more probable than not. I believe that that is an unmistakable inference to be made from all the facts.
Q. Okay. And is that in just looking at the PET scan or did you consider other factors?
A No. It's -- you can't use a PET scan standing alone for much of anything except maybe a tumor. The -- the combination of circumstances and of evidence is what teaches me that conclusion.
Q Okay. I want to ask you about a second statutory mitigating factor in the State of Florida which is, defendant under the influence of extreme mental or emotional disturbance, and I'm gonna ask you the same question. Does that apply to Mr. Miller?
A Um, yes. In the sense that he is partly loose and disinhibited. And that's an extreme disturbance of behavior. Now, as his condition progresses, he's becoming apathetic and has what might be called inertia. And that's a different force but it's also abnormal. But I don't think it was the one operating at the time of the crime.
Q Are you familiar with the statutory mitigating factor of the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired?
A I am absolutely certain that he could appreciate

the criminality of his behavior. In my conversations with him, not about the crime but about all sorts of social realities, such as, for example, his ability to interpret proverbs which is certainly a sign of certain sorts of brain damage. He was really very normal just like his vocabulary was. But, um, that's not to say that he didn't have some odd and sometimes spectacularly implausible stories to tell me. On the other hand, he is unable fully to restrain himself for two reasons.

Q And when you say restrain himself, are you talking about - -

A Conform his behavior to the requirements of law, which is always, I think, an exercise in your restraint.

Q Okay.

A Um, the law is at least some significant part about things you are not to do as much as it is about things you ought to do. In any case, I believe that he is quite unable to conform his behavior to those requirements of law because if I may put it this way, his brake pads on his brain are worn out and he can't stop. And it seems to me he finds himself doing something without having, um, fully evaluated the consequences and still less having attempted to stop doing it.

Q. And did you see evidence of that in the interview that you read between law enforcement and Mr. Miller?

A. Yes, I thought so. Like, he has been on one or two other occasions, for example, um, in some things that I saw during the trial, he was in the police interrogation saying not - - he did not say, I did not mean to do it which is often said. What he said is, I lost it. I lost it with the man who came in the front door and I lost it with the woman. And he couldn't describe it, it didn't look like any better than that. And losing it is exactly what this kind of disorder is all about. And I thought it was Sherlock Holmes who used to say, a singular or at least an uncommon way to describe one's crime is say I lost it. Now, I'm sure people have heard that too, but just the way it was written in the transcript, it seemed to reflect unclear thinking. Perhaps the utter absence of any thinking.

(Vol. VI PCR. 974-77).

Joan Johnston

The State called Joan Johnston who was employed as a mitigation expert by the public defender's office. (Vol. VII PCR 1158). Ms. Johnston prepared a "social history summary" and "investigative notes" that she shared with the defense attorney's. (Vol. VII PCR 1160-61). She recounted that Mr. Miller presented himself as intelligent and calm. (Vol. VII PCR. 1161). He had acceptable social skills and interacted in a polite manner with Ms. Johnston. (Vol. VII PCR. 1161). Over objection, Ms. Johnston testified that she might have "experienc[ed] interactions with [Mr. Miller] that [Ms. Johnson] later concluded might be manipulative on his part." (Vol. VII PCR. 1162).

Larry Henderson

Mr. Henderson is currently employed as the chief of the Capital Division of the Federal Defenders Office in Orlando. (Vol. VIII PCR. 1171). He has been practicing law since approximately 1981. (Vol. VIII PCR. 1171). Mr. Henderson was employed at by the Public Defender's Office for the Ninth Judicial Circuit from approximately 2005 to 2010. (Vol. VIII PCR. 1171). Mr. Henderson came to represent Mr. Miller when he was assigned, along with Jerry Hooper, to represent Mr. Miller. (Vol. VIII PCR. 1172). Mr. Henderson described his duties as "first chair of the penalty phase. Mr. Hooper was dealing with the guilt phase." (Vol. VIII PCR. 1172). Mr. Henderson consulted

with Mr. Hooper throughout the course of their representation of Mr. Miller. (Vol. VIII PCR. 1172).

Once Mr. Miller was convicted, Mr. Henderson did not attempt to obtain the most favorable recommendation from the jury regarding the death penalty. (Vol. VIII PCR. 1172). Mr. Henderson testified that the reason for this was that "Mr. Miller directed us as his attorneys to have him receive a death sentence." (Vol. VIII PCR. 1172-73). Mr. Henderson never directly informed the court that he was seeking death for Mr. Miller. (Vol. VIII PCR. 1172-73). He explained the reasoning behind not informing the court directly, stating:

> It was my understanding that unless Mr. Miller was absolutely putting up no defense, was waving everything, was waving the presentation of all mitigation, those sorts of things, then we would notify the Court, put that on the record, make sure his decision was competent, that he was competent and that it was a knowing and voluntary decision and then proceed from there.

(Vol. VIII PCR 1173). Mr. Henderson never "directly" informed the Court of this because: "The tactic that was being used was to achieve Mr. Miller's desire, and that was not that he die, but that he receive -- if he was found guilty, that he receive a death sentence with as many legal issues as could possibly be there to prolong any carrying out of the execution." (Vol. VIII PCR. 1173). Mr. Henderson, however, did attempt to argue for a life sentence for Mr. Miller in closing argument, "with

reservations." (Vol. VIII PCR 1173). "Mr. Miller understood that to preserve all of the issues that were presented legally, his best positioning would be to have a recommendation that was not unanimous for death because that would eliminate some of the important issues." (Vol. VIII PCR 1173). Nevertheless, Mr. Henderson presented evidence on behalf of Mr. Miller during the penalty phase. (Vol. VIII PCR 1173). Mr. Henderson also still had a legal theory that he tried to promote in the penalty phase: "[T]o position Mr. Miller so that if he changed his mind throughout the proceedings and wanted to avoid a death recommendation, then we could do our best to obtain a favorable jury recommendation." (Vol. VIII PCR 1174). Despite all of the evidence and testimony Mr. Henderson presented, he claimed that "We were purposively getting him a death recommendation . . ." (Vol. VIII PCR 1174-75).

Mr. Henderson described the optimal jury recommendation for Mr. Miller's legal issues on appeal was a 7 to 5 death recommendation. (Vol. VIII PCR 1175-76). Mr. Henderson participated in Mr. Miller's appeal on one issue as a volunteer and was familiar with the issues that Mr. Miller raised on direct appeal. (Vol. VIII PCR 1175-76). The notion that a unanimous death verdict was not as favorable as a non-unanimous death recommendation was applicable to "the requirement by the jury in finding facts necessary to impose[] a sentence." (Vol.

VIII PCR 1176). This was based *Ring v. Arizona* and "a whole line of cases that were based on *Apprendi v. New Jersey*." (Vol. VIII PCR 1177).

At the time of Mr. Miller's trial, in a case that did not involve a jury override, Mr. Henderson agreed that no one had received relief in a capital case based on *Ring v. Arizona* in a case originating out of Florida. (Vol. VIII PCR 1176). Mr. Henderson explained:

> Florida has a system whereby the defendant, if found guilty of first degree murder, has a separate penalty phase. The penalty phase is to present evidence dealing with aggravating and mitigating circumstances. And the jury makes a recommendation as to whether a -- what type of sentence should be imposed, life or death.
>
> Interestingly, if it was a 6-6 recommendation, it was taken as a death recommendation. That was disavowed by the Florida Supreme Court later, but it became pretty clear that's the way it was. This was in the early seventies. But in 2007, it was a 6-6 recommendation for life. Six for life, six for death was a life recommendation, and then the judge had the option of overriding that.
>
> From an appellate standpoint, if there was any evidence in the record construed in favor of a life recommendation, the judge would use his or her discretion in overriding that recommendation. But there were several overrides early on in the seventies and eighties.

(Vol. VIII PCR 1177-78). At the time that Mr. Miller's case was pending *Proffitt*, *Hildwin*, *Bottoson* and *King* had been decided. (Vol. VIII PCR. 1178). Despite a lack of success, Mr. Henderson was aware that attorneys in Florida have continued to raise *Ring*

claims. (Vol. VIII PCR 1179). Even the unanimity issue had been raised and rejected in Florida courts and had been rejected by the United States Supreme Court as far back as *Proffitt*. (Vol. VIII PCR 1179). Mr. Henderson conceded that if the Florida Supreme Court or the United States Supreme Court ever held that *Ring* applied to Florida, there was no guarantee that it would be applied retroactively to Mr. Miller. (Vol. VIII PCR 1179).

Mr. Henderson hired experts in this case. (Vol. VIII PCR 1181). Mr. Miller agreed to meet with these experts. (Vol. VIII PCR 1181). One of the experts hired on behalf of Mr. Miller was Dr. Jeffrey Danziger. (Vol. VIII PCR 1181). Dr. Danziger was "initially" hired as a confidential expert. (Vol. VIII PCR 1181). Mr. Henderson claimed that he consulted with Dr. Danziger before listing him as a witness. (Vol. VIII PCR 1181). Mr. Henderson's understanding of whether confidentiality and attorney-client privilege applied to the communications with Dr. Danziger was: "With agents, I call them agents, people working for the defense can consult with the client unless these people are made available for cross-examination. Then, whatever they hear from the defendant cannot be revealed." (Vol. VIII PCR 1182). Mr. Henderson agreed that before you list a mental health expert the State is not allowed to question that expert about the evaluation of a client. (Vol. VIII PCR 1182).

After Mr. Henderson listed Dr. Danziger as a witness,

however, the State had the right to take his deposition. (Vol. III PCR 1182). Mr. Henderson explained that how the expert is listed determines when the State could take an expert's deposition if the expert is a penalty phase witness. (Vol. VIII PCR 1182). In this case, that was exactly what happened.

Mr. Henderson did not take any steps to prevent the State taking the deposition of Dr. Danziger. (Vol. VIII PCR 1182). Mr. Henderson found that during the deposition Dr. Danziger "was couching things in, things that were favorable to the State." (Vol. III PCR 380). The deposition of Dr. Danziger was taken by Robin Wilkinson of the State Attorney's Office, one of the prosecutors in Mr. Miller's case. (Vol. VIII PCR 1183). Mr. Henderson did not specifically recall any questions that Ms. Wilkinson asked Dr. Danziger in the deposition that Mr. Henderson had not thought of or discussed with Dr. Danziger. (Vol. VIII PCR 1183). Mr. Henderson had dealt with Dr. Danziger before and "was kind of a known quantity when [he] selected him" as an expert. (Vol. VIII PCR 1183). Mr. Henderson "believed that he would find Mr. Miller antisocial, that he would have an antisocial personality disorder. He would explore the drug usage by Mr. Miller." (Vol. VIII PCR 1183). When asked if Dr. Danziger was selected as an expert because "he would be favorable towards obtaining a death sentence," Mr. Henderson responded, "I felt he -- he would -- Dr. Danziger is from a northeastern school. He

comes across a little bit pompous. Depending on how he is asked questions he tends to answer them in a particular way as a witness. But I -- as far as presenting evidence favorable to the death penalty, I believe he would present evidence that Mr. Miller -- or opinion testimony that Mr. Miller had an antisocial personality disorder. He suffered from polysubstance abuse and that he had had a dysfunctional childhood."(Vol. VIII PCR 1183-84).

Dr. Mings also found that Mr. Miller had an Antisocial Personality Disorder and testified to this at trial. When asked if "there was anything unique about Dr. Danziger's testimony or skills or abilities or [Mr. Henderson's] perception of [Dr. Danziger] that he would have brought to a penalty phase that Dr. Mings would not have?" (Vol. VIII PCR 1184). All that Mr. Henderson could offer was: "Well, Dr. Danziger was a medical doctor. Through him, I could get into the illnesses being suffered by Mr. Miller, the hepatitis and other problems that Mr. Miller had. And gave me that option of presenting testimony of a medical doctor as opposed to a psychologist." (Vol. VIII PCR 1184).

Mr. Henderson's experience with Antisocial Personality Disorder as far as how jurors would see it in a penalty phase was that: "It's probably the most common diagnosis of our clients from a defense standpoint. It's typically present - - it has been

present - - in most of the cases I have done, there has been a diagnosis of Antisocial Personality Disorder and I have dealt with Dr. Danziger on cross-examination about that before in different cases." (Vol. VIII PCR 1184-85). Mr. Henderson also admitted that whether Antisocial Personality Disorder is viewed favorably viewed by the jurors "depends on how it is presented, but typically . . . it's not favorable." (Vol. VIII PCR 1185). Mr. Henderson testified that whether he would want to present Antisocial Personality Disorder in a certain matter "depends on what you're trying to do with it overall in the case and how you're presenting the defendant and what you're trying to accomplish." (Vol. VIII PCR 1185).

Mr. Henderson stated that he was "purposely presenting antisocial personality disorder as 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." (Vol. VIII PCR 1185). Mr. Henderson "would want to present that in a way that would enable jurors to understand that that is a characteristic of Mr. Miller -- of people with that disorder that is going to remain. It will attenuate somewhat as they grow older. They are -- they are not going to stop being antisocial." (Vol. VIII PCR 1185).

Mr. Henderson believed that he could have presented this

with Dr. Mings. (Vol. VIII PCR 1186). Mr. Henderson explained his strategy for listing Dr. Danziger was to "eventually feature Mr. Miller wanting his own cell, wanting his own television until it became time to execute him. That was said by him early and often, and that was his position throughout. And with Dr. Danziger, I tried to focus him specifically on that request by Mr. Miller, that desire." (Vol. VIII PCR 1186). Mr. Henderson then admitted that this was for the purpose of obtaining a life recommendation but later modified his answer to "life votes." (Vol. VIII PCR 1186-87). Mr. Henderson believed there was a "slight risk" of obtaining a life recommendation but "Mr. Miller understood the risk was there."(Vol. VIII PCR 1187).

Mr. Henderson understood the distinction suffering from Antisocial Personality Disorder and the labeling of an individual as a Sociopath. He also understood that while the term "sociopath is antiquated" he "was sure that it was used" in popular discussions such as in the media. (Vol. VIII PCR 1190). "Sociopath" was not Mr. Miller's diagnosis. (Vol. VIII PCR 1190-91). Nevertheless, Mr. Henderson did not object to Dr. Danziger labeling Mr. Miller a sociopath and the stigma that resulted. (Vol. VIII PCR 1191).

At penalty phase, the State asked Dr. Danziger whether he was first contacted by the defense. Mr. Henderson did not object to this question. (Vol. VIII PCR 1192). While Mr. Henderson

agreed that the State, or opposing counsel, is not permitted to comment on the failure to call a witness after reviewing this part of the transcript Mr. Henderson did not find it objectionable although, "[i]t may have been." (Vol. VIII PCR 1191). This was also despite Mr. Henderson's stated strategy of trying to provide as many appealable issues for Mr. Miller as he could. (Vol. VIII PCR 1192).

Other than his right to testify, even if Mr. Miller's preference was for a death sentence, Mr. Henderson admitted that Mr. Miller did not waive his right to counsel, his right to present a penalty phase, his right to be evaluated by a confidential expert and not have the State comment on these rights. (Vol. VIII PCR 1193). Mr. Henderson claimed that while he did not explain to Mr. Miller in the broader sense that what he said to Dr. Danziger could be used against him in the penalty phase, in a narrow sense: "It was explained that the initial evaluation would be confidential and it would remain confidential until such time as Dr. Danziger was listed as a witness. That would not happen without notifying Mr. Miller, going over that with him, and that occurred. And after that, Dr. Danziger was listed." (Vol. VIII PCR 1194).

Mr. Henderson had mitigation investigator Joni Johnston on this case. (Vol. VIII PCR 1194). Mr. Henderson could not recall whether he gave the social history that he obtained from Ms.

Johnston to Dr. Mings and was unable to refresh his recollection. (Vol. VIII PCR 1195); *see also* (Vol. 19 R.1458 where Dr. Mings was asked: "In fact, you were given a social history provided to you by Miss Johnston from the Public Defender's Office about an interview she had with Mr. Miller's brother?" And answered" I don't believe so"). Whatever social history Mr. Henderson may have obtained on Mr. Miller, he agreed that he did not present a complete social history. (Vol. VIII PCR 1196). Mr. Henderson claimed that Mr. Miller did not want some of his social history divulged and because of the goal of obtaining a non-unanimous death sentence. (Vol. VIII PCR 1196). Mr. Henderson believed that Mr. Miller's social history could have led to a life recommendation because "[c]hildhood abuse and dysfunctional childhood is very powerful. It can be very powerful." (Vol. VIII PCR 1196).

Despite the stated goal of obtaining a non-unanimous death recommendation, Mr. Henderson called Dr. Drew Edwards at the penalty phase. (Vol. VIII PCR 1196). Mr. Henderson agreed that testimony of an expert like Dr. Drew Edwards could also be very powerful but nevertheless, he was not concerned that Dr. Edwards testimony may have led to a life recommendation. (Vol. VIII PCR 394). He did think that it would achieve a life vote from some jurors. (Vol. VIII PCR 1196). He thought Dr. Edwards presented well to the jury. (Vol. VIII PCR 1198). There was no reason that

Mr. Henderson could have simply just presented Dr. Edwards' testimony, although Mr. Henderson claimed that he wanted to "stay fluid" just in case Mr. Miller changed his mind and wanted a life recommendation. (Vol. VIII PCR 1198).

Before the penalty phase, Mr. Henderson obtained an MRI on Mr. Miller's brain. (Vol. VIII PCR 1199). Mr. Henderson believed that he did not present evidence of the MRI itself and was not sure whether Dr. Mings or Dr. Danziger referred to it. (Dr. Mings did refer to it but it was in a response to a State question. He also indicated that he was not qualified to read an MRI. Vol. 19. R. 1459). Mr. Henderson spoke to Dr. Danziger about a PET Scan and was told that Mr. Miller had:

> Mild deficits, probably in his frontal lobe in his cognitive processes. And that it would probably not rise to the level of a substantial impairment, but there was some impairment there and imaging was recommended. There was a discussion about what type of imaging would be best with a PET scan. They use radioactive material to do the imaging. It's perhaps more invasive in that respect. Mr. Miller had had an MRI previously from way back, and I spoke with a doctor about doing a particular PET scan on Mr. Miller and he didn't think it would be that productive.

(Vol. VIII PCR 1199-1200). The doctor referred to above by Mr. Henderson was named Choko. Dr. Choko does not perform PET Scans. (Vol. VIII PCR 1200). Mr. Henderson has spoken to experts who actually evaluate PET Scans, read PET Scans and were experts in PET Scans but did not do so in reference to Mr. Miller. (Vol. VIII PCR 1200). While Mr. Henderson has consulted with and

presented the testimony of noted PET Scan expert Dr. Wu, he never contacted Dr. Wu in the instant case or any other PET Scan expert. (Vol. III PCR 1201).

Mr. Henderson agreed that a juror in Florida is never required to recommend death and always has the option to dispense mercy and argue for life. (Vol. III PCR 1202). Mr. Henderson even "mentioned" this idea during closing argument. (Vol. VIII PCR 400). He also believed that he may have argued about redemption in his closing argument. (Vol. VIII PCR 1202).

On cross-examination, Mr. Henderson's testimony exemplified the problems with Dr. Danziger. Mr. Henderson even had to send a letter to Dr. Danziger to get him to recognize Antisocial Personality Disorder as mitigating:

> A. I have dealt with Dr. Danziger before about whether antisocial personality disorder is a mitigating circumstance or not. [ ] And Dr. Danziger is of the professional opinion that antisocial personality disorder is not a mitigating circumstance. And I have spoken with him that that's not his call. It is. It has been recognized as one, and if it exists, it is a mitigating circumstance and you can talk about that. This was to point that out to him. It is a mitigating circumstance and it's not a -- it's not a component of mental health diagnosis. What it is, is it's a legal fact. It's a legal fact that's a mitigating circumstance. I was trying to get him to admit that and didn't succeed but --
> Q. Why was that important to you?
> A. Well, um, that's -- that is a mitigating circumstance. It's something that people do not choose to have. It is pervasive. It affects their daily behavior. It may not be a psychological mental health disease, but it is certainly an affliction. So to the extent that it can mitigate against imposition of the

> death penalty, however, and for whatever reason having that disorder justifies imposition or warrants imposition of a sentence other than the death penalty, then it should be considered. But that was the purpose of the letter.
> Q. Now, that -- that letter was in June of 2007; is that correct?
> A. Yes.
> Q. And was it your hopes that Dr. Danziger would sign on to that theory and testify in accord with that?
> A. Well, it's a debate, and he would certainly have to acknowledge after receiving the case if he was testifying that it is a mitigating circumstance. Now, he may not agree that it's there, and depending on his demeanor when he was talking about it, um, it's for the jury to assess. But I thought it was pretty clear that it is a mitigating circumstance for him to say, well, it's not a psychological consideration, um, you know, I see the distinction.
> Q. So did you feel you had accomplished that purpose with that particular letter to Dr. Danziger?
> A. I felt that I had documented and provided me with ammunition to get him to admit that that is a mitigating circumstance. I mean, that's -- that was the purpose of the letter.

(Vol. VIII PCR 1228-29).

Gerrod Hooper

Assistant Public Defender Gerrod Hooper represented Mr. Miller at trial. He testified that he had worked for the Key West Public Defender’s Office for about 4 years, the Tampa office for 7 years, and currently worked in Orange County for about 15 years. (Vol. VII PCR. 1048). Mr. Hooper informed: “[O]f the attorneys in the PD's office here that handled the capital cases and the murder cases and it was obviously maybe four or five of us, [Larry Henderson and I] were the only two that did

not know the son of the victim." (Vol. VII PCR. 1048). Mr. Hooper admitted there was a "concern" in the office about the victim being the mother of attorney Smith. "Well, yeah. That's why we were the only two that didn't know him and that we would be comfortable in handling the case. So, yes, that was a concern and, yes, that's how it was addressed." (Vol. VII PCR. 1050).

Mr. Hooper stated that during voir dire he normally strives to prohibit improper comments from reaching the prospective jurors. This is because he said "you don't want to taint the jurors." (Vol. VII PCR. 1050). Regarding the situation with Juror 285 when the court informed this juror that automatic death penalty for first degree murder is "unfortunately" not the law, Mr. Hooper stated that they should have objected to that improper comment. (Vol. VII PCR. 1052). Mr. Hooper described why the comment was objectionable: "one of the people in the panel may misconstrue the words and misinterpret it as the Court not liking the way the law is and preferring the law to be otherwise. So that's -- that would be objectionable." (Vol. VII PCR. 1053).

Mr. Hooper agreed that he given certain portions of the transcript, without objection, Prosecutor Lewis definitely misstated the law. The State's comments during jury selection were read to Mr. Hooper and he responded as reflected below:

[Q] So Mr. Lewis addressed the jury as follows:

> In other words if the weight of the evidence leans towards death, then your vote, according to the law, would be death. If the weight of the evidence, in terms of the mitigators outweigh the aggravators, weighs towards life imprisonment or things that warrant a life sentence, do you feel that you can vote for life in that circumstance? Yes. And the State continues, and again, you can vote for death if the circumstances support death? This juror said, whichever one weighs out the most. Mr. Lewis said, nothing further. And then Mr. Henderson took over. So I'm gonna ask you if you might have seen that as an opportunity to have the law clarified in Florida capital sentencing law?
> [MR. HOOPER] A Well, that -- the remarks by Lewis are a misstatement of the law, at least in the initial about the weight and –
> Q. I'm sorry. I didn't hear you.
> A. Yeah. The first part of what you read from the prosecutor, Mr. Lewis, if I heard you correctly, would be a misstatement of the law where he's saying you would vote for death if the aggravators outweigh the mitigators. That would not be appropriate.
> Q. Why is that?
> A. Huh?
> Q. Why is that?
> A. Well, you're never required to vote for death. It's not a weighing act. You can have all the aggravators, every statutory aggravator there is, and you are still not required to vote for death. That would be inappropriate.

(Vol. VII PCR. 1067-1068).

Mr. Hooper agreed that in regards to Juror 68, when the prosecutor informed this particular juror that “the aggravators should be given greater weight,” an objection should have been made. (Vol. VII PCR. 1095-1096). With regards to Juror 43, Mr. Hooper agreed that given the way the State addressed this juror, objections should have been made. Regarding Juror 43, Mr. Hooper testified that he had the following problems with the way the

prosecutor addressed this juror:

> I understand what he is trying to ask. . . .However I have never heard it asked so clumsily. . . .The problem I have here is where he says, 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 – and then he says there's no conscience there. If at that point he said because the aggravators outweigh the mitigators and in considering everything I feel that death is the appropriate choice or something to that effect I wouldn't have any problem with it. But the way it's worded up there is suggestive of a checklist that if the aggravators outweigh the mitigators then the vote would be for death. So I find that portion there objectionable. Yes.

(Vol. VII PCR. 1101-1102). Mr. Hooper agreed that Prosecutor Lewis's comments towards Juror 58 were objectionable in that they suggested to this juror that "mercy" was not an option under the law. (Vol. VII PCR. 1105-06). Mr. Hooper confirmed that if the law is being stated incorrectly and prejudicially, he would strive to make objections and have the law clarified. (Vol. VII PCR. 1106-1107).

Regarding the Dempsey conflict, Gerrod Hooper testified that he did not take certain steps to investigate David Dempsey's criminal cases. (Vol. VII PCR. 1136). Mr. Hooper knew that Dempsey was represented by his office, and that his files were located somewhere in his office, but he was not going to look into those files. Mr. Hooper stated that he would not "read confidential communication between Mr. Dempsey and his attorney nor could I get Mr. Dempsey's attorney and ask them to disclose

confidential communication between Mr. Dempsey and him." (Vol. VII PCR. 1136). When Mr. Hooper was asked why he did not obtain the probation files of David Dempsey, he stated, "I don't think I have ever done that." (Vol. VII PCR. 1139).

Gerrod Hooper did not remember what efforts he might have to speak with roommate Deborah Hood. (Vol. VII PCR. 1141). He testified that if he had certain information on Deborah Hood and David Dempsey, he would have tried to utilize the information:

> [I]f I had [her] available and could get her under subpoena assuming she told me he tried to rob her, and if he's on the witness stand and he volunteers that he never robbed or tried to rob her, then I imagine I might have asked him, well, didn't you try to rob Deborah Hood? I may have asked him that, certainly.

(Vol. VII PCR. 1142).

Janice Dempsey

David Dempsey's mother, Janice Dempsey, was called to the evidentiary hearing. Ms. Dempsey recalled an incident wherein her son took her car keys. She described this as a "tug of war":

> Q. So, [] you don't dispute that he became violent with you as he was trying to get these personal items from you?
> A. When you say violent, I mean, it was like a tug of war over the keys.
> Q. Tug of war?
> A. Yeah. Like he had the keys in his hand, and I was trying to pull them back and he wouldn't give up. He was determined to take the car.

(Vol. VI PCR. 827).

She relayed that her son took the keys and he did not have

permission to take the keys. (Vol. VI PCR. 827). During the tug of war, Ms. Dempsey stated that he asked for money, and she actually called the police during the struggle. (Vol. VI PCR. 833). When Mr. Dempsey was asked if he ever became engaged in a physical tug of war over her car keys, he stated, "Not that I recall." (Vol. VI PCR. 838).

Deborah Hood

David Dempsey's second robbery victim, Deborah Hood, testified at the evidentiary hearing that David Dempsey indeed took her "property under threats of force."(Vol. VI, PCR. 848). Although she never called the police on Mr. Dempsey, Deborah Hood informed, "The baseball bat was my cop." (Vol. VI PCR. 855). She confirmed:

> A. He would take money and dope from me, both.
> Q Okay. Did he ever hit you?
> A. Yes.
> Q. Did he, [] as he was trying to obtain your money and drugs, was he hitting you?
> A. Yes.
> Q. Okay. And, [] did you ever have to use a baseball bat against him to protect yourself?
> A. I did.
> Q. To protect your property?
> A I did.
> Q. About how many times did that happen?
> A. Three, four. I honestly can't answer that because I honestly don't recall.
> Q. Okay. Um, tell me about -- tell me about using a baseball bat to defend yourself against David Dempsey.
> A. I would take the baseball bat out and tell him, you leave me alone or I'm gonna hit you with it.

(Vol. VI PCR. 848-849). And on cross-examination she confirmed:

> Q. When you say force -- that he threatened you, what did he threaten you with?
> A. I don't recall. I don't recall. It was either bout money or dope and that's all I remember.
> Q. Did he ever use violence against you that you can recall?
> A. Yeah, he popped me a couple times, yeah.
> Q. When you say popped you a couple times?
> A. Slapped my face.
> Q. Do you know what that was about, why he slapped your face?
> A. Thinking I had more drugs than what I had or that I had drugs and I won't give him any.

(Vol. VI PCR. 856).

SUMMARY OF THE ARGUMENTS

CLAIM I – Trial counsel was ineffective at the penalty phase for employing typical-state expert Dr. Jeffrey Danzinger, then listing him as a witness obviously not knowing the damage he would cause Mr. Miller's case for life, and allowing the State to call Dr. Danzinger to support their case for death. Trial counsel was also ineffective for failing to obtain a PET scan and otherwise investigate, uncover, and explain available mitigation.

CLAIM II – Trial counsel's prejudicially ineffective failure to obtain a PET deprived Mr. Miller of evidence and argument that could have supported his motion to suppress the incriminating statements in this case. Trial counsel failed to present evidence from an MRI and PET scan revealing that he has BEHAVIORAL VARIANT FRONTOTEMPORAL DEMENTIA (bvFTD). Mr. Miller's

alleged waiver of Miranda was not knowing, intelligent, or voluntary.

CLAIM III – Mr. Miller's bvFTD and deteriorating mental condition is such that his continued confinement on Florida's death row constitutes cruel and unusual punishment; this death sentence will never be carried out because of his deteriorating mental condition.

CLAIM IV – The State violated *Brady* and *Giglio* by failing to turn over information in their possession which would have impeached essential state witness David Dempsey. Trial counsel labored under various conflicts of interest which adversely affected their representation of Mr. Miller, including failure to adequately investigate and impeach David Dempsey.

CLAIM V – Trial counsel was ineffective in failing to object to various comments from the trial court and the State which misled the jury to believe that a sentence of death was mandated in this case.

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), these claims are a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

ARGUMENT I

TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY AND SENTENCING PHASE OF MR. MILLER'S TRIAL THUS DENYING MR.

MILLER HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Miller had the right to the effective assistance of counsel at every stage of the proceedings against him. Claim III addressed counsel's failures during the penalty phase trial and sentencing stage which led to a breakdown of the adversarial process undermining the results in this case. Counsel's performance during this stage was deficient and prejudicial because there is a reasonable probability that had Mr. Miller received the effective assistance of counsel he would not have been sentenced to death. This Court should find that counsel was ineffective at this stage of performance and reverse the denial of postconviction relief. *Strickland v. Washington,* 466 U.S. 668 (1984).

In *Eddings vs. Oklahoma*, 455 U.S. 104 (1982), the United States Supreme Court required that in a death penalty case:

> [T]hat the sentencer in capital cases must be permitted to consider any relevant mitigating factor

Id. at 112.

In *Rompilla v. Beard*, the United States Supreme Court held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigation evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution

will probably rely on as evidence of aggravation at the sentencing phase of trial." *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 2460 (2005). The Court, finding that counsel rendered deficient performance, cited counsel's failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of prior incarcerations, and failure to gather evidence of a history of substance abuse. *Id.* at 2463.

In *Rompilla*, trial counsel spoke with several members of Rompilla's family and three mental health experts, none of whom had any particularly favorable or useful information. *Id*. Rompilla himself was not very cooperative, even giving counsel fake leads, thus frustrating the gathering of information. *Id.* Moreover, even the consultation with the three mental health witnesses who had examined Rompilla prior to trial turned up nothing fruitful. *Id.* at 2563.

The Court recognized that "the duty to investigate does not force defense lawyers to scour the globe on the off-chance that something will turn up; reasonable diligent counsel may draw the line to think further investigation would be a waste." *Id*. (citing *Wiggins*, 539 U.S. 510). In rejecting the Commonwealth's argument that the information trial counsel gathered from Rompilla and other sources gave them reason to believe that further investigation would be pointless, the Court found that counsel's failure to examine the court file on Rompilla's prior

conviction was deficient performance. *Id.*

Trial counsel was ineffective during Mr. Miller's penalty phase and sentencing. Counsel acted unreasonably by failing to fully investigate and develop the mitigation that could have been presented on behalf of Mr. Miller. Counsel acted unreasonably in choosing experts, listing Dr. Danziger as a defense witness when his opinion was so negative that the State called him as a witness. Counsel should have avoided the harm that Dr. Danziger caused by objecting to the State calling Dr. Danziger as witness against Mr. Miller, even if Dr. Danziger's transformation into a State witness was a direct result of counsel listing him as a witness in the first place.

Mr. Miller, as seen in the penalty phase, had prior felony convictions thus rendering his case less than ideal for a *Ring* challenge. It should have been obvious to Mr. Henderson that there was nothing that made Mr. Miller's case ideal for a *Ring* challenge. Accordingly, a strategy based on *Ring* was unreasonable.

The Constitution required that counsel develop and present more mitigation than that which was presented. Apart from Dr. Edwards, trial counsel's penalty phase presentation failed to put forth important mitigation. Counsel's deficiencies during the penalty phase prejudiced Mr. Miller because the jury that recommended his death did so without a complete understanding of

Mr. Miller's character, mental condition throughout his life, the cause of Mr. Miller's drug abuse and bad behavior and all of the mitigation that could have been presented.

A. Mr. Miller is entitled to relief because trial counsel was ineffective for hiring Dr. Jeffrey Danziger, listing Dr. Danziger as a witness and failing to object to the State calling Dr. Danziger in violation of Attorney-Client Privilege, Work Product and Confidentiality.

Trial counsel was ineffective for listing Dr. Danziger as an expert witness and for failing to move to exclude Dr. Danziger from testifying adversely to Mr. Miller's interest. When the State offered Dr. Danziger as an expert, trial counsel did not object, but rather, stated "We're well-aware of Dr. Danziger's qualifications. We have no objection." (Vol. XIX R. 1509). Worse than not trying to prevent the testimony of Dr. Danziger, this statement had the effect of actually bolstering the harmful testimony that Dr. Danziger would put before the jury.

Mr. Miller entered into evidence the pretrial deposition of Dr. Danziger. (Vol. VIII PCR. 1170). Trial counsel listed Dr. Danziger as a witness on October 23, 2007. (Vol. VII R. 1186). On November 8, 2007, the State took the deposition of then defense witness Dr. Danziger. The very next day, November 9, 2007, the State listed Dr. Danziger as a witness. Obviously by speaking to Dr. Danziger during the deposition the State decided that Dr. Danziger's testimony was so helpful to the State's case and harmful to Mr. Miller's case for life that the State wanted

to present the previously confidential opinion of Dr. Danziger.

What was patently obvious to the State should have been patently obvious to trial counsel - - Dr. Danziger was harmful to Mr. Miller's case for life. Trial counsel should never have listed Dr. Danziger as witness, and should have objected to the State taking Dr. Danziger's deposition and calling him as a witness. The fact remains that on November 8, 2007, Dr. Danziger was a defense witness based on the State being the party to take the deposition. On November 9, 2007, Dr. Danziger was a State witness. The only thing that changed between November 8, 2007 and November 9, 2007 was that Dr. Danziger gave a deposition that showed his opinion was harmful to Mr. Miller and that aided the State in obtaining Mr. Miller's death sentence.

As indicated in Dr. Danziger's deposition, he evaluated Mr. Miller on April 7, 2007. (Depo page 1). After the evaluation, trial counsel had approximately 7 months to realize that Dr. Danziger was useless for mitigation, and to simply not list him as a witness, or strike him from the witness list before he gave a deposition. Certainly, before listing Dr. Danziger as a witness, counsel should have asked Dr. Danziger essentially the same questions the State asked.

Had trial counsel merely asked some of these same questions, before listing Dr. Danziger, counsel would have been aware that Dr. Danziger was bent on branding Mr. Miller as a

sociopath and otherwise diminishing the mitigation that could have been presented in favor of Mr. Miller. With such knowledge, reasonable counsel would not have listed Dr. Danziger on the witness list in order to prevent the injury that Dr. Danziger caused Mr. Miller at the penalty phase.

Now a State witness, Dr. Danziger proceeded to minimize even the underdeveloped mitigation that he should have found, counsel should have developed and, the jury that recommended Mr. Miller's death, should have heard. Indeed, after presenting himself as a defense expert to Mr. Miller, Dr. Danziger could have presented a great deal of mitigation about Mr. Miller's life and drug problems but, taking direction from the State, proceeded to contribute to Mr. Miller's death sentence during Mr. Miller's penalty phase.

Dr. Danziger presented the following diagnosis with prejudicial effect:

> The State: In looking at that, did you render a diagnosis of Mr. Miller?
> Dr. Danziger: Yes.
> The State: And what is that diagnosis?
> Dr. Danziger: The diagnosis on Axis I for primary psychiatric diagnoses is, first, a polysubstance dependence, which was in remission in the controlled setting of the jail. And then dysthymia, which is a long-term low level syndrome of depression.On Axis II, which refers to personality and character pathology, I diagnosed antisocial personality disorder.

(Vol. XIX R. 1514-15).

Dr. Danziger's testimony essentially ignored the Axis I

diagnosis of Polysubstance Abuse and dwelled on the judgment loaded Axis II diagnosis of Antisocial Personality Disorder, which the State later prompted Dr. Danziger to refer to as a "characterological disorder." Rather than discuss how Antisocial Personality Disorder was mitigating, or how the symptoms could be explained by Mr. Miller's background, Dr. Danziger injuriously and prejudicially equated sociopathy with antisocial personality disorder:

> Q. Dr. Danziger, can you describe to the ladies and gentlemen of the jury what is an antisocial personality disorder?
> A. In describing that, it's first important to describe what a personality disorder is. All of us have a personality. It's the way we interact with others, with our environment, with the world around us. And we all may have different personality traits. Some of us may be more stubborn, some of us perhaps a little more self-confident, some of us may be a little shier [.] We all have different traits in our personality.
>
> When those personality traits are exaggerated to the point where they become maladaptive to the point where they are inflexible, they persist throughout adult life, dominate one's personality and cause distress either to one's self or others, or interfere with one's level of functioning, then it's gone from a personality trait to what we call a personality disorder.
>
> Again, a personality disorder would be inflexible, maladaptive, starting in adolescence, persisting throughout adult life and generally interfering with function and causing distress to the person or to others.
>
> And there's different types of personality disorders. Antisocial personality disorder, the predominant feature is a pervasive pattern of disregard for and a violation of the rights of others, and a pattern that

has been occurring since the age of 15, in other words, it starts early in life. There's a number of different features that we see in antisocial personality disorder.

There's actually seven criteria. If an individual has three of them, they would qualify for the diagnosis. The first criteria is someone who has a failure to conform to social norms with respect to lawful behavior as indicated by repeatedly performing acts that are grounds for arrest. Secondly would be deceitfulness. This would be repeated lying, use of aliases or trying to con others for personal profit. Third would be impulsivity or failure to plan ahead. Fourth, would be irritability, aggressiveness, or repeated physical fights.

Fifth would be a reckless disregard for the safety of one's self or others. Sixth, would be consistent irresponsibility. And this would be manifested by a failure to sustain consistent work behavior or honor financial obligations. And the seventh would be a lack of remorse. This would be indifferent to or rationalizing having hurt, mistreated or stolen from other individuals.

You -- to make the diagnosis of antisocial personality, an individual must be 18 years old. If they're under 18 and demonstrating these behaviors, we call that a conduct disorder. And to make a diagnosis of antisocial personality disorder, the behavior has to start before the age of 15. So if -- an individual doesn't have to have all seven of these factors. But if they have, I believe, three or more, and it is something that's been persistent throughout adult life, then they would qualify, according to our diagnostic manual, for the antisocial personality disorder.

(Vol. XIX 1512-13).

Dr. Danziger also testified prejudicially, without objection:

He was in the United States military for 17 weeks, but was discharged from the military because apparently he had left a North Carolina penitentiary, enlisted in the Army and then North Carolina wanted him back.

*****

> We added up all of the time that he had been in prison, and since the age of 18, 41 years ago, he spent 32 years and three months in prison. In addition, there was also time in county jails awaiting trial, including being in the Orange County Jail. So over all of the past 41 years, since the age of 18, he's been behind bars approximately 35 of them.

(Vol. XIX 1512, 1513-14).

Dr. Danziger incorrectly went beyond Antisocial Personality Disorder to prejudicially label Mr. Miller a "sociopath":

> Q. What about the term sociopath, how does that relate to a [sic] antisocial personality disorder?
> A . Essentially they are synonymous, would mean much the same thing. Essentially a sociopath would be mostly on the lack of remorse, the lack of care of one's actions causes to others. But antisocial personality disorder and the term sociopath are often used interchangeably by psychiatrists.

(Vol. XIX R. 1517-18). This was not only damaging to Mr. Miller's case for life, it was not true. Sociopath is an antiquated term when used synonymously with Antisocial Personality Disorder. To the extent that there is a separate non-DSM diagnosis, it requires a different analysis than the criteria for Antisocial Personality Disorder. Both Antisocial Personality Disorder and Sociopathy branded Mr. Miller with a judgment on his "character" and made it more likely that the jury would recommend death.

Dr. Danziger also recounted Mr. Miller's account of the crime and negated statutory mitigating factors that the defense would not even seek an instruction on:

> Q. Do you have an opinion as whether or not based on his long-term drug use and his antisocial personality

> disorder whether or not the defendant's capacity to appreciate the criminality of his conduct to the requirements of law was substantially impaired at the time of murder?
> A. It is my opinion it was not, that he did have the capacity to appreciate the wrongfulness of his conduct.
> Q. And based on how he described -- did he talk to you actually about some of the facts of the crime itself?
> A. Yes, he did.
> Q. What did he tell you?
> A. What he told me is that he had met the victim, Jerry Smith, earlier in the week. Noted that she wore a lot of jewelry. And he said he went over there to steal jewelry. Essentially what he said was that given that she seemed elderly and a bit confused that she might have difficulty in later identifying him.
> Q. Did he talk to you about actually going out into the yard where Jerry Smith was when he stabbed her?
> A. Yes, he did.
> Q. And did he say what he was doing at that time?
> A. He said that he was trying to get the jewelry. He said he heard her scream, pushed her down, was trying to get the jewelry, heard sirens, jumped over the fence and ran. He said he was not sure how the lady, meaning the victim, Jerry Smith, got stabbed. But he knows that she was stabbed and somehow he ended up being stabbed himself.
> Q. Of course at the time that you interviewed him, he's already been charged with these crimes?

(Vol. XIX R. 1521-22). Dr. Danziger's recounting of Mr. Miller's alleged statements portrayed Mr. Miller in the most callous of lights and enabled the jury to hear a version from an expert who failed to express Mr. Miller's remorse. This caused the jury to place greater weight on Mr. Miller's earlier account to police and divested the jury of any notion that the events in question had simply gone wrong. Dr. Danziger never expressed the view that Mr. Miller did not go to the victim's house to commit murder

and that the murder, had it actually been committed by Mr. Miller, was the result of Mr. Miller's panic.

Dr. Danziger's prejudicial testimony was aggravated by his confirmation that he was hired by the Defense:

> Q. And, in fact, Dr. Danziger, you were first contacted by the defense in this case?
> A. I was.(Vol. XIX R. 1522).

Even if Dr. Danziger was somehow a permissible witness, counsel should have objected based on this being impermissible comment and testimony on, Mr. Miller's right to remain silent, right to trial, right to counsel and the right to present mitigation. In *Griffin v. California*, 380 U.S. 609 (1965), the United States Supreme Court held "that the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id*. at 615. Counsel should have moved for a mistrial because all semblance of a fair penalty phase was lost by the State deliberately eliciting that Dr. Danziger was contacted by the defense. Mr. Miller had the right to remain silent, the right to develop mitigation and the right to counsel. He also had the right to have his then-confidential defense expert remain confidential until and unless Dr. Danziger testified, or at least until the defense ineffectively listed

him as a witness. Dr. Danziger's prejudicial testimony should not have been heard by the jury because counsel should not have listed Dr. Danziger in the first place. And if somehow the State could breach attorney-client privilege and confidentiality, the result was even worse; the jury, to Mr. Miller's prejudice, was left with the false impression that the defense avoided calling Dr. Danziger as a witness because he was obviously less than favorable. When asked if Dr. Danziger had a reputation of being a state expert or defense expert, Gerod Hooper conceded: "historically, I think he has been used more by the State." (Vol. VI PCR. 1143).

The law is clear that Dr. Danziger, having been retained by the defense on behalf of Mr. Miller, could not be called as a State witness because of attorney-client privilege and confidentiality. In *Northup v. Acken*, 865 So.2d 1267 (Fla. 2004), this Court stated the proper analysis that reasonable counsel must undertake before listing an expert:

> In essence, Florida litigants must make a simple and discrete decision prior to entry of a pretrial case management order by the trial court. An attorney must evaluate whether he or she intends to use evidence in his or her possession for strategy and trial preparation purposes only, which would qualify the selection of the particular items as a protected product of the thought processes and mental impressions of an attorney. On the other hand, if the evidence or material is reasonably expected or intended to be disclosed to the court or jury at trial, it must be identified, disclosed, and copies provided to the adverse party in accordance with the

> trial court's order and the discovery requests of the opposing party.

Id. at 1270.

In *Ursry v. State*, 428 So.2d 713 (4th DCA 1983), the trial court, over the defendant's objections, permitted a former defense psychological expert to testify on behalf of the State. *Id*. at 714. The former defense expert gave the only expert testimony adverse to defendant's insanity defense. The jury found defendant guilty. *Id*. On appeal, the State argued attorney client privilege was waived as a matter of law because the defendant listed the on his witness list. *Id*. The State argued that Florida Rule of Criminal Procedure 3.220(b)(3) allowed the State to subpoena all witnesses defense counsel expects to call as a witness at trial. The court did not find this argument persuasive since the defendant, at the hearing on his motion to exclude the defense psychologist, stated that he did not intend to call the expert as a defense witness and in addition, the State candidly admitted that it decided to call the former defense expert only after the defense told him that he would not be a defense witness. *Id*. The court also found that while the attorney-client privilege dissipates when the doctor is used as a witness, such was not the case at bar because the doctor did not testify for the defense. *Id*.

The *Ursry* court stated:

> The correct rule is clearly set forth in *Pouncy v. State*, 353 So.2d 640. There, the Court held that where a psychiatrist is employed by counsel for a defendant to assist him in preparing a defense for his client and not to treat the defendant the State may not depose the expert or call him as a witness. The witness is subject to the attorney-client privilege. On the other hand, if the doctor is used as a witness, the privilege dissipates and he is subject to treatment as any other witness. See also United *States v. Alvarez*, 519 F.2d 1036 (3rd Cir. 1975) and *McMunn v. State*, 264 So.2d 868 (Fla. 1st DCA 1972).

In *Sanders v. State*, 707 So.2d 664 (Fla. 1998), this Court considered similar, yet less egregious facts than this case:

> In rebuttal, the State called Dr. Sidney Merin, a clinical psychologist. Sanders objected to Dr. Merin's testimony because Dr. Merin had originally been retained as a confidential expert for Sanders and had been provided with confidential and privileged information regarding Sanders. Although the information was in Dr. Merin's possession for six months, he stated that he did not review this information before it was returned to Sanders. Dr. Merin was allowed to testify. He did not interview Sanders before giving his testimony but concluded, based on Sanders' taped confession and other records, that no mental mitigators were present and that much of Sanders' behavior was done to get attention.

Id. at 666. This Court reversed the death sentence and stated:

> We also agree with Sanders' second penalty phase contention that the trial judge erred in allowing Dr. Sidney Merin to testify on behalf of the State. In May 1994, the trial court granted Sanders' motion to appoint a confidential expert pursuant to Florida Rule of Criminal Procedure 3.216(a). The order did not identify a particular expert by name. In June 1994, defense counsel wrote a letter to Dr. Merin, asking that he serve as the defense expert. Subsequently, defense counsel provided Dr. Merin with numerous documents regarding Sanders and communicated information to Dr. Merin about Sanders' case. Due to an "office snafu," Dr. Merin took no action on the case

and did not interview Sanders. After several attempts, defense counsel finally gave up trying to get Dr. Merin to interview Sanders and hired another expert.

In February 1995, the State listed Dr. Merin as a witness. About that same time, [he] wrote to defense counsel, returning the documents forwarded to him by defense counsel with the assurance that he had not reviewed any of them. At that point, [he] had been in possession of the documents forwarded by defense counsel for over six months. Based on the fact that Dr. Merin had originally been retained to represent Sanders, defense counsel moved to strike Dr. Merin as a witness. The trial court denied the motion, relying on *Rose v. State*, 591 So.2d 195 (Fla. 4th DCA 1991).

. . . .

[W]here an expert is hired solely to assist the defense and will not be called as a witness, the State may not depose the expert or call him as a witness. *Lovette v. State*, 636 So.2d 1304, 1308 (Fla.1994). Under this rule, the State cannot make a confidential expert for the defense its witness when the attorney-client privilege has not been waived. *Lovette*; *Ursry v. State*, 428 So.2d 713 (Fla. 4th DCA 1983); *Townsend v. State*, 420 So.2d 615 (Fla. 4th DCA 1982). Unless otherwise waived, only when the defense calls the expert as a witness is the privilege relinquished. *Lovette*; *Ursry*.

***

In this case, Dr. Merin was retained by Sanders and provided with privileged materials of Sanders' that were in his possession for over six months. Further, Dr. Merin himself was disturbed about testifying for the State after having been first retained on behalf of Sanders. He explained: "I felt horribly guilty and uncomfortable when I was reminded that [defense counsel] had sent this to me and emotions act as a very, very powerful reminder." He further stated: "I felt very uncomfortable about being called by both sides." Only after being reassured by the State that it was acceptable to the trial court did Dr. Merin accept the commission to assist the State. Because Dr. Merin was not called as a witness by Sanders and because Sanders did not otherwise waive the attorney-client privilege under the rule, it was error to allow Dr. Merin to testify on behalf of the State.

> Based on the errors that occurred in this case, we conclude that a new penalty phase proceeding is required.

Id. at 668-69.

If Dr. Danziger was not a confidential expert, Mr. Miller needed to be informed that he had the right to remain silent and that anything he said could be used against him during his penalty phase. *See Estelle v. Smith*, 451 U.S. 454, 468-70 (1981); (holding that the right to remain silent and the right to counsel are implicated when a defendant is interviewed by a non-confidential expert for competency). Until trial counsel listed him as a penalty phase witness, Dr. Danziger's conversation and opinions concerning Mr. Miller remained clearly under the Attorney-Client Privilege. If what Dr. Danziger "found" was so harmful to Mr. Miller that trial counsel did not want to call him as a witness, trial counsel should not have listed him.

B. Counsel was ineffective for failing to present the full mitigation concerning Mr. Miller's abuse, neglect and trauma.

At trial, no witness, expert or otherwise, explained the full effect of the trauma and deprivation that Mr. Miller suffered while developing into adulthood and throughout his entire life. Rather than brand Mr. Miller with Antisocial Personality Disorder, counsel should have fully developed this area of mitigation. Even if the Antisocial brand was somehow reasonable, presenting the full effect of trauma and deprivation

did not exclude the presenting of the dubious Antisocial Personality Disorder. Had counsel fully investigated Mr. Miller's social history, a detailed mitigation profile could have been presented to the jury. Counsel was deficient in this regard and, as a result, Mr. Miller was prejudiced because the jury was denied an understanding of what he had suffered throughout his life, how this affected his life and how it ultimately led to his conviction for murder and lifelong imprisonment.

As part of the postconviction process, Dr. Glenn Caddy evaluated Mr. Miller and conducted neuropsychological tests. Mr. Miller suffers from memory impairment and brain damage that affects his ability to think. He forgets what he used to know and lacks the ability to process abstract information. Based on the evidence of neuropsychological impairment, Dr. Caddy recommended that a PET Scan be done on Mr. Miller. The PET Scan was conducted showing that Mr. Miller's brain is impaired. Counsel's ineffectiveness and the results of the PET Scan are incorporated here.

Moreover, Mr. Miller's life experience offers a counter explanation to Antisocial Personality that either refutes the diagnosis entirely or, mitigates it greatly. Antisocial Personality, unexplained, functioned to brand him with the mark of a sociopath and caused the jury to deny full consideration of Mr. Miller's mitigating life and social history.

Counsel was deficient for failing to present a detailed social history and Mr. Miller's complete mental condition. Mr. Miller's social history was highly mitigating and would have greatly contributed to his case for life. Mr. Miller was prejudiced because had the penalty phase jury heard the full extent of Mr. Miller's mitigation, there was a reasonable probability that the outcome of the jury's death recommendation would have been different.

Dr. Caddy's testimony at the evidentiary hearing greatly supported this aspect of Mr. Miller's claim. While there was some mitigation presented at the penalty phase, no expert delved into the deep trauma, deprivation and abuse Mr. Miller suffered the way that Dr. Caddy did at the evidentiary hearing. All of what Dr. Caddy testified to was available for presentation at the penalty phase and should have been presented. Mr. Miller never waived the effective assistance of counsel or the right to an adversarial penalty phase. When mitigation is available and compelling and counsel fails to present the mitigation in order to avoid a life recommendation, the adversarial proceedings cease to be adversarial and cease complying with the Constitution's demands for a fair trial.

Mr. Miller had right to have an accurate portrayal of his character and experiences presented to the jury. Dr. Danziger's hostile account of Antisocial Personality Disorder and

stigmatizing branding of Mr. Miller as a Sociopath was in stark contrast to Dr. Caddy's detailed explanation and consideration of Mr. Miller's life experiences as giving rise to the some of the elements of the disorder. While counsel was able at penalty phase to elicit that Antisocial Personality is not chosen, counsel failed to establish that Mr. Miller's actions that gave rise to this diagnosis were not just influenced by the disorder; The conduct throughout his life was the result of the harshest of deprivations and abuse that compelled behaviors and actions that Antisocial Personality alone would not have occasioned.

Mr. Miller was more than the stigmatized person he was labeled as by Dr. Danziger; he was an individual who may have committed bad acts but whose ability to avoid such conduct was severely limited. Throughout Mr. Miller's life he did what he needed to do to survive and to feed his addictions, but his ability to do so was overwhelmingly guided by his past experiences and his lack of resources.

Mr. Miller had a right to the effective assistance of counsel to advocate on his behalf. Advocacy in the legal profession means zealous advocacy. Without a plea to death or some other sort of waiver, this meant that counsel had a duty to challenge the State's case for death and to fully present Mr. Miller's case for life. And, without an adversarial testing, the death sentence was unconstitutionally imposed because death is

only a possible penalty for cases that are the most aggravated and least mitigated. This Court should reverse.

C. Trial counsel was ineffective for failing to have a PET Scan and present the results to the jury.

Trial counsel was aware of Mr. Miller's age, history of drug and inhalant abuse and could have easily found out that Mr. Miller suffered a head injury. Also, counsel at least had some knowledge that Mr. Miller suffered from memory problems. These are all indications and possible causes of brain damage. Trial counsel did in fact have an MRI test done. Based on the results of a reasonably competent mental health investigation and the MRI, counsel should have obtained a PET Scan for Mr. Miller.

Effective counsel would have known the importance of a PET Scan to developing mitigation and filed a motion to obtain one. Mr. Miller has obtained a PET Scan during postconviction. Dr. Frank Wood received the results of the PET Scan and offered the following written opinion:

> Lionel Miller suffers from Behavioral Variant Frontotemporal Dementia, which is a disorder involving progressive deterioration of brain structure and function, disproportionately severe in the frontal and temporal lobe areas of the brain. The disorder has been increasingly well characterized in the clinical and scientific literature, and the defendant [] meets the specific criteria now recognized for the disorder. The brain imaging findings are abnormal in a way that is also highly typical for the disorder. Both the neuropsychological and neuroimaging findings also indicate that the disorder was present at the time of the crime for which the defendant was found guilty. This is an extreme and disabling condition, and in my

> opinion it clearly establishes the statutory mitigator of extreme mental and/or emotional disturbance.

After reviewing the PET Scan results, Dr. Wood found that Mr. Miller suffered from Behavioral Variant Frontotemporal Dementia and found that the two statutory mental mitigators were present. (Vol. VI PCR. 974-77). Had a PET scan been conducted, Mr. Miller's debilitating and progressive disease would have led to the jury weighing this compelling mitigation in conjunction with Mr. Miller's history of trauma and drug abuse, and the jury would have recommended life.

D. Conclusion

Counsel performed deficiently prejudicing Mr. Miller. Had this not occurred, there was a reasonable probability that the outcome would have been different in Mr. Miller's case. This Court should reverse.

ARGUMENT II

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBTAIN A PET SCAN AND PRESENT THE RESULTS OF THE PET SCAN TO SHOW THAT MR. MILLER WAS INCOMPETENT TO WAIVE *MIRANDA*, AND THAT HIS CONFESSION WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY BECAUSE OF MR. MILLER'S BEHAVIORAL VARIANT FRONTOTEMPORAL DEMENTIA. MOREOVER, COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING EVIDENCE OF MR. MILLER'S MENTAL CONDITION THROUGH THE TESTIMONY OF A MENTAL HEALTH EXPERT TO SHOW THAT MR. MILLER'S WAIVER WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY. THIS WAS CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Trial counsel's performance regarding Mr. Miller's interrogation by law enforcement was deficient and prejudicial

because there is a reasonable probability that had Mr. Miller received the effective assistance of counsel he would not have been convicted and sentenced to death. *Strickland v. Washington,* 466 U.S. 668 (1984).

One of the important factors for a court determining whether a waiver of a suspect's *Miranda* rights was valid under the totality of the circumstances is the suspect's "age, experience, background and intelligence." *Ramirez v. State*, 739 So.2d 568, 576 (Fla. 1999). In order for a waiver of *Miranda* to be valid the waiver must be knowing, intelligent and voluntary. The State bears the burden of proving that the waiver of the *Miranda* rights was knowing, intelligent and voluntary. *Id*. 576.

Mr. Miller's confession was a devastating piece of evidence that alone led to his conviction. Trial counsel filed a motion to suppress Mr. Miller's confession. Following the testimony at the suppression hearing, trial counsel made limited argument on the lack of [pre-*Miranda*] recording, that Mr. Miller may have been tired, a possible misunderstanding of the rights under Miranda based on the form used. *See* Motion transcript May 21, 2007, (Vol. I R. 181-85). After the State argument the Court denied the motion to suppress finding that Mr. Miller's "statements were freely and voluntarily given, that he made a specific waiver of his *Miranda* rights." (Vol. I R.188-89).

Counsel was, or should have been, aware of Mr. Miller's

diminished mental functioning due to Mr. Miller's bvFTD, neuropsychological impairment and ongoing substance abuse. Trial counsel should have obtained a PET Scan and a proper neuropsychological evaluation based on Mr. Miller's reports of memory loss. In postconviction, Mr. Miller was evaluated by neuropsychologists Dr. Glenn Caddy and Dr. Frank Wood (discussed in facts section above, and incorporated here by specific reference). Mr. Miller's brain functioning and memory loss could have been presented during the suppression hearing.

With a full presentation of Mr. Miller's condition, the following arguments could have been presented to support the conclusion that Mr. Miller's waiver of *Miranda* was invalid:

Mr. Miller's initial waiver was invalid based on his age, experience, background and intelligence. His memory was affected by his age. Also, the older he became the more diminished his functioning became, including, but not limited to his memory. This was generally the case and also the direct result of Mr. Miller's Dementia. Mr. Miller's background included years of drug and inhalant abuse, sometimes to the point of passing out. This affected his understanding of the rights that he was supposedly informed of by the reading of *Miranda*. While Mr. Miller is not unintelligent, his ability to use his intelligence was diminished by his memory impairment because he was impaired in his ability to remember his past experiences and apply them to

the decision making process that is inherent in a valid waiver of *Miranda*. Therefore, Mr. Miller's waiver of his rights under *Miranda* was not knowing, intelligent and voluntary.

The *Miranda* warnings require that one be informed of the right to remain silent and right to an attorney before and during questioning. If one cannot afford the services of an attorney, one will be appointed without charge. These rights may be exercised at anytime, and anything that the suspect says can and will be used against the suspect. It was found by the trial court that Mr. Miller was informed of these rights. Mr. Miller, however, could not make a knowing, intelligent and voluntary waiver of these rights. He also could not exercise these rights at any later point in the questioning because brain dysfunction did not allow him to recall that he had these rights to exercise. Mr. Miller could not knowingly, intelligently and voluntarily waive rights that he could not exercise at any time because he could not remember that he in fact had these rights.

Counsel was deficient for not obtaining a full understanding of Mr. Miller's mental condition and presenting this at the motion to suppress hearing to show that Mr. Miller's waiver of *Miranda* was invalid. Even without a full understanding of Mr. Miller's mental condition, counsel could have called defense experts to show that the alleged waiver was invalid.

Evidence Presented in Support of Relief

There was plenty of evidence available showing that Mr. Miller was incompetent to waive *Miranda* had trial counsel fully investigated the mental health issues surrounding Mr. Miller. CCRC offered the MRI report from 2007. (Vol. XII PCR. 60-68). Specifically, the "Cambridge Report" on the MRI of Mr. Miller's brain was completed September 14, 2007. The actual MRI was performed August 23, 2007. Mr. Miller was prejudicially unable to present the results of this MRI at the motion to suppress hearing held prior to trial on May 21, 2007 in support of the argument that Mr. Miller was incompetent to waive *Miranda* because of his Hippocampal Sclerosis. The postconviction PET scan performed in 2011 was also unavailable. The interpretation of the PET scan and the opinions of Dr. Wood all could have been utilized in support of Mr. Miller's motion to suppress statements at the trial level. A full investigation into Mr. Miller's mental health was not conducted, and he suffered prejudice as a result.

Dr. Wood described the PET scan showing the atrophy in Mr. Miller's brain was "well into the abnormal range." (Vol. I PCR. 107). He stated that the PET scan images showed that "there's more activity, more brightness in the back of the head than there is in the front of the head." (Vol. VI PCR. 909). He informed: "There's a dark gap in there that is usually not present, at least not in that size. More importantly, it is measurably less intense than it should be or than it normally is

in people of his age." (Vol. VI PCR. 909).

As seen on the MRI and even more pronounced on the PET scan, Mr. Miller is not able to pay attention to the things that are happening around him. When asked by law enforcement if he would waive his *Miranda* rights, he could not competently waive those rights. Impaired frontal lobes, recent long term chronic crack cocaine abuse, and lack of sleep all hinders a knowing, intelligent, or voluntary waiver of *Miranda* here. There was a failure to conduct a full investigation into his mental health and challenge his capacity to waive *Miranda*. If Mr. Miller is unable to pay attention, he is unable to follow law enforcement as they were attempting to explain to him his *Miranda* rights.

In addition to not functioning at the time of the offense, Mr. Miller's frontal lobes were not functioning at the time he allegedly provided a valid Miranda waiver. Counsel failed to present available information in support of the motion to suppress based upon an unknowing, unintelligent, and involuntary waiver of *Miranda*. This disease is progressive, but it was present at the time of the hearing of the motion to suppress.

Had trial counsel fully investigated Mr. Miller's mental health issues, they could have presented powerful forensic evidence in support of suppression of the incriminating statements in this case. Following arrest, Mr. Miller was incapable of providing a valid waiver of *Miranda*.

Gerrod Hooper's Testimony Regarding the Motion to Suppress

Assistant Public Defender Gerrod Hooper testified about the Motion to Suppress Statements filed in this case. He did not seem to have any independent recollection of the issues raised in the motion at all. *See* (Vol. VII PCR. 1108-1128). The MRI reports were completed several months after the suppression hearing, and the defense never moved to rehear the denial of the motion raising the findings of the MRI. They never sought a PET scan in this case, for guilt or penalty phase issues. In sum, there really was no strategic reason for trial counsel's failure to fully investigate all mental health issues as they related to Mr. Miller's ability to waive *Miranda*. Mr. Hooper testified:

> Q. Mr. Hooper, how long had Mr. Miller been up prior to the police administering Miranda in this case?
> A. I don't recall.
> Q. Do you remember how much crack cocaine he had smoked in the days leading up to his questioning?
> A. No. But he was pretty much always smoking crack. He was pretty much -- he was into crack.
> Q. Okay. Do you remember how long he was interrogated?
> A. No.
> Q. Okay. If you had evidence or an expert to testify that Mr. Miller has some very significant memory problems such that he may not remember that he has a right to assert the right to counsel or the right to remain silent midquestioning, would you have presented that evidence?
> A. Okay. Okay. I think I got ya. That is -- if a client -- well, Mr. Miller in this case or any client has the present ability to understand, comprehend and waive Miranda but because of some deficit in memory when you advise them they have the right to have counsel before or during questioning, that if it's a, say an hour questioning that, you know, a half hour

> into the questioning they may forget that they continue to have that right, is that your question?
> Q. Yes.
> A. If I had information on that, then I would have explored that. Yeah, that's a good point.
> Q. Okay. Was there anything preventing –
> A. Excuse me.
> Q. Was there anything preventing you from presenting Mr. Miller's improper brain functioning at the motion to suppress in support of his Miranda waiver not being knowing, intelligent or voluntary?
> A. Well, I don't know if I had any doctors saying that it was.
> Q. Okay.
> A. Not -- I don't know if I had a doctor saying it was voluntary or knowing. If I had a doctor that was saying because his mental condition he couldn't waive Miranda and this test, whatever test, PET scan, MRI, any test would help support that, then there would be nothing physically preventing it.

(Vol. VII PCR. 1126-1127). The following is also illustrative of the ineffective assistance of counsel in this regard:

> Q. What did Dr. Cambridge say about Mr. Miller's competency to waive Miranda and retain what Miranda was during the interrogation?
> A I didn't use him on guilt phase. I didn't use him for that? I believe he was just penalty phase.

(Vol. VII PCR. 1156).

Trial counsel was ineffective for failing to present available mental health evidence in support of the Motion to Suppress in this case. Because of his brain damage, Mr. Miller was mentally incapable of providing a knowing, intelligent, and voluntary waiver of *Miranda* prior to questioning.

ARGUMENT III

MR. MILLER'S CONFINEMENT ON DEATH ROW UNDER A DEATH SENTENCE THAT WILL NOT BE CARRIED OUT BECAUSE OF MR.

MILLER'S DIMINISHING MENTAL FUNCTIONING LEADING TO INCOMPETENCY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT'S TO THE UNITED STATES CONSTITUTION. THIS COURT SHOULD VACATE THE DEATH SENTENCE.

The testimony of Drs. Wood and Caddy clearly proved this claim, providing the necessary evidence to grant relief. At hearing, Dr. Wood established that Mr. Miller suffers from Behavioral Variant Frontotemporal Dementia. (bvFTD). The nature of this disorder is detailed in this brief. Moreover, and also fully incorporated herein, Dr. Caddy testified to brain damage and memory loss and impairment.

As a result of Mr. Miller's bvFTD, brain damage and memory loss, Mr. Miller will be incompetent to be executed by the time he completes the state and federal collateral process. The execution of the incompetent is barred by the United States Constitution, the Florida Constitution and Florida law. Over time Mr. Miller's mental condition and functioning will become further diminished as he awaits execution, under a death sentence for a crime that his memory and understanding of will grow fainter and fainter to the point that Mr. Miller will not understand why he is being executed or under a death sentence. Accordingly, Mr. Miller's death sentence serves no legitimate purpose and violates the Eighth and Fourteenth Amendments. Mr. Miller may inevitably challenge his competency to be executed under *Ford v. Wainright,* should a death warrant be signed

against him. Here, Mr. Miller challenges his remaining under a death sentence when he will not be competent at the time a death warrant is signed, because the specter of death under such circumstances is cruel and unusual under the Eighth Amendment and Fourteenth Amendments to the United States Constitution.

Two important cases must be considered: *Atkins v. Virginia* and *Roper v. Simmons*. While each prohibit execution of a certain class of individuals, the mentally retarded and juveniles, the Eighth Amendment Jurisprudence of these cases provides solid grounding for the instant claim. Each is taken in due course.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that executions of mentally retarded criminals were cruel and unusual punishments prohibited by the Eighth Amendment. *Id.* at 321. The Court reasoned:

> We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender. *Ford*, 477 U.S., at 405

Id.

In *Roper v. Simmons*, 536 U.S. 304 (2004) the United States Supreme Court held that execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by Eighth and Fourteenth Amendments. *Id*. at 578-579. The Court

reiterated its view that a death sentence must serve a legitimate purpose such as retribution or deterrence. Considering juveniles, the Court clearly stated:

> The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson v. Oklahoma*, *supra*; *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *Atkins*, *supra*. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

Id. at 568-69.

In both cases, the Court found that death may not be imposed on a certain class of individuals because of "evolving standards of decency." *See Roper*, 536 U.S. at 589; *citing Trop v. Dulles*, 356 U.S. 86, 100–101, [] (1958); *Atkins*,536 U.S. at 311-12; *citing Trop* at 100-101. In the case of the execution of the "insane" which are those who are incompetent to be executed, the standard of decency did not have to evolve because as *Ford v. Wainwright*, 477 U.S. 399 (1984) makes clear, such standards predate the Constitution. *Id*. at 406-410.

Because Mr. Miller's condition will worsen to the point of incompetency to be executed, his remaining under a death sentence is cruel and unusual punishment. Soon, Mr. Miller will remain on death row understanding that he was sentenced to be executed but not understanding WHY he faces execution because of his declining mental functioning. This implicates the specific

constitutional concerns of the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976).

Contrary to *Gregg*, *Ford*, *Atkins* and *Roper*, Mr. Miller's remaining under a death sentence violates the Eighth and Fourteenth Amendment. To the extent that this could have been brought out before and during Mr. Miller's trial, trial counsel were ineffective. Mr. Miller's living day-to-day with a death sentence when he cannot remember why he received the death sentence or the events that led to the death sentence is unnecessary and wanton infliction of pain. He will experience years of impending death without an understanding of the justification for such a possible pending fate. Retribution will not be served because he will not recognize his death sentence as society's judgment on the wrongfulness of his acts, but rather, an arbitrary act of malice of which he is the victim. This Court should reverse.

ARGUMENT IV

THE STATE OBTAINED THIS CONVICTION AND DEATH SENTENCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS *BRADY* AND *GIGLIO*. THE STATE FAILED TO TURN OVER IMPEACHING INFORMATION ON DAVID DEMPSEY TO THE DEFENSE, SPONSORED, AND FAILED TO CORRECT THE FALSE AND MISLEADING TESTIMONY OF MR. DEMPSEY. ADDITIONALLY, TRIAL COUNSEL WAS LABORING UNDER AN ACTUAL CONFLICT OF INTEREST IN THIS CASE, OR WAS GENERALLY INEFFECTIVE, PREVENTING THEM FROM FULLY DISCOVERING AND UTILIZING ALL AVAILABLE INFORMATION TO IMPEACH MR. DEMPSEY. ANY ALLEGED WAIVER OF THE CONFLICT BY MR. MILLER WAS NOT KNOWING, INTELLIGENT OR

VOLUNTARY.

CCRC ordered and obtained a copy of a November 28, 2006 hearing transcript wherein Mr. Miller's attorneys from the public defender's office discussed the conflict that they had in this case in connection with essential State witness David Dempsey:

> MR. HOOPER: There is a potential problem that I learned previous, Judge, to it and I want to alert Your Honor to it. At the outset there was several issues that could result in a potential conflict. I filed a notice of disclosure to put the Court on notice and Ms. Wilkinson on notice. We–my office represented some witnesses in the case previously. Mr. Miller was brought over at that hearing. He waived any potential conflict. Mr. Miller is comfortable with myself and Mr. Henderson on the case, that is not the problem. [] I would set these two witnesses for deposition first, um, and at the deposition advise them of their representation, former representation. If they didn't have any problem, fine. If they had a problem, I would cease the deposition, set it for status in front of the Court with them to see whether or not they could convince the Court whether or not to remove us.
>
> . . . .
>
> MR. HOOPER: Okay. So I tried deposing them twice. They were street people, and we were unable to serve them. Since then, one of the people, a key witness in the case, a Mr. Dempsy [sic] , had been arrested, represented by my office and released and is now rearrested. He's in the Orange County Jail now and he's presently represented by someone in my office. His deposition is set for -- I believe nine or ten o'clock tomorrow morning, and if Your Honor agrees, I will [] see if he is comfortable with my continuing in the case, and if so, proceed with the deposition. If not, abort the deposition and have -- and reset this for status so he can be present.
>
> THE COURT: Let me ask you this question, would you give me the names of the two witnesses that your office has previously represented?
>
> MR. HOOPER: Yes. The one is – [] David Dempsy. And the other one I can't remember, Deborah Hood. Deborah

Hood we've not located, at least of the both street people. Mr. Dempsy has been picked up on another charge and is in Orange County Jail.
THE COURT: Okay. I take it that Mr. Dempsy is a State witness?
MS. WILKINSON: Your Honor, he's a State's witness and he's fairly essential in the case.
THE COURT: Okay. If Mr. Dempsy was called to testify, what testimony does the State of Florida expect for him to state or say?
MS. WILKINSON: That he was friends with the defendant, that he had contact with the defendant shortly after the murder and how the defendant appeared.
THE COURT: And how did the defendant appear?
MS. WILKINSON: The defendant at that time was bleeding, made some statements, needed to get away from a certain area.
THE COURT: Okay. What statements?
MS. WILKINSON: Your Honor, I can't tell you that off the top of my head, exactly.
THE COURT: Okay.
MR. HOOPER: They would implicate him.
MS. WILKINSON: They were implicating statements but as far as exactly what he said, I can't tell you.
THE COURT: Okay. Now, did you represent Mr. Dempsy?
MR. HOOPER: Myself personally? No, Your Honor.
THE COURT: Okay. Did your cocounsel?
MR. HOOPER: No, Your Honor, which is why I do not technically see a conflict. I merely filed it with the Court in the interest of disclosure.
THE COURT: Now, did you [] or your colleague [] go into the archives of the file room of the Public Defender of the Ninth Judicial Circuit, Mr. Robert Wesley's office, and pull out Mr. Demsy's [sic] file and look for any notes or what we would call work product?
MR. HOOPER: No. The exact opposite, Your Honor. I made a conscious decision not to do that.
THE COURT: And cocounsel --
MR. HENDERSON:[]I have gone online[]. All I have on Mr. Dempsy is all of the public records so I have no private information on Mr. Dempsy.
THE COURT: Okay. So, in other words, the two of you don't possess any so-called work product, obviously, information that can be gathered by your own independent investigation that you would probably undertake that you would do with any particular

witness, correct?
MR. HOOPER: That is correct, Your Honor.
THE COURT: Cocounsel.
MR. HENDERSON: That is correct, Your Honor.
. . . .
THE COURT: Now, I do not want to misquote any policy or any statement that Mr. Wesley may have said because I don't have a photographic memory, but I have some memory of something he said, and I believe that I see just maybe about there was some type of new ruling that said as long as the PD didn't actually represent that person, there was, quote, not a conflict or what's the -- I know there has been a revolution [sic] in your new office.
MR. HOOPER: That is correct, Your Honor, as long as Mr. Henderson and I have not had privileged information, there is not a conflict per se. If there was, I would be before you on a motion to withdraw, which is why we are not moving to withdraw. Of course, it is aside from the conflict consideration and we -- as Your Honor said, we see no conflict. There is a course of broader duty to disclose and I felt compelled to disclose that to Your Honor and to Ms. Wilkinson in this case. She decided to move to conflict and also to Mr. Miller, he is comfortable with the representation. That leaves the two witnesses, one who will be deposed tomorrow. The reason that I propose to abort the deposition until he's brought before Your Honor, if he objects, if he objects, is to give him the opportunity to convince Your Honor that there's a conflict. Even though I don't see one. One of -- aside from the conflict issue, which I think you are a hundred percent correct on that, Your Honor, there's also the collateral issue of the Bar. And I am trying to protect myself and my cocounsel, Mr. Henderson, from any Bar grievance filed by Mr. Dempsy. So, I think, if in the deposition, which is why I haven't gone and saw him in jail, I want to make sure Ms. Wilkinson or someone from her office is present. If he says no, I object, I don't want you cross-examining me, I think he should be afforded the venue to come in and pitch his case, if he will, to the Court and let the Court make that determination before we proceed.
THE COURT: Ms. Wilkinson, do you have any comments? I am a little lost, Mr. Hooper, as to what he is going to tell me other than what you have told me.

MR. HOOPER: Well, probably not, but if I go into deposition tomorrow and say I have to disclose that one of the other attorneys in my office currently represents you on a pending case and my office has represented you in the past, I don't know anything about you or your case, I see no conflict, Judge Perry, on the information I proffered to him. Cease. No conflict. Would you like to proceed with deposition? If at that point he says, okay, I have no problem moving forward, but if at that point he says, no, I see it as unethical, I have a problem with you proceeding in the case and taking my deposition and cross-examining me at trial. I would just feel a tad more comfortable if he was given the chance to be brought over here and then you could ask him, Mr. Dempsy, why do you perceive there's a conflict? And then you could make a ruling, [] but after having heard from him. I'm a little paranoid with the Bar complaints and this increases my comfort level.
THE COURT: No, I can understand where you're coming from. Mr. Miller, you have been sitting there attentive but quietly [;] you heard your lawyer represent that you have no problem with him and Mr. Henderson representing you []. Is that true, sir?
THE DEFENDANT: Yes, sir, Your Honor, that's true.
THE COURT: Have you had full opportunity to discuss with them the pros and cons regarding this representation of you?
THE DEFENDANT: Yes, Your Honor, I have.
THE COURT: Any questions whatsoever?
THE DEFENDANT: Um, only question I had, sir, is these preliminary hearings, we signed a waiver last time I was in court where I won't need to attend these preliminary hearings [;] I don't know what your feelings are on that, but --
THE COURT: Well, I have worn it out, Mr. Miller, and I have heard Mr. Henderson tell me numerous times that death is different and that you have an absolute right to be here. And most of the cases say that you need to be here. This is your first appearance before me and so if you-all can enlighten me as to why is it that you don't want to be present at hearings, or is it just certain hearings you don't want to be present at?
MR. HENDERSON: May I speak?
THE COURT: Mr. Henderson.
MR. HENDERSON: Your Honor, I think clearly although death is different as far as waiving his presence, Mr.

> Miller can waive his presence [;] it is quite a hardship for him to attend status hearings and that being they get him up at -- they got him up this morning at 3:30 in the morning to bring him here. His diet is limited to bologna sandwiches.
> . . . .
> MR. HOOPER: Like I said, Mr. Dempsy will be in tomorrow morning. If he has no objection, good, if he has an objection, we have to jump through the other hoop. It still could be done fairly quickly.

November 28, 2006 Hearing, pages 3-4, 4-7, 8-12, 14. EH Defense Exhibit 7. *See* Vol. XII PCR. 161-182.

David Dempsey's Deposition and the Conflict Problem

On February 26, 2007, Mr. Hooper conducted the deposition of David Dempsey. *See* Vol. XII PCR. 95-158. Mr. Hooper promised Mr. Dempsey at the deposition that with regards to cases wherein he was represented by the public defender's office, "I haven't discussed your cases with any of the attorneys here," and "I haven't looked in your folders." (Vol. XII PCR. 98). He assured "I don't intend to go down in the basement or wherever they keep the old files and peek in them," "But I would physically have that capability." (Vol. XII PCR. 100). David Dempsey answered, "I trust you," and that with regards to him being questioned by Mr. Hooper, "I'm very comfortable." (Vol. XII 100). He also agreed to waive any potential conflict of interest. (*Id.* 100).

The problem with this situation is, Mr. Hooper appears to be more concerned about the rights of the probationer facing cross-examination rather than his actual client facing the death penalty in that proceeding. Apparently afraid of some bar

complaint that Dempsey might file against him for cross-examining him too hard, decided to pursue a less-than-vigorous investigation into ripe and available areas of bias and credibility. It was indeed within Dempsey's probation file where counsel should have looked to find vital impeaching information. At trial Dempsey suggested that he would never be involved in a robbery, and that he allegedly sought to protect Deborah Hood and his mother from Mr. Miller. (Vol. XV R. 870, 883, 885). He should have been impeached.

Probation Files of David Dempsey, Impeaching Information

Records in the possession of the State, specifically, the Department of Corrections Probation and Parole Services, show that David Dempsey attempted to rob his mother while on probation. Relevant probation files were introduced at the evidentiary hearing. *See* Vol. XII, PCR. 1-46. An entry in the PP-76 probation notes reflects that David Dempsey's mother stated that on "10/14/07, [Dempsey] became violent, demanding money and her car keys, at which point she called the police." Vol. XII, PCR. 12. This information would have refuted David Dempsey's at least two representations to the jury that he himself would never be involved in a robbery. Dempsey also testified that he was calling his mother to warn her about Mr. Miller. The PP-76 notes reflect that it was her own son that Ms. Dempsey had to fear. This is information that the State should have forwarded

to the defense under *Brady v. Maryland,* 373 U.S. 83 (1963). Additionally, under *Giglio v. United States,* 405 U.S. 150 (1972), the State should not have left uncorrected testimony suggesting that David Dempsey would never be involved in a robbery.

The PP-76 notes also reveal that immediately following reports that David Dempsey threatened his mother, "[David Dempsey] stated [to his probation officer that] he will be testifying as a state witness in case number 48-2006-CF-005222-0/A. S[ubject] stated jury selection will begin on 11/13/07. MDR." Vol. XII, PCR. 12. This information shows that David Dempsey, who would be facing a violation of probation, was attempting to curry favor with the State for his help in assisting the State by testifying against Mr. Miller. Defense counsel should have investigated these issues, but apparently counsel refrained from investigating the information within the probation files for fear that this could lead to a bar complaint by Dempsey. In essence, trial counsel had a duty to show that Dempsey was violating his probation by attempting to rob his mother because such information would help Mr. Miller at trial to impeach Mr. Dempsey. But, trial counsel could not do this because the same office would presumably be trying to show another court that Mr. Dempsey was doing fine on his probation. Though the record in this case is clear that Mr. Dempsey was

waiving any conflicts of interest, the record is not so clear that Mr. Miller waived, or even understood, the potential conflicts of interest that came to fruition here. Though it is clear that Mr. Miller did not want to be awakened at the jail at 3:30am and fed bologna sandwiches throughout the day, it is not so clear that he knew he was waiving his right to have Mr. Dempsey vigorously investigated and cross-examined.

Regarding witness Debra Hood who was discussed at the November 28, 2006 hearing, trial counsel was ineffective for failing to investigate her and failing to learn that she too had been robbed by Dempsey. She recalled that Dempsey beat her a few times to obtain drugs while he was staying with her, and that she even had to try and defend herself against him with a baseball bat. The jury who convicted Mr. Miller should have heard this impeaching information about Dempsey.

The Law on Conflicts of Interest

Mr. Miller "must demonstrate that counsel labored under an actual conflict of interest that adversely affected counsel's performance." *See Connor v. State*, 979 So. 2d 852, 861 (Fla. 2007). Mr. Miller has met this burden in this case with regard to witness David Dempsey. *See also Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *Wright v. State*, 857 So. 2d 861 (Fla 2003). The public defender's office actively represented the conflicting interests of David Dempsey and Lionel Miller, and in so doing

failed to dig far enough into the probation files to gather vital impeaching information against this damaging witness.

Evidence Presented in Support of Relief

Gerrod Hooper testified at the evidentiary hearing and provided testimony in support of this claim. From the very moment that Mr. Miller was arrested for this crime and the public defender's office was appointed to represent Mr. Miller, the office labored under a conflict of interest because many attorneys in that office knew the victim's son, attorney Christopher Smith.

The problem here is Mr. Hooper's apprehension to investigate Dempsey's criminal cases to find impeaching information. Had he not been conflicted, had he fully investigated Dempsey's cases, he could have found the impeaching information.

Though mother and son were apprehensive to admit it in a court of law, David Dempsey took his mother's car keys from her without permission by force, and attempted to force her to give him money as well as reflected in the probation files. This was a robbery and an attempted robbery under Florida law. Fla. Stat. Ann. 812.13 (2007) defined robbery as follows:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Fla. Stat. Ann. 812.13 (2007). Clearly this incident between mother and son meets the statutory definitions of the crimes of robbery and attempted robbery.

At the very least, there was a use of force by Mr. Dempsey during this incident. Mr. Dempsey is larger and stronger than his mother. In light of his mother's and former roommate's testimony, Dempsey is not to be believed.

Testimony from his mother and Deborah Hood not only would have directly impeached Mr. Dempsey at trial, but it would have showed that he was not a stranger to becoming violent with women to obtain more drugs. *See* (vol. XV R. 870). Dempsey was not the passive and peaceful drug user that he painted himself out to be on the stand. He certainly had a motive to commit the instant murder. Trial counsel was ineffective for failing to present this information.

When Dempsey testified he lied about not having been involved in any robberies. Not only had he robbed his own mother, as corroborated by the probation files, but he had also robbed his own landlord, Deborah Hood. *See* (Vol. VI PCR. 846-864). As shown by this evidence, drug fiends will go to great lengths to obtain more drugs. This information was available to the defense had they not been laboring under conflicts of interest, and had they simply investigated these issues.

Whether through conflicts of interest, *Brady* and *Giglio* violations, ineffective assistance of counsel, or a combination of all of these factors, vital impeaching information about David Dempsey did not reach the jury who convicted Mr. Miller. This Court should reverse.

CLAIM V

MR. MILLER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION AND DURING THE PENALTY PHASE. THIS VIOLATED MR. MILLER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Trial counsel was ineffective for failure to object to the court's and the State's improper comments regarding the venire's feelings about the death penalty during *voir dire*. During jury selection, multiple times, the court made improper comments regarding an alleged necessity to vote for the death penalty. Trial counsel was ineffective for failing to object to these improper comments. Certain comments had the effect of misleading the jury to feel that they could not serve on the jury unless they were prepared to cast a vote for death. Mr. Miller was prejudiced because potential jurors were struck and some jurors sat based on misinformation about the death penalty process.

The following comments were made by the court early in jury selection which would lead the venire to believe that the court favored the death penalty in first degree murder cases:

> THE COURT: Some people believe that anyone who is convicted of first degree murder should automatically get the death penalty.
> JUROR BADGE 285: Yes.
> THE COURT: But unfortunately that is not the law.

(Vol. X R.103). Trial counsel should have objected and asked for a curative instruction at that point. The court continued, without objection or a defense motion for curative instruction, to improperly alienate the jurors who possibly seemed apprehensive to impose the death penalty. The court inquired:

> THE COURT: [I]f the facts and circumstances in this case under the law would warrant a sentence of death, could you vote to impose that?
> JUROR BADGE 937: I believe so.
> 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 BADGE 937: Well, I have never been in this situation before.
> THE COURT: I know you haven't.

(Vol. X R.122). This juror expressed no hesitation whatsoever in her response about the imposition of death. And even if there was hesitation in her response, she would still qualify for service. *See Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968).

For the court to press this juror in this fashion is to impress upon her the notion that the court prefers death over life, that death is the appropriate penalty in the case, and that unless she absolutely is inclined to vote for death, she is unsuitable to serve on the jury. A "death-qualified" juror is not

a juror who should be predisposed towards recommending death in a capital case. Much to the contrary, because of confusion in this area of law, this Court overhauled and amended Florida's jury instructions in 2009. This penalty phase was tried in 2007, but it has never been the law in Florida that a death sentence be mandated in a capital case. The court and the State were wrong to suggest otherwise, and the defense was ineffective for failing to object to certain comments made during *voir dire.*

In 2009, this Court specifically clarified the law in capital sentencing in this regard:

> And second, in the latter portion of the instruction, we have authorized an amendment stating that **the jury is "neither compelled nor required to recommend death," even where the aggravating circumstances outweigh the mitigating circumstances** (emphasis added).

In re Standard Jury Instructions In Criminal Cases-Penalty Phase of Capital Trials, 22 So. 3d 17, 22 (Fla. 2009).

When Juror 937 was pressed about an alleged requirement of voting for death when allegedly "under the law" the penalty was "warrant[ed]," this was improper. There is never a requirement under Florida law that death *must* be recommended in a particular case, even where the aggravators clearly outweigh the mitigators. Prospective jurors on this panel were given the mistaken impression that a vote for death was compelled under Florida law where the aggravators outweighed the mitigators.

The State addressed Juror 467 as follows:

> MR. LEWIS: And what the judge is basically asking you. . . .[can you] make your decision based on the evidence and those factors you have to weigh. Can you do that, solely base your decision–
> JUROR BADGE 467: Yeah.
> MR. LEWIS: In other words, if the weight of the evidence leans toward death, then your vote, according to the law, would be death. If the weight of the evidence in terms of the mitigators outweigh the aggravators, weighs towards life imprisonment, are things that warrant a life sentence, do you feel you can vote for life in that circumstance?
> JUROR BADGE 467: Yes.
> MR. LEWIS: And, again, you can vote for death if the circumstances support death.
> JUROR BADGE 467: Whichever one weighs out the most.
> MR. LEWIS: Nothing further.

(Vol. XI R.228-29). At this point, the defense should have objected based on *Cox v. State,* 819 So. 2d 705 (Fla. 2002) and *Gregg* v. Georgia, 428 U.S. 153 (1976). Unbeknownst to Mr. Miller's jury, a vote for life was still an option here even where the aggravators arguably might have "weigh[ed] out the most." Under Florida law, *life* is mandated when mitigators outweigh the aggravators. But death is ***not mandated*** when the aggravators outweigh the mitigators; life is still an option. Regarding Juror 275 who actually served on the jury, the State improperly and erroneously tainted this juror as follows:

> [W]hat 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 [impose death] 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 [imposing death] or don't want to do it [impose death], how would you resolve that conflict?
> JUROR BADGE 275: 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.
> MR. LEWIS: Even if you're not required to you feel strongly enough about your duties as a juror and your commitment, your oath, to follow the law that you would abide by the letter of that law?
> JUROR BADGE 275: Yeah, I would.
> MR. LEWIS: You sure you would?
> JUROR BADGE 275: I would have to.
> MR. LEWIS: Okay. I mean, are you sure you're sure? That's my question. You've answered it in the I believe [referencing the Court's earlier admonishments about "believe"].JUROR BADGE 275: I'm certain that I would follow the law [and impose death].
> MR. LEWIS: Thank you.
> THE COURT: Mr. Henderson, you may inquire.

(Vol. XI R. 255). This all was said without objection

There is a notation at Vol. XI R. 258 that "(Juror [275] leaves area.)," and then both parties do not make any challenges. The transcript then reflects that Juror Badge 789 is addressed. *If* the jurors were individually addressed during *voir dire*, and there was no collective improper instruction being given, this claim does not fail. Juror 275 *was* misinstructed, and *did in fact serve*. Therefore there is prejudice here. Additionally, in the jury deliberation room, the jurors affected by the erroneous jury instructions, such as Juror 275, could have tainted the

remaining serving jurors by repeating misconceptions of capital sentencing law as instructed.

It is *never* a duty under the law to impose the death penalty. A juror always has the option to dispense mercy and vote for life. At (Vol. XI 317-321), the State addressed Juror 16 at length and gave her the erroneous impression that unless she could absolutely commit 100% to vote for death, she could not serve on the jury. Juror 16 finally stated, "I guess I don't think I could commit a hundred percent to that [the death penalty]." This "concession" should not prohibit her from serving on the jury, it should qualify her for serving on the jury. This juror's hesitation qualifies her to serve on the jury because she is announcing a willingness to still consider life as a possible penalty even where the aggravation was overwhelming. That is actually the law! The State's understanding and recitation of capital sentencing law here is backwards. As in *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000), the State's comments during jury selection in the case at bar tended to improperly "cloak the State's case with legitimacy as a bona-fide death penalty case."

This Court granted penalty phase relief in a death case where the prosecutor made the following statement: "[Y]ou may not want to carry out your full responsibility under the law and just decide to take the easy way out and to vote for death, I'm

sorry, vote for life.... I ask that you not be tempted to do that, I ask you to follow the law. . . .And then under the law and the facts death is the proper recommendation." *Ferrell v. State*, 29 So. 3rd 959, 987 (Fla. 2010). This Court held in *Ferrell* that "the prosecutor improperly argued that his case deserved the death penalty" based on the following comments to the jury: "The State doesn't seek the death penalty in all first degree murders, it's not always proper to do that.... But where the facts, where there are facts surrounding the murder that demand the death penalty, the state has an obligation to come forward and seek the death penalty. This is one of those cases." *Id.* at 987. This Court found that "the failure of trial counsel to object to even one of these clearly improper remarks left the State's case virtually untested. The State's arguments that the jury would be violating their lawful duty if they did not vote for death [], the statement that this case deserved the death penalty [] all serve to strengthen the contention that our confidence in the outcome of the penalty phase is undermined." *Id.* at 988. In the case at bar, the State's repeated references to an alleged requirement to vote for death under the law warrants relief in this case.

Juror 268, another individual who served on this jury, was informed by the State prior to her service, without objection that if the aggravators outweighed the mitigators she must

"follow the law" and "vote for death."(Vol. XII R. 462). (Emphasis added). The law, contrary to the State's suggestions to Juror 268 above, does not mandate death where the aggravators are not outweighed by the mitigators.

The State improperly pressed "Juror Badge 58" as follows:

> [Would you] follow the law even if it was different than your personal belief? Let's say the Court read you the law, do that balancing test, you determine that the death penalty under the law is appropriate, um, but personally it didn't rise to that personal standard coming in where you thought the death penalty would be appropriate, so how would you resolve that conflict in your personal belief compared to the law.

(Vol. XII R. 475). The State is wrong here to suggest that death and only death is the appropriate sentence under the law after a "balancing test" is performed that favors the aggravators. A personal belief that life is warranted, and that a vote for life should be cast is actually proper under the law.

Although Juror 58 was stricken, this was not before, without objection from the defense, the State misinformed her that "the law" was "in conflict" with "giv[ing] some[one] mercy," Vol. XII R. 484, and that "mercy doesn't have anything to do with the law." (Vol. XII R.485). Mercy actually has everything to do with the law, and such confusion is one reason why Florida's standard jury instructions were overhauled.

Juror 43 who served was erroneously pressed by the State:

> [THE STATE]: . . . .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. . . .I know I have to make the check [for death] under the law, I have these religious beliefs, but I have to follow the law [and vote for death]. . . .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 [i.e. vote for life]. . . .is there a chance, even a small one, that you may vote [for life] 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 [for death] because of those religious beliefs?
> . . . .
> [State still addressing Juror 43]: Okay. And do you have any doubt whether you could set aside that personal tension and make your decision [for death] based on the law?
> JUROR BADGE 43: No. I don't have doubts in that regard.

(Vol. XII 530-531). Because the defense failed to object here and have this juror correctly instructed by the court that he could lawfully dispense mercy and impose life regardless of the weighing process, Mr. Miller was prejudiced because at least one erroneously instructed juror served on his jury after promising the State that he would adhere strictly to a weighing process, and set his personal beliefs aside that may favor mercy and life rather than death. This juror needed to be immediately informed that death is not ever compelled under the law, even where the evidence weighs largely in favor of aggravation.

As a matter of record, the defense made no objections specific to the manner and substance in which the jury was being questioned during *voir dire*. The lower court even noted at the

conclusion of *voir dire* in response to an unrelated objection and motion that there "was no objections lodged to the process through the more than two and one-fourth days that we've gone through this whole process." (Vol. XIII R. 590). Objections certainly should have been lodged.

Penalty Phase Problems--The Prejudice Continues

Trial counsel had an opportunity to inform the jury in an opening statement that the weighing process was not stringent and inflexible, but they waived the opportunity when they passed on an opening statement. (Vol. XVIII R. 1326). Even before waiving this opportunity, trial counsel was ineffective for failing to object during the State's opening when they continued to misinform the jury that because the aggravation will "far outweigh" the mitigation, "there's only one penalty that is appropriate for this case." (Vol. XVIII 1325-1326). Unopposed and uninterrupted, the State opened with the following:

> . . . .[T]he State's quite confident that you will find th[e] aggravating factors far outweigh his background, that may not have been the best childhood, but the State is quite confident that you will find that they far outweigh the circumstances of his childhood and his adult life and obviously his addiction, you've already heard about, the State is quite confident that you will find there's only one penalty that is appropriate for this case, and that is the ultimate sanction in this state, the death penalty.

(Vol. XVIII R. 1325-1326). The defense should have objected here. There was more than "one penalty" available here.

The defense was ineffective for failing to object when the State in its closing argued that this case came shrouded in legislative legitimacy that the death penalty should be imposed under law. Unopposed, the State argued: "remember back on jury selection–because all of you were brought over to that corner of the room and talked about following the law in this case and whether or not you could follow the law." (Vol. XIX R. 1581). The State here is referencing the "death penalty qualification" process that occurred during *voir dire* in this case. During that process, the State gave the false impression that in order to be qualified to serve on the jury, they were required under law to recommend death if the aggravators outweighed the mitigators. The State's closing arguments mirrored and repeated those false instructions contrary to *Brooks and Ferrell, Id.* Trial counsel never explained to the jury that their decision could lawfully go beyond the simple "weighing process." This was ineffective.

The Final Instructions, Prejudice Solidified

Immediately following the defense closing argument, the court instructed the jury in part that they would have to determine "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances." (Vol. XIX R.1605). Although these were the standard instructions at the time, the court here reinforced the mistaken notion that under Florida law it is strictly a weighing process that determines the death or

life recommendation. As such, it was imperative that trial counsel educate the jury at the penalty phase that under the law it was not strictly a weighing process, that life was always an option in any case. They ineffectively failed to do so here.

At Vol. XIX R.1607, the court instructed the jury on the seventh aggravating factor for their consideration. “Seven, the victim of the capital felony was particularly vulnerable due to advanced age or disability.” Soon thereafter, the jury was again reminded that they had a:

> duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider if established by the evidence are: One, the age of the defendant at the time of the crime. Two, any of the following circumstances that will mitigate against the imposition of the death penalty. A, any other aspect of the defendant’s character, record or background. B, any other circumstance of the offense.

(Vol. XIX R. 1608).

In practicality, the defense really only offered one mitigating factor for consideration: age. The 2007 standard jury instructions coupled with trial counsel’s errors and omissions at the penalty phase misled this jury to believe that life was not a possible sentence under the law in this case.

Testimony Supporting of Relief

The prejudice here is compounded against Mr. Miller because these improper comments from the State are coming on the heels of improper comments by the court. Mr. Hooper described this

trial as a “weird situation” because he stated that “Mr. Miller, if found guilty, did not want a life sentence.” (Vol. VII PCR. 1087). In any event, in no way was trial counsel prohibited from objecting and preserving the record on appeal. As a matter of fact, *Strickland* and the 6th Amendment require that objections be made and the record be preserved. Trial counsel failed in this regard. This Court should reverse.

CUMULATIVE ERROR

Due to the errors that occurred individually and cumulatively at both the guilt phase and penalty phase, this Court should grant relief from this unconstitutional conviction and death sentence.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Miller respectfully urges this Honorable Court to reverse the circuit court’s order denying relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished through the portal to opposing counsel and furnished by e-mail to Lisa-Marie Lerner [LisaMarie.Lerner@myfloridalegal.com] and [CapApp@MyFloridaLegal.com] on this 23rd day of September, 2013.

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I hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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