Filing # 8848266 Electronically Filed 01/06/2014 04:17:04 PM

RECEIVED, 1/6/2014 16:18:42, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-516

LIONEL MICHAEL MILLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY 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."

REPLY TO 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.

Under the Sixth Amendment to the United States Constitution, Mr. Miller had the right to the effective assistance of counsel to fully present Mr. Miller's case for life and to fully contest the State's death case. Adequate performance of defense counsel contributes greatly to the fairness and efficacy of Florida's death penalty system. It is essential to the constitutionally required limitation of the death penalty to the most aggravated and least mitigated cases. Counsel failed to fulfill this role because counsel's performance was deficient. Counsel's deficient performance prejudiced Mr. Miller because he was placed in the category of individuals subject to execution without the full consideration of his mitigation. Had this not occurred, there was a reasonable probability the outcome would have been different. Mr. Miller was and remains the individual that the State is seeking to execute. He never waived his right to a penalty phase hearing before the jury or accepted a death sentence.

Without an on-the-record knowing, intelligent and voluntary waiver of counsel or counsel's advocacy, Mr. Miller had the

right to the assistance of effective counsel. The State's Answer Brief and the lower court's order do not refute that Mr. Miller is entitled to relief based on trial counsel's ineffectiveness. This Court should reverse.

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.

The State did not call Dr. Danziger as a State witness to provide further information the jury could consider in mitigation. The State called Dr. Danziger in furtherance of the State's goal of seeking Mr. Miller's execution. Once listed as a defense witness and deposed by the State, Dr. Danziger was readily available to join the State's effort.

Dr. Danziger's testimony could have easily been avoided. All defense counsel had to do to prevent the harmful effects of Dr. Danziger's testimony was not list Dr. Danziger as a witness. Whatever perceived credibility that counsel originally saw in calling Dr. Danziger, e.g. his medical license, his Harvard undergraduate degree, was credited to the State by the jury. The alleged credibility offered by Dr. Danziger was to the prejudice of Mr. Miller. Dr. Danziger did not refute Mr. Miller's mitigation in the sense that he found that the defense experts' opinions were incorrect. Dr. Danziger's harm to Mr. Miller was that he recast Mr. Miller's mitigation as aggravation with the

use of previously confidential information. Here, the State's right to present rebuttal testimony was a thin guise for the admission of harmful and unpermitted aggravating evidence.

Antisocial Personality Disorder may be mitigating if placed in context of a life of trauma and deprivation as seen with the testimony of Dr. Caddy. It is absolutely not mitigating when placed before by the jury by an expert with no context and empathy. Antisocial Personality Disorder is admissible because it is a mitigating part of the defendant's character. The defendant's bad character itself has no relevance to supporting a death sentence. The death penalty is not imposed in Florida because of an individual's status but because of conduct. The closest the jury comes to weighing the defendant's character against him is when prior record or imprisonment is considered. Such consideration, however, never approaches a final and total judgment on the individual's lack of worth as a human being. The death penalty is not imposed because of what a person is but rather, what the person has done.

Dr. Danziger's testimony went far beyond agreeing with the defense experts. Dr. Danziger branded Mr. Miller with the stigmatic judgment that Mr. Miller was a "sociopath." *See* (Vol. XIX R. 1517-18). Accurate and professional diagnosis defines the disease or disorder the person suffers from, not the person. If a medical doctor finds that someone has a disease, the doctor

states that the person has the disease, not that the person is the disease. The careful use of language avoids sufferers having to endure the stigma on top of their disease.

The State's Answer argued that there was some sort of strategic justification for trial counsel listing Dr. Danziger because it eliminated the possibility of the State calling Dr. Colistro who the State had contacted and "was preparing a damning report on Miller and knew all the details about Mr. Miller's prior convictions and actions in prison." AB at 39. The State then concludes that "Henderson clearly had strategic reasons for hiring Danziger and listing him as a witness, as he for [sic] preferring him to Colistro." AB at 40.

The alleged "damning report" appears to be contained at Exhibit 14. *See* (Vol. XXIII PCR. 1809, et seq). Of course, while it may technically be a report, it is hardly damning when it is essentially a summary of the police report and Mr. Miller's interrogation, facts which were testified to in the guilt phase. The report does not discuss anything about "all the details about Mr. Miller's prior convictions and actions in prison." Considering that there was testimony from law enforcement and Mr. Miller's parole officer about law enforcement's version of Mr. Miller's crimes and incarceration, Dr. Colistro, Ed.D, could offer no further "damning" testimony unless he was present at the crime scenes or was psychic.

Assuming that Dr. Colistro was coming to Florida to "damn" Mr. Miller, his damnation was still limited by the rules of evidence and the fact that damnation is limited under Florida's death penalty scheme. The State is allowed to present evidence of prior violent felonies and the circumstances of prior violent felonies. If Dr. Colistro saw Mr. Miller as part of the parole process in Oregon he might have been able to testify about the circumstances of his prior violent felonies, although there was little he could add. Other than that, Dr. Colistro's thoughts and impressions on the police reports were not relevant.

Mr. Henderson never stated that there was an agreement that if the State called Dr. Danziger as a witness the State would forgo calling Dr. Colistro. As he explained, that while he would have preferred Dr. Danziger to testify against Mr. Miller rather than Dr. Colistro, whether the State called Dr. Colistro was entirely up to the State. (Vol. VIII PCR. 1212). Mr. Henderson did agree with the State that he was "contending" with the possibility that the State would call Dr. Colistro as a rebuttal witness. *See* (Vol. VIII PCR. 1211). Certainly, as trial attorney, he had a lot to contend with in preparing for the penalty phase. That does not mean that anything Dr. Colistro said would be admissible. If Dr. Colistro was called for some purpose he would have to "contend" with Dr. Colistro as he would any other witness - - through objections and questioning.

The State saw that they could have the benefit of a "credible" expert to facilitate an *ad hominen* attack on Mr. Miller. Dr. Colistro paled as a harmful witness when compared to Dr. Danziger. Dr. Colistro apparently had never seen Mr. Miller after the homicide in Florida but, even if he had, he would not have been able to gather the type of privileged information that Dr. Danziger did. Dr. Danziger spoke to Mr. Miller under the false premise of being a defense expert sent by his own attorneys to aid him. Dr. Colistro, some sort of prison psychologist, would have interviewed Mr. Miller with full knowledge that Dr. Colistro was certainly not there to help. If indeed Mr. Miller were able to remember Dr. Colistro, he would have remembered that he never in fact had helped him and would have understood that he was a State expert there to "damn" him.

Trial counsel, exercising a basic analysis of whether to list Dr. Danziger as a defense witness should not have listed Dr. Danziger as a defense witness, thus enabling the State to call him as a State witness. Counsel's own notes establish that Dr. Danziger was adversely biased against Antisocial Personality Disorder, a genuine psychological ailment and, by exercise of this bias, he prejudiced Mr. Miller:

> 11-8-07 (Thursday)
>
> State deposed Dr. Mings and Dr. Danziger today. Mings was very helpful - Danziger was less than helpful and

> seemed to actively go out of his way to assist the state. Presents the dilemma of whether to call him on direct or let State call him now as part of their case and have him on cross. State asked such questions as what mitigation did you see in ASPD and he says very little - he also volunteered that I had provided him with a copy of Florida Supreme Court case squarely holding that ASPD is a mitigating circumstance – he just doesn't agree that it is entitled to any weight. A motion in limine re areas of cross-examination may be necessary - and there is little confidence that he will not volunteer something improper on direct – other areas that were damaging were his references to Miller claiming to have received Elavil and other meds in Oregon DOC to curb his aggression re fighting w/CO's there, and other area was the fact that Ms. Smith was too attached to the rings/jewelry to give them up as he thought she would, and he tried to take them from her twice - once i/s when neighbor intervened and 2d time when he encountered her outside – Will meet w/Miller to see what he ultimately wants to do with Danziger - either not present him, let State call him and then deal with him on cross, or risk direct with him.

(Vol. XXIII PCR. 1736). The decision to call Dr. Danziger was trial counsel's alone. The decision referenced at the end would have easily been avoided by counsel simply not listing Dr. Danziger as witness. If Dr. Danziger could not be convinced by the rest of his profession, Mr. Henderson, or the opinions of this Court, that Antisocial Personality Disorder was mitigating in the context of trauma and deprivation, Dr. Danziger would certainly not see the light during his penalty phase testimony either for the State or during crossexamination.

A very recent United States Supreme Court opinion, *Kansas v. Cheever*, 134 S. Ct. 596 (2013), addressed the state's use of

evidence from a court-ordered evaluation from a dismissed federal case in a subsequent state prosecution as rebuttal testimony. *Cheever*, however, does not justify counsel's ineffectiveness in listing Dr. Danziger. First, Dr. Danziger was not a court-appointed expert. He was solely a confidential expert hired by the defense purportedly for the benefit of Mr. Miller. Second, the testimony cannot fairly be called rebuttal of the defense case. The essence of Dr. Danziger's testimony was a redescription of Mr. Miller's Antisocial Personality Disorder based on confidentially-obtained information from Mr. Miller. He did not rebut the testimony of Dr. Mings and Dr. Edwards; he merely used his diagnosis to open the door for what was nothing more than improper character evidence, nonstatutory aggravation and the gross stigmatization of Mr. Miller.

The State argues in its statements of fact that Mr. Henderson "did advise Miller that anything that he said to Dr. Danziger could be used against in him in the penalty phase, saying that the initial evaluation would remain confidential until Dr. Danziger was listed as a witness. The defense would only list him after notifying and discussing it with Miller, which they did before they listed." AB at 18; *citing* PCR 8:1193. Whether the ambiguity was intentional or not, the State's account of Mr. Henderson's response does not fully reflect the statements of Mr. Henderson. The actual portion of the

transcript cited by the State reads as follows:

> Q Did he waive -- did he have the right to be evaluated by a confidential expert?
> A. Yes.
> Q. Did he have the right to present mitigation without the State commenting on his right to present mitigation?
> A. That's a little broad. They can't comment on his right to present mitigation. I agree with that.
> Q. And when Dr. Danziger was hired, he was, in fact, a confidential expert?
> A. At that time, yes.
> Q. Had you personally advised Mr. Miller that anything he said could be used -- anything he said to Dr. Danziger could be used against him in his penalty phase?
> A. I spoke with Mr. Miller prior to listing Dr. Danziger and explained to him prior to seeing Dr. Danziger, I explained confidentiality to him. And prior to listing Dr. Danziger, I again spoke with Mr. Miller, and yes, I spoke with him about those things.
> Q. Did Mr. Miller -- was Mr. Miller advised that by speaking with Dr. Danziger, what he said to Dr. Danziger could be used against him in a penalty phase?
> A. In the broadest of terms, it was more narrow than that. 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. 1193-94).

There was no strategic reason to list Dr. Danziger as a defense witness when prior to the deposition trial counsel knew of Dr. Danziger’s hostility to Antisocial Personality Disorder. Even after being supplied with case law from this Court, Dr. Danziger refused to change his position. It was deficient for counsel to list Dr. Danziger as a defense witness thus

nullifying attorney-client privilege and violating Mr. Miller's trust. Mr. Miller was more than prejudiced, he was betrayed when Dr. Danziger portrayed Mr. Miller's Antisocial Personality Disorder outside of the context of Mr. Miller's history of trauma and deprivation, thus stigmatizing Mr. Miller before the jury. Counsel acted deficiently in listing Dr. Danziger. Had this not occurred, there was a reasonable probability the outcome would have been different.

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

The jury that recommended Mr. Miller's death knew very little about him. For the jury to make a constitutional decision it was necessary that they engage with all of Mr. Miller's mitigating history of trauma and deprivation. Because counsel deficiently failed to develop and present the full scope of this mitigation, Mr. Miller was prejudiced because he did not receive a full and fair sentencing hearing.

The State's brief is replete with paraphrases that are at best exceptionally generous and at worst, incorrect. For example, the State argues in its brief:

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

Miller has. (PCR 6:934-36, 940-45).

AB at 36-36. As Dr. Caddy made clear, Dr. Caddy did review a number of prison and other records, he just did not necessarily do so before he met with Mr. Miller. *See* (Vol. VI PCR. 937,942). Dr. Caddy could not list everything he reviewed because he was in Australia and did not have everything accessible. *See* (Vol. 6 PCR. 948). Dr. Caddy did review a number of documents including what the State referred to as "the extensive history that Mr. Miller has with the Oregon Department of Corrections and prior psychological assessments." *See* (Vol. VI PCR. 937). The reports that Dr. Caddy did review "didn't seem to provide the level of detail that [he] was able to get. Whether that means that they didn't get that detail or didn't report it, [he didn't] know." (Vol. VI PCR. 938). Within the so-called "extensive history that Mr. Miller ha[d] with the Oregon Department of Corrections and prior psychological assessments" were parole evaluations in which there would have been an incentive for Mr. Miller to portray himself as normal as possible, (and for the evaluator to portray Mr. Miller in the worst light to prevent against the evaluator's accountability upon recidivism).

The State suggested that Mr. Miller manipulated Dr. Caddy. Dr. Caddy did not find that to be the case in any of the testing or in Mr. Miller's accounts of his past. With Dr. Caddy, Mr. Miller never attempted to minimize his involvement with any of

his crimes, thus further refuting the State's allegation that Mr. Miller was manipulative. (Vol. VI PCR. 936-939).

The State appeared to attack Dr. Caddy's opinion based on the fact that Dr. Caddy, using his years of experience and training, actually spoke with Mr. Miller and actually conducted neuropsychological testing. This was in sharp contrast to the testimony of Dr. Waldman who very aggressively took the stand to testify against a man he had never met in order to facilitate a death sentence. Even in the cold transcript, the tenor and tone of Dr. Waldman's testimony showed that, unlike the speculation on Dr. Colistro's damnation, Dr. Waldman was actually trying to damn Mr. Miller by simply denying everything that was said about him by Dr. Caddy. Having no problem testifying against another human being he had never met, Dr. Waldman refused to see that Mr. Miller as a reliable source of information when he was not impaired by his frontal temporal lobe dementia.

Dr. Waldman's attack on Mr. Miller and Dr. Caddy was exemplified by, prior to objection, Dr. Waldman's quarrelling with a Dr. Caddy's "report" of his interview with Mr. Miller. Mr. Miller said that when he was incarcerated he tried to run and as a result Mr. Miller was called "Rabbit." *See* (Vol. VIII PCR. 1288). The State recounted Waldman's testimony as:

> For instance, Caddy was the only one to whom Miller said **he was put out of the house at the age of 4.** Waldman noted that a 4 year old could not have

> survived alone and could not even find water. (PCR 8:1282-84).

AB 25. Of course, a 4 year old could not sign up with the utility company for water, but is it so farfetched that a four year old could find a hose or even sadder, a puddle? Later in the same brief the State argued:

> Even given those, Caddy's testimony is largely cumulative to that given by Mings at the trial. The jury knew that: his mother abandoned the family; his father was abusive; his early life was unstable; he was thrown out at 4 or 5 years of age; he lived with his grandmother who loved him and provided him with some stability; she died when he was twelve; he went to foster homes; went to reform school by 14 or 15; and had a very serious and extensive history of poly-substance abuse.

AB 36. Trial counsel and Dr. Mings did not spend enough time developing social history. Much of the alleged contradictions are not contradictions at all and actually show that Mr. Miller spoke of some of the trauma and deprivation that he suffered, at least if the State's argument at page 36 is considered.

Dr. Waldman's attack on Mr. Miller became spiteful and aggressive, all under the guise of a medical opinion:

> THE WITNESS [Dr. Waldman]: That they called him rabbit? That's what they called Cool Hand Luke, the Paul Newman character. The warden referred to him as a rabbit. Never saw this in any entry at any time except that he escaped three times and used a hacksaw. Um, tells some story about robbing a couple of their picnic basket. That's a story that was not anywhere else.
> MR. HENDRY: Objection, Your Honor. Basis would be that we have heard Dr. Caddy's testimony. We know what Dr. Caddy testified to, and we would object to Dr.

> Waldman sitting here going through everything that Dr. Caddy said and saying this is unbelievable.
> THE COURT: As to him expressing the opinion as to unbelievability, that objection will; be sustained. An expert cannot express an opinion about the credibility or believability of another expert's or the validity of another expert's opinion. He can testify as to where he differs on an opinion and arrives at a different conclusion and explain the defects in the expert's data. But he can't do that. So the objection is sustained.

(Vol. VIII PCR. 1288). Is it such an outlandish lie that the small and quick, young Mr. Miller who ran away from the prison camp would be called "Rabbit?" In the movie Cool Hand Luke, contrary to Dr. Waldman's account, Cool Hand Luke (the Paul Newman character) was called Cool Hand Luke. The movie references rabbit or having rabbit in one's blood, e.g., "You gonna fit in real good, of course, unless you get rabbit." There was a character named Rabbit but he was played by Mark Cavell, not Paul Newman.

Cool Hand Luke was a novel based on the prison experiences of Donn Pearce. Mr. Pearce was incarcerated in Florida for two years. It would seem that Mr. Pearce would have intimate knowledge of what a person who ran from a prison camp would be called. Accordingly, even if this was Mr. Miller's incarceration in North Carolina, it is not beyond the pale to think that Mr. Miller might have been called Rabbit.

The State further described Dr. Waldman's findings:

> In all the documents he reviewed he only found one instance of sexual abuse reported by Miller although he told Caddy that he had been habitually abused . . . [Mr. Miller]had never said that he had been hit with a pickax. Miller had reported a back injury from a motorcycle accident but told Caddy that a Texas guard had run him over with a horse. These are examples of lies and manipulation from a sociopath.

AB at 25. This argument was illogical. The conclusion that "these are examples of lies and manipulation from a sociopath" hardly follows from the examples. Does having a back injury from a motorcycle accident somehow inoculate an individual from being run over by a horse? Dr. Waldman was just aghast with disbelief over the possibility that prison reports would not fully describe that when Mr. Miller was struck in the head with a metal object such reports would fail to indicate what that it was a pickax. By Dr. Waldman's own admission he said that the Oregon prison reports indicated that Mr. Miller was struck by a piece of metal but, for Dr. Waldman, the failure to specify that it was a pickax indicates that Mr. Miller was lying. (Vol. VIII PCR. 1286-87). Apparently, in Dr. Waldman's opinion, unless Mr. Miller described the metal item he was struck with sufficient detail to the prison interviewer as a pickax, he must be lying.

Dr. Waldman's aggressive spin on Mr. Miller's history of trauma and deprivation took a horrible turn for the worst when he discounted Mr. Miller's history of sexual abuse because of a lack of report to the prison authorities. *See* (Vol. VIII PCR.

1286). This Court, and any serious mental health expert, knows that sexual abuse and rape is grossly unreported. Unfortunately, individuals often feel a great deal of shame and fear their attacker and thus, fail to report such attacks. In prison, the threat from the rapist is even more pronounced and the willingness of prison authorities to accept such an account from an inmate greatly impaired. Prison rape goes unreported because the only way to avoid retaliation from the rapist is to get out of prison, which is something that the victim cannot control.

Dr. Caddy supplied compelling testimony about Mr. Miller's extensive history of deprivation and trauma. He also provided the bridge to Dr. Wood and the PET Scan. Counsel was deficient for failing to fully develop this and fully present this to the jury. As a result, Mr. Miller was prejudiced and denied a full and fair penalty phase. Had counsel acted effectively the outcome of this case would have been different.

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

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. XIX 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, here he never contacted any PET Scan expert. (Vol. VIII PCR 1201); *see also* (Vol. XXIII PCR. 1762 acknowledging the need for special expertise to read a PET Scan). He should have.

A PET Scan is independent evidence and stands alone. Much like Dr. Danziger who did not feel that Antisocial Personality Disorder was mitigating, counsel once again never consulted with an individual who was trained in the interpretation of PET Scan and would have found it useful to understanding Mr. Miller. It was rather senseless to seek an opinion of the viability of a

PET Scan from an anti-PET Scan expert, or one that at least did not have the expertise in PET Scans. This Court should reverse.

REPLY TO 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 in their efforts to suppress Mr. Miller's statements made to law enforcement was ineffective. This was primarily due to a failure to obtain a PET scan and utilize such results during the suppression hearing.

At pages 45-47, the State simply block quotes portions of the lower court's order denying this claim. Contrary to the lower court's findings, the record evidence does not reflect that the trial attorneys strategically missed an opportunity to obtain a PET scan for use at the suppression hearing.

At page 46 of the State's answer, it cites that portion where the order says that Mr. Miller underwent an MRI scan. This is true, but, the MRI scan was performed three months after the hearing on the motion to suppress statements, and the MRI scan clearly showed hippocampal sclerosis. The order, without

referencing any specific citation to the record, says that Dr. Wood stated that the 2007 MRI scan was "within the normal limits." Dr. Wood clearly testified that the PET scan was showing atrophy in Mr. Miller's brain was "well into the abnormal range." (Vol. VI PCR 908). Dr. Wood stated that had he been consulted in this case in 2007 and reviewed the MRI report, "he would have said that any complete examination had to include a PET scan." (Vol. VI PCR 892). If the MRI scan was indeed "within the normal limits" Dr. Wood would not have recommended a PET scan in this case.

In quoting the lower court's order at page 46 of the Answer, there is mention that "neither doctor could offer a conclusion how much of Mr. Miller's condition is due to a deterioration in the five and a half years since trial." In describing the PET scan, Dr. Wood referred to the 2007 MRI scan and stated, "You will remember that Dr. Sadler, the radiologist, had noted on the MRI scan that there was hippocampal sclerosis in the left hemisphere." (Vol. VI PCR 960). This testimony shows that Mr. Miller's brain abnormality was present in 2007, that there was brain atrophy at the time of trial. The lower court stated that trial counsel "reasonably relied on" Dr. Danzinger and Dr. Mings and that there was no ineffective assistance of counsel just because "Dr. Wood and Dr. Caddy reached a contrary conclusion." This was not a "contrary

conclusion" that was reached. This is the result of a full and competent investigation into Mr. Miller's mental health issues and his brain dysfunction.

To justify denial of relief on this claim, the State also cites to the lower court's mention of the "overwhelming evidence" of guilt presented at trial, claiming that even if the confession was suppressed, the outcome of the trial would not have been different. Suppression of the confession in this case would have made a difference at trial.

At page 47 the State says that Dr. Mings "include[ed] a test for *Miranda,*" and cites to "PCR 7:1336-38" as supporting record citation. At Vol. VIII PCR 1348, Dr. Mings in fact describes Mr. Miller's performance on such a test, and says that "it doesn't have, like, standard scores. It's more of a qualitative thing. What I'm doing is making sure he comprehends *Miranda*, what they mean, and those kinds of things. . . He understood all of the questions, answered them appropriately, essentially." Apparently Dr. Mings failed to analyze, and trial counsel failed to ask Dr. Mings to analyze, whether *at the time Mr. Miller was questioned*, under the influence of all the sleep deprivation and crack smoking, what was his comprehension of and ability to knowingly, intelligently, and voluntarily waive his *Miranda* rights. And how would brain dysfunction have affected his abilities in that regard. The fact that Dr. Mings

administered Mr. Miller a test in jail many months after the interrogation, absent the sleep deprivation and crack cocaine abuse, has little bearing on Mr. Miller's ability to waive *Miranda* on the night of the actual interrogation.

On page 47 the State claims that "Danziger also specifically ruled out dementia or any cognitive dysfunction. (State Exh. 10, p.4)." If the State here is referencing Vol. XXIII PCR 1758, this sheet actually indicates "substantially impaired capacity" based on Mr. Miller's "intoxication at the time." The sheet does in fact indicate "not demented or retarded," but it does not specifically rule out bvFTD. It does reference "brain imaging" and that Mr. Miller "usually get (sic) knocked on the head." Those are red flags that should and would have led reasonable and competent trial counsel to seek the advice of a PET scan expert, and obtain a PET scan in addition to the MRI scan to gather support for statutory mental health mitigation and possible use at a suppression hearing. No PET scan was sought in this case because of institutionalized deficient performance in his office. Mr. Hooper informed: "I can tell you my office here [in Orange County] does not generally favor getting PET scans." Vol. VII PCR 1122. Like in *Simmons v. State*, 105 So. 3d 475, 507 (Fla. 2012), in failing to obtain a PET scan and otherwise investigate the mental health issues, "counsel was ineffective in fully investigating possible

mitigation and in presenting that available mitigation to the jury." Trial counsel should have presented the results of a PET scan to the trial court that adjudged his motion to suppress as well as to the jury that recommended the sentence of death.

At page 48, the State claims that the "MRI was largely unremarkable." Mr. Miller's brain atrophy seen in the 2007 MRI scan was remarkable, so much to the point that had trial counsel consulted with a PET scan expert like Dr. Wood, a PET scan would have been recommended. The State claims here that "the defense attorneys did all the tests and scans which were appropriate." That is not true. As Dr. Mings agreed, there was nothing preventing a PET scan at the trial level, and it could have been done. (Vol. VIII PCR 1361-62).

At page 49 the State argues: "As Waldman pointed out, Miller's dialogues with the court were cogent and logical and refuted any claim that his ability to understand concepts and language was in any way impaired." Accepting Dr. Waldman's opinion for the sake of argument, this does not account for Mr. Miller's state of mind at the time he waived his *Miranda* rights, and whether at that time the waiver was knowing, intelligent and voluntary. The combination of sleep deprivation, crack cocaine abuse, and bvFTD during the interrogation rendered the alleged *Miranda* waiver unknowing, unintelligent, and involuntary.

At page 52 the State claims that in 2007 "the brain atrophy

was within normal limits." Dr. Wood testified that in 2007 the atrophy was actually "approaching then borderline of abnormal," and that the "hippocampus sclerosis is an unmistakable abnormality that is consistent with an early stage of disease." Vol. VI PCR 972. The State also cites here to Dr. Waldman's opinion: "Waldman disputed that memory is a symptom of FTD." Dr. Alan Waldman's credibility is questionable. His opinions have been found in at least one case to be speculative and inadmissible. *See Williams v. Consol. City of Jacksonville*, 2006 U.S. Dist. Lexis 8257, 2006 WL 305916, (M.D. Fla. 2006)(the court in that case barring "Dr. Waldman's speculation"; holding that "Dr. Waldman is precluded from making gratuitous statements;" and on another issue in this personal injury case, the Court "will not permit Dr. Waldman to speculate"). Though Dr. Waldman "reviewed records," he never once attempted to engage in a conversation with him or evaluate Mr. Miller.

Contrary to the State's argument at page 53 that Mr. Miller "suffered no prejudice by the admission of his confession," he most certainly did suffer prejudice in this regard. If the confession had no inculpatory value, the State would not have sought its introduction at trial. It is elementary that a confession is typically an extreme building block in a state case against a criminal defendant. This claim is not procedurally barred as claimed at age 55. Although an aspect of

the confession was once discussed by this Court, the relation of the PET scan to the suppression motion has never been discussed. This Court should reverse.

REPLY TO 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.

While Mr. Miller certainly may be incompetent to be executed, this claim challenges Mr. Miller remaining under a death sentence while suffering from these conditions. Mr. Miller's remaining under a death sentence violates the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. This claim is proper and relief should be granted.

REPLY TO ARGUMENT IV

MR. MILLER'S LAWYERS WERE LABORING UNDER OBVIOUS CONFLICTS OF INTEREST THAT CAUSED THEM TO PROVIDE INADEQUATE AND SUBSTANDARD LEGAL REPRESENATION. THE STATE VIOLATED BRADY AND GIGLIO IN FAILING TO PROVIDE IMPEACHING INFORMATION ON DAVID DEMPSEY AND IN FAILING TO CORRECT HIS FALSE TESTIMONY.

At pages 57-59, the State block quotes portions from the lower court's order denying this claim. The lower court actually overlooked the competent and substantial evidence supporting this claim.

The records obtained from DOC clearly establish *Brady* and *Giglio* violations. At page 58 the State cites to that portion

of the lower court's order wherein it finds that "Dempsey did not violate the terms of his probation." This is an incorrect finding of fact and law. Robbery is against the law. And when probationers break the law, they violate their probation.

Though the Dempseys and the State now try to downplay the incident and dispute its occurrence, it happened. Ms. Dempsey testified that she became embroiled in a "tug-of-war" with her son over the car keys. (Vol. VI PCR. 827). Ms. Finnigan did not "explain" that this would not violate the terms of Mr. Dempsey's probation. She just confirmed that a VOP charge was not made against Mr. Dempsey for the robbery of his mother. The notes in fact show that Mr. Dempsey was using his status as a witness in the case against Mr. Miller to curry favor with his probation officer. Shortly after the entries regarding the incident with his mother, the probation notes state: "[David Dempsey] stated [to his PO 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). Obviously Mr. Dempsey would make a better presentation for the State testifying in civilian rather than jail clothes.

The lower court states further as seen on page 58 that "evidence of this alleged robbery would not have been admissible at trial," calling it "ancillary." This would have been direct impeachment to Mr. Dempsey's testimony wherein he informed the

jury that he had never been involved in a robbery before. Vol. XV R. 870. Counsel should have looked into these issues, but they failed to do so because they represented Mr. Dempsey on his criminal case. Just because "it did not result in a conviction" does not bar admissibility of this impeaching evidence. Mr. Dempsey obviously was using his state witness status as an avoid a VOP card, not simply keeping his probation officer informed.

The lower court also finds reprinted at page 58 the robbery of Debra Hood to be inadmissible "for the same reasons." Covering all the bases, the lower court finds that even if this evidence was introduced, "the Court finds there is no reasonable probability it would have affected the outcome of the trial." These clear *Brady* and *Giglio* violations warrant reversal because these errors led to Mr. Miller's conviction and death sentence. The lower court continues, extinguishing this claim, finding alternative basis after alternative basis to deny the claim, citing Ms. Hood's alleged "unavailability" because she "did not make any attempts to notify authorities in Florida of her whereabouts," and because "it would have been difficult to find her." Reasonable search efforts should have been made.

As seen on page 59, the lower court cites to *McWatters v. State*, 36 So. 3d 613 (Fla. 2010) to deny the conflict claim. This case is distinguishable because it involves a completely different factual scenario. Also, Mr. Miller did not realize

that the conflict could adversely affect the defense, and he did not realize that he could obtain other counsel. Most of the inquiry focused on Mr. Dempsey's feelings on the conflict, not Mr. Miller's understanding of the conflict. Also at page 59, the lower court again cites to "Ms. Hood's testimony that it would have been difficult to find her during this period of time." It was no more difficult to find her in the past few years than it would have been to find her in 2006-2007. Mr. Hooper and Mr. Henderson never testified about any reasonable efforts that were made to locate Ms. Hood in Michigan.

At page 60 the State claims that the defense "offers no facts or arguments on how counsel could have discovered the information on Dempsey." A simple records request to the Department of Corrections would have discovered the information on Mr. Dempsey. Here they also claim that the allegations concerning David Dempsey are merely "conclusory." These allegations are actually detailed in depth and were proven at the evidentiary hearing. Mr. Miller has established clear *Brady*, *Giglio*, and *Strickland* violations.

At page 61, in discussing *Giglio*, the State reminds that "the evidence is material 'if there is any reasonable likelihood' that it 'could have affected' the jury's verdict. Id. at 506." Mr. Miller has met this standard. The jury believed Mr. Dempsey's extremely damaging testimony against Mr.

Miller because they did not hear evidence that he has been involved in violent robberies before for money, cars, and drugs. Mr. Dempsey cannot be trusted, and he was testifying to save his own skin. At page 62, the State nearly concedes admissibility of this information when it says, “while Mr. Miller might argue that it would go to the truthfulness of Dempsey, the jury already heard that he had been convicted multiple times for theft and drug related crimes.”

At page 65 the State claims that with regard to Mr. Dempsey informing his probation officer about his status as a state witness to curry favor and avoid a violation of probation filing, they claim this is “a supposition that Finnegan refuted. (PCR 18).” Ms. Finnigan never refuted that this is what was going on. She actually stated that “I would have no way of knowing” why he provided that information to his probation officer. (Vol. VI PCR 18). Ms. Finnigan was not Ms. Dempsey’s probation officer and her basic role in testifying at the evidentiary hearing was that of records custodian. The timing of this information being supplied to the probation officer is curious because it came right on the heels of robbing his mother. At page 69 the State asserts: “Oddly, Miller argues that his trial counsel should have dug through the public defender’s closed files to find confidential information with which to impeach Dempsey, clearly a violation of professional

ethics at the least." Mr. Miller never argued this. He argued that the records should have been obtained from DOC. This Court should reverse.

REPLY TO ARGUMENT V

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER COMMENTS FROM THE TRIAL COURT AND THE STATE DURING VOIR DIRE, AND FOR FAILING TO OBJECT TO THE STATE'S IMPROPER PENALTY PHASE CLOSING ARGUMENT.

At page 71-89, for 18 pages, the State block quotes portions from the lower court's order denying this claim. The same lower court that denied this claim is the same trial court that gave appearances to the jury that it preferred a death recommendation over a life recommendation. Trial counsel agreed that objections should have been made to the trial court's improper statements. (Vol. VII PCR. 1052).

Pages 71-73 of the State's Answer reproduces the lower court's order quoting some of the jury instructions read to the jury during *voir dire*. Those instructions are correct. But the problem is those instructions come on the heels of repeated statements that fly in the face of those instructions. The taint had already occurred, and in not being immediately addressed and cured, the jury was forever prejudiced towards a vote for death.

Page 74 reproduces the lower court's order pointing out that there was individual *voir dire* conducted at trial. Then

the court notes that “Mr. Miller complains of improper comments made before eight of the potential jurors; however, only three of those jurors served on the panel, jurors numbers 43, 268, and 275.” Although only three of the eight affected jurors served, these three jurors could have tainted and influenced the remaining deliberating jurors with their improper understanding of capital sentencing law. Any one of those jurors could have encouraged them to vote for death.

At pages 74-75, after re-printing the transcripts revealing improper comments by the State made to Juror number 43, the lower court in conclusory fashion just says: “The Court finds juror number 43 was clearly and correctly informed about the law and the process by which it applied to the evidence in Mr. Miller’s case.” Contrary to law, the State suggested to this juror that he must “check the box for death because aggravators outweigh the mitigators.” (Quoted from the trial transcript, page 74 of the Answer brief). An objection should have been made. The lower court’s “analysis” is inadequate and decides the issues contrary to law.

The quoted order then discusses Juror number 268, quoting the improper comments the State made to this biased juror who would ultimately sit on the jury. Interestingly, at page 76 this juror says that if some evidence showed a defendant to be innocent, then she would lean towards incarceration for life.

This juror informed the State during *voir dire*, quoted at pages 75-76: “[I]f the evidence could prove or like, okay, it is a possibility of either DNA or some little missing piece that could say, oh, well, he actually didn’t do it or she didn’t do it, then that’s when I kind of lean for the whole life without parole.” So it appears it would require actual innocence for this particular juror to “lean” towards a life recommendation. That begs the question of why this particular juror would not outright acquit an actually innocent man.

At the bottom of page 76, in the quoted trial transcript, the State suggests to Juror 268 that the law would mandate a death sentence if the aggravators were to outweigh the mitigators, and he seeks reassurance that the juror would cast a vote for death in light of the weight of the evidence. With Juror 268, this is a given because this juror informed she would lean towards a life recommendation if the accused “actually didn’t do it.” This juror was already biased towards a death recommendation, and this bias was influenced and reinforced by the State’s comments. Trial counsel should have clarified the law here, moved to strike this juror, objected, or asked for a curative instruction. In any event, trial counsel was ineffective in the handling of this juror.

At page 77, the lower court points to statements from Mr. Henderson to this juror following the State’s comments wherein

Mr. Henderson is apparently alleged by the court to have clarified with this juror that it is not simply a weighing process. Although the court here cites to 3 paragraphs, in not one paragraph does trial counsel inform the juror that it's not strictly a weighing process. Although Mr. Henderson does tell Juror 268 that regarding aggravators, "you are free to weigh it however you want to weigh it," he never tells the juror that regardless of how the aggravators and mitigators weigh out, life is always an option, and death is never mandated by law. With regard to mitigation, Mr. Henderson says, "you are free to weigh it however you want to weigh it," but he never informs that the law does not mandate death even if the mitigation weighs nothing, or is greatly outweighed by the aggravators.

At page 78 of the brief quotes the lower court's order: "The Court finds juror number 268 was clearly and correctly informed about the law and the process." In reality, this juror was not firmly instructed that the case should not even proceed to a penalty phase if "he actually didn't do it." And this juror was never clearly instructed that in the event of a penalty phase, life was an option regardless of weight.

Regarding Juror Number 275, at the middle of page 78 the State cites to that portion of the lower court's order wherein the court repeats the improper comments about how "it would be absolutely that you would vote for death, because the

aggravators clearly outweigh the mitigators." There is no "absolute" duty to recommend death. These comments were completely improper. Just because this juror responded that he would "have to follow the instructions" does not mean he was not tainted by then State's comments. This juror could have logically assumed the State's comments were part of his instructions, that a death recommendation was "absolute." Mercy is always an option regardless of weight in the penalty phase.

On pages 79—80, the State relies upon the lower court's order finding that Mr. Henderson "emphasized" to juror 275 the correct law. Though Mr. Henderson was correct that the law never mandates death, the law actually mandates life when the mitigators outweigh the aggravators. So Mr. Henderson was incorrect in his emphasizing statement to Juror 275. Right after he made this incorrect statement, he went on to inform again that "It's a weighing process, once you redo the calculation, whatever way you attribute to it, that's the recommendation as to the punishment you're supposed to come up with." Throughout the trial there was an improper overemphasis placed on weight in the penalty phase. Contrary to the lower court's order, repeated by the State on page 80, Juror number 275 was not "clearly and correctly informed about the law and the process."

As seen by the trial transcript quoted at pages 80-86, Jurors 16, 58, 285, 467 and 937 were tainted by improper and

prejudicial comments made by the court and the state. In any "context," these jurors were not "clearly and correctly informed about the law and the process." The taint of these improper comments was a structural defect that rendered the process and the trial objectionable and the results unreliable.

The trial court's reliance on *Jones v. State*, 845 So. 2d 55, 67 (Fla. 2003), reprinted at page 86 is misplaced. As explained by this Court, the key words for the statements made in *Jones* were "strongest phraseolgy employed by the prosecution." As seen in *Jones*, those statements were very mild compared to the case at bar, and they were isolated. The statements in the case at bar were completely improper, repeated, pervasive, and were improperly reinforced by the trial court. Like in *Henyard v. State*, 689 So. 2d 239, 250 (Fla. 1996) these statements were improper, but unlike *Henyard*, they were in fact prejudicial.

At page 89 the State references that portion of the lower court's order wherein it speaks of trial counsel's "complying with Mr. Miller's directive that they seek a death recommendation in the penalty phase." If this indeed was the intent of trial counsel at the penalty phase, then the penalty phase was a sham proceeding. This Court should have no confidence in the result of this proceeding if those alleged directives were being followed by trial counsel. The lower

court's order is not supported by "competent, substantial evidence" as suggested by the State. These claims are not procedurally barred as suggested at page 89. If these claims were procedurally barred, the lower court would have so ruled. Mr. Miller never waived this claim as suggested by the State at page 90. The objectionable nature of the comments is clear on the face of the record. There can be no explanation for the failure to object, unless of course trial counsel was attempting to follow alleged directives to join the State in seeking a death recommendation.

Contrary to what the State argues, the lower court's order was not supported by competent and substantial evidence, and accordingly, 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,[LisaMarie.Lerner@myfloridalegal.com]and [CapApp@MyFloridaLegal.com] on this 6th day of January, 2014.

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CERTIFICATE OF COMPLIANCE

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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