APPENDIX

Index to Appendix

May 10, 2022, Order of the Eleventh Circuit Denying a Certificate of Appealability A-1, A000003

August 9, 2022, Order of the Eleventh Circuit Denying Reconsideration A-2, A000009

November 18, 2021, District Court Order Dismissing Petition A-3, A000020

January 25, 2022, District Court Order Denying Rule 59(e) Motion A-4, A000088

October 21, 2021, Evidentiary Hearing Exhibits 8[1], 14, 16 ..... A-5, A000098

August 15, 2017, CHU-N Motion to Appoint Counsel A-6, A000240

August 24, 2017, District Court Order Appointing CHU-N A-7, A000250

January 30, 2019, Initial Petition for Writ of Habeas Corpus A-8, A000253

February 1, 2019, Respondents' Motion to Substitute CHU-N with CHU-M A-9, A000389

April 8, 2019, Petitioner's Memorandum of Law In Support of Habeas Corpus Petition A-10, A000397

April 9, 2019, Respondents' Motion to Dismiss Petition as Untimely A-11, A000468

July 8, 2019, Respondents' Response Brief to Petition for Writ of Habeas Corpus A-12, A000481

October 7, 2019, Petitioner's Reply in Support of 28 U.S.C. §2254 Petition A-13, A000572

[1] Evidentiary hearing exhibit 8 was filed under seal. An electronic version is not available, but Petitioner has included a marked exhibit copy from the October 21, 2021, hearing.

APPENDIX

Index to Appendix (Cont'd)

April 16, 2021, District Court Order Substituting CHU-N with CHU-M, Ordering Limited Evidentiary Hearing A-14, A000633

May 24, 2021, District Court Order A-15, A000647

June 9, 2021, District Court Order Granting Motion for Extension A-16, A000650

July 26, 2021, Respondents' Motion to Determine Waiver of Privilege and Motion to Call Additional Witness at Evidentiary Hearing A-17, A000653

July 27, 2021, District Court Order Denying Respondents' Motion A-18, A000661

August 9, 2021, District Court Order Scheduling Limited Evidentiary Hearing A-19, A000664

September 22, 2021, Petitioner's Motion to Continue Limited Evidentiary Hearing A-20, A000668

October 7, 2021, District Court Order Denying Motion to Continue A-21, A000684

Transcript of October 21, 2021, Limited Evidentiary Hearing A-22, A000687

December 17, 2021, Petitioner's Motion to Alter or Amend Judgment A-23, A000829

March 16, 2022, Petitioner/Appellant's Application to Eleventh Circuit for Certificate of Appealability A-24, A000882

May 31, 2022, Petitioner/Appellant's Motion for Reconsideration of Order Denying Certificate of Appealability A-25, A000994

APPENDIX A-1

May 10, 2022, Order of the Eleventh Circuit Denying a Certificate of Appealability

USCA11 Case: 22-10657 Date Filed: 05/10/2022 Page: 1 of 4

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-10657

Non-Argument Calendar

DAVID MILLER, JR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:17-cv-00932-BJD-JBT

ORDER:

David Miller, Jr., a Florida inmate sentenced to death, applies for a certificate of appealability to appeal the denial of his petition for a writ of habeas corpus as untimely. *See* 28 U.S.C. § 2244. Because no jurist of reason could debate whether he has shown that he is entitled to equitable tolling, Miller's application for a certificate of appealability is **DENIED**.

The district court denied Miller's petition because it was untimely and not entitled to equitable tolling. "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Miller acknowledges that his petition was filed after the one-year limitation period, but he argues that he is entitled to equitable tolling. *See* 28 U.S.C. § 2244(d)(1).

Miller has failed to carry his burden to show that jurists of reason could find it debatable whether he is entitled to equitable tolling for the entire period between the expiration of the limitation period on August 3, 2006, and January 30, 2019, when Miller filed his petition. *See, e.g., Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1237 (11th Cir. 2017) (explaining that "[b]ecause [a

USCA11 Case: 22-10657 Date Filed: 05/10/2022 Page: 2 of 4

USCA11 Case: 22-10657 Date Filed: 05/10/2022 Page: 3 of 4

petitioner]" did not show that he was entitled to equitable tolling "the district court properly dismissed the habeas petition as untimely"). "[E]quitable tolling is an extraordinary remedy limited to rare and exceptional circumstances." *Id.* at 1221 (internal quotation marks omitted). Miller's application for a certificate of appealability does not offer any argument that could give a jurist of reason any reason to doubt that the district court correctly resolved the procedural issue when it denied the petition as untimely. To be sure, Miller offers arguments that attempt to cast doubt upon the reasoning of the district court, which relied only on the relationship between Miller and his attorney that led up to the August 3, 2006, deadline. But Miller does not offer any reason why he is entitled to equitable tolling for the period after the withdrawal of his original attorney in 2013. During that period, Miller was represented by the multiple attorneys, including the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Florida, which was appointed on August 24, 2017.

The standard for granting a certificate of appealability is whether the district court's "*resolution*" of the issue "was debatable amongst jurists of reason," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (emphasis added), not whether the specific reasoning of the district court was infallible. *See, e.g.*, *Szuchon v. Lehman*, 273 F.3d 299, 318 n.8 (3d Cir. 2001) ("[W]e can deny a certificate of appealability on any ground with support in the record."). So, even if we assumed that jurists of reason could debate whether Miller is entitled to equitable tolling up to the withdrawal of his attorney in

2013, Miller has still not shown that a jurist of reason could debate the resolution of the timeliness issue. Because Miller does not offer any argument that could convince a jurist of reason that it is debatable whether he is entitled to the extraordinary remedy of equitable tolling for the period between 2013 and January 30, 2019, his application for a certificate of appealability is **DENIED**. And Miller's motion to proceed in forma pauperis is **DENIED** as moot.



CHIEF JUDGE

USCA11 Case: 22-10657 Date Filed: 05/10/2022 Page: 4 of 4

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 10, 2022

Gregory W. Brown
Federal Public Defender's Office
400 N TAMPA ST STE 2700
TAMPA, FL 32801

Appeal Number: 22-10657-P
Case Style: David Miller, Jr. v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 3:17-cv-00932-BJD-JBT

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

APPENDIX A-2

August 9, 2022, Order of the Eleventh Circuit Denying Reconsideration

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-10657

Non-Argument Calendar

DAVID MILLER, JR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:17-cv-00932-BJD-JBT

Before WILLIAM PRYOR, Chief Judge, JORDAN and LAGOA, Circuit Judges.

PER CURIAM:

Appellant's motion for reconsideration of this Court's Order denying a Certificate of Appealability is **DENIED**.

JORDAN, Circuit Judge, concurring.

Mr. Miller seeks reconsideration of the order denying him a certificate of appealability. I agree with the court that we should deny that motion but believe that some explanation for the denial is warranted. As this is my first foray in this case, I set out my reasoning.

The one-year AEDPA limitations period began to run for Mr. Miller on January 22, 2001, which was 90 days after the Florida Supreme Court issued its opinion on direct appeal. *See Miller v. State*, 770 So. 2d 1144 (Fla. 2000); 28 U.S.C. § 2244(d)(1)(A). On October 2, 2001—253 days into the limitation period—Robert Norgard filed a motion for state post-conviction relief on Mr. Miller's behalf. In 2005, Mr. Norgard also filed a state habeas corpus petition. The AEDPA clock stopped until the post-conviction proceedings concluded. *See* § 2244(d)(2). That occurred on April 13, 2006, when the Florida Supreme Court issued the mandate on its denial of Mr. Miller's post-conviction motion and state habeas petition. *See Miller v. State*, 926 So. 2d 1243 (Fla. 2006). At that point, Mr. Miller had 112 days left (i.e., until August 3, 2006) before the AEDPA deadline expired. The AEDPA deadline passed with no petition filed in federal court. It was not until January 30, 2019—more than 12 years after the deadline expired—that the Capital Habeas Unit of the Federal Defender's Office for the Northern District

of Florida (CHU-N) filed Mr. Miller's federal habeas corpus petition. *See* D.E. 15.[1]

The procedural question presented by Mr. Miller's application for a COA, and by Mr. Miller's motion for reconsideration, is whether reasonable jurists could (a) debate whether Mr. Miller is entitled to equitable tolling for those 12 plus years or (b) conclude that the issue is adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 336–37 (2003); *Lambrix v. Secretary*, 872 F.3d 1170, 1179 (11th Cir. 2017); 28 U.S.C. § 2253(c). Equitable tolling is "an extraordinary remedy limited to rare and exceptional circumstances." *Cadet v. Fla. Dep't of Corr.*, 853 F. 3 1216, 1221 (11th Cir. 2017) (internal quotations and citation omitted).

The district court held a limited evidentiary hearing on the issue of equitable tolling as it related to Mr. Norgard's

[1] CHU-N filed a motion for appointment of counsel in district court in August of 2017 but notably did not file a federal habeas petition. *See* D.E. 1. CHU-N instead asked the district court to hold the case in abeyance pending resolution of Mr. Miller's then-pending state habeas corpus petition in light of the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See* D.E. 7. The district court ordered CHU-N to file a status report informing it of the progress of Mr. Miller's state court proceedings by August 14, 2018, and administratively closed the case. *See* D.E. 10. CHU-N timely filed a status report informing the court of Mr. Miller's ongoing state habeas corpus action. *See* D.E. 11. But it was the state, not CHU-N (on Mr. Miller's behalf), which filed a motion to reopen the case months after Mr. Miller's state habeas proceedings had concluded. *See* D.E. 14.

representation. Although Mr. Norgard was the only witness at the hearing, Mr. Miller also introduced a number of exhibits.

Following the hearing, the district court credited Mr. Norgard's testimony and found that it was Mr. Miller "who decided to forego his federal remedies and reported his decision to Mr. Norgard at the state court evidentiary hearing and during a post-mandate phone conversation before the [AEDPA] limitation period expired[.]" D.E. 72 at 27. *See also id.* at 30 (noting that at the state court evidentiary hearing held on November 4-5, 2003, Mr. Miller stated on the record that he "want[ed] to cancel these proceedings and go back to prison" and "want[ed] to drop all [his] appeals"). Because Mr. Norgard "abided by his client's directive to not file a federal habeas petition," there was "no abandonment" or "constructive abandonment." *Id.* at 27–28. Nor were there extraordinary circumstances warranting equitable tolling, even taking into account Mr. Miler's mental problems, because there was no persuasive evidence that Mr. Miller was not competent at the time he conveyed his wishes to Mr. Norgard. *See id.* at 31–40.[2]

[2] Mr. Miller contends that the district court failed to recognize the interrelatedness of his mental illness and attorney misconduct. *See* D.E. 24 at 17–18 ("In rejecting tolling due to attorney misconduct, the district court focused on the instructions not to file [a federal habeas petition] allegedly given by a severely mentally ill man."). But "mental impairment is not per se a reason to toll a statue of limitations." *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009). Mr. Miller must demonstrate "a causal connection between his mental incapacity and his ability to file a timely" petition at all relevant times. *Id.* As far as I can tell, we have failed to grant equitable tolling for a mentally ill

I assume, without deciding, that reasonable jurists could debate the district court's factual findings on these issues and whether Mr. Miller is entitled to equitable tolling through August/September of 2013, when Mr. Norgard withdrew as counsel. *See Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). Among other things, Mr. Miller introduced evidence at the evidentiary hearing that some of the phone calls that Mr. Norgard said he had placed to Mr. Miller (including the April 26, 2006, call where Mr. Miller supposedly confirmed his position) were not listed on Department of Corrections records; that Mr. Norgard did not see Mr. Miller at the Jacksonville jail during the state evidentiary hearing; that after the state evidentiary hearing Mr. Norgard next visited Mr. Miller in prison on August 9, 2013, well after the AEDPA limitations period had expired; and that Mr. Norgard's billing records did not reflect his purported phone calls with Mr. Miller to discuss whether or not to file a federal habeas petition.

I also assume, again without deciding, that reasonable jurists could debate whether Mr. Miller is entitled to equitable tolling from August of 2017—when CHU-N was appointed as counsel—through January of 2019, when CHU-N filed Mr. Miller's federal habeas petition. The Capital Habeas Unit of the Federal Defender's Office for the Middle District of Florida (CHU-M) replaced CHU-N because the court recognized that CHU-N had a possible conflict

---

petitioner—who is represented by counsel—without some kind of showing of attorney misconduct (e.g., abandonment, bad faith, dishonesty, divided loyalty, mental impairment). *See Cadet*, 853 F.3d at 1236–37.

with respect to equitable tolling given its delay in filing Mr. Miller's federal habeas corpus petition. *See* D.E. 35. CHU-M therefore asked the district court to give it additional time to make equitable tolling arguments for the period of time spanning from CHU-N's appointment to the filing of the habeas corpus petition. *See* D.E. 40. In June of 2021 the district court granted the motion and gave CHU-M until December 8, 2021, to file its additional memorandum on equitable tolling related to CHU-N. *See* D.E. 43. But CHU-M never got the chance to file its memorandum because the district court dismissed Mr. Miller's habeas corpus petition as untimely on November 18, 2021, nearly a month before CHU-M's deadline to address equitable tolling with respect to CHU-N. *See* D.E. 72. Reasonable jurists could debate whether the district court erred in not giving CHU-M the time it had previously granted to file its memorandum, as the denial of an opportunity to litigate on a material issue is a violation of due process which can never be harmless error. *See United States v. Smith*, 30 F.4th 1334, 1338 (11th Cir. 2022).

But even making these two assumptions, there is still a big time period—from September of 2013 to August of 2017—that needs to be excused through equitable tolling. On September 24, 2013, the state court appointed Frank Tassone as Mr. Miller's new attorney in place of Mr. Norgard. After a little more than a year, and without having filed (as far as I can tell) anything on Mr. Miller's behalf, Mr. Tassone moved to withdraw as counsel. On December 9, 2014, the state court appointed Christopher Anderson as Mr. Miller's new attorney. More than two and half years later, on

June 28, 2017, Mr. Anderson filed a second state petition seeking relief in light of the Supreme Court's decision in *Hurst*. As noted earlier, CHU-N was appointed as Mr. Miller's federal habeas corpus counsel in August of 2017 while Mr. Anderson litigated the availability of *Hurst* relief in state court.

The problem for Mr. Miller, as I see it, is that he did not signal or explain to the district court in his filings that the period of time covered by the representations of Mr. Tassone and Mr. Anderson was also subject to equitable tolling. CHU-N did not make any such assertion before it withdrew, and CHU-M did not say that it would seek equitable tolling for that four-year period (it only asserted that it was going to make an equitable tolling argument for the time covered by CHU-N's representation). *See* D.E. 40 at 1 (CHU-M requesting an extension to file a memorandum "concerning equitable tolling of the limitation during the period of *CHU-N's* representation") (emphasis added). So the district court was not put on notice that equitable tolling was an issue for the time that Mr. Miller was represented by Mr. Tassone and Mr. Anderson. And when Mr. Miller moved for a COA in this court, he did not make any equitable tolling arguments about his representation by those two attorneys. In fact, Mr. Miller did not make any arguments about Mr. Tassone or Mr. Anderson until his motion for reconsideration. Because a motion for reconsideration generally cannot be used to assert arguments or introduce evidence that could have been presented prior to the entry of the order in question, *see Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir.

2009), I do not think Mr. Miller has met the COA standard with respect to equitable tolling for the time covered by the representations of Mr. Tassone and Mr. Anderson.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 09, 2022

Gregory W. Brown
Federal Public Defender's Office
400 N TAMPA ST STE 2700
TAMPA, FL 32801

Appeal Number: 22-10657-P
Case Style: David Miller, Jr. v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 3:17-cv-00932-BJD-JBT

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action

APPENDIX A-3

November 18, 2021, District Court Order Dismissing Petition

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR,

Petitioner,

vs. Case No. 3:17-cv-932-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

I. Status

Petitioner David Miller, Jr., a Florida prisoner convicted and sentenced to death, filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Petition) (Doc. 15) and a Memorandum of Law (Memorandum) (Doc. 24).[1] Respondents, in their Response Brief to Petition for Writ of Habeas Corpus (Response) (Doc. 29), submit that the Petition is untimely filed and Petitioner must argue for equitable tolling, requiring that he demonstrate both that he

[1] Generally, the Court references the page number assigned by the electronic filing system, unless otherwise indicated.

diligently pursued his federal habeas rights and extraordinary circumstances prevented his timely filing of a federal habeas petition.[2] Response at 17-30. In Petitioner's Reply in Support of 28 U.S.C. § 2254 Petition (Reply) (Doc. 33), Petitioner claims equitable tolling is warranted. Reply at 5-13. The Court conducted a limited evidentiary hearing on October 21, 2021.[3]

As acknowledged by the parties, the Petition is untimely filed, filed well beyond the Antiterrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitations. Response at 10; Petition at 7. See Order (Doc. 35) for the calculation of the relevant one-year period.[4]

---

[2] The Court refers to the exhibits in the Appendix (Doc. 32) as "Ex." The Court will, where applicable, refer to the Bates Stamp page numbers at the bottom of each page. Otherwise the Court will refer to the page number on the document itself.

[3] The Court refers to the evidentiary hearing transcript (Doc. 67) as "EH." The Court will reference the page number found in the upper right-hand corner of each page of the transcript.

[4] At the evidentiary hearing Respondents re-raised their contention that the 90-day period should be counted from August 31, 2000, resulting in their calculated date of November 29, 2000 as being the date the judgment and sentence became final ("AEDPA statute of limitations starts as the judgment and sentence became final when the 90 days for seeking certiorari review in the United States Supreme Court expired[.]"). See Response at 12 (Statute of Limitations Timing). Respondents said, "we're probably disagreeing about the days remaining[,]" and "I've got the petition due June the 15th, 2006[.]" EH at 21. Respondents' calculation is incorrect. The rules of the Supreme Court and the related Eleventh Circuit law provide: "if a movant does not timely file his petition, his conviction becomes final 90 days after the appellate court enters judgment on the appeal 'or, if a motion for rehearing is timely filed, within 90 days of the appellate court's denial of that motion.'" Warmus v. United States, 253 F. App'x 2, 4–5 (11th Cir. 2007) (per curiam) (quoting Close v. United States, 336 F.3d 1283, 1284–85 (11th Cir.2003) (quoting Clay v. United States, 537 U.S. 522, 525 (2003)) (citing Sup. Ct. R. 13.2). See also Wilmore v. United States, No. 18-11653-J, 2018 WL 5295886, at *2 (11th Cir. 2018) (not reported in Fed. Rptr.) (noting the

II. Petition, Memorandum, & Response

Petitioner did not file his federal Petition (Doc. 15) until Wednesday, January 30, 2019, well past the expiration of the one-year limitation period.[5] The Petition filed on January 30, 2019 is untimely and due to be dismissed unless Petitioner can establish equitable tolling of the statute of limitations is warranted. Petitioner submits that equitable tolling "is pertinent here." Petition at 9. He contends his mental health issues impacted his ability to communicate with counsel, making effective communication virtually impossible. Id. at 10-11. He argues that courts have widely recognized that equitable tolling applies when a defendant suffers some form of mental incapacity (citing Bolarinwa v. Williams, 593 F.3d 226, 231 (2d Cir. 2010);

---

date of denial of rehearing and stating the statute of limitations for filing a section 2255 motion began to run 90 days later, when the conviction became final), cert. denied, 139 S. Ct. 833 (2019); Cullers v. Sec'y, Fla. Dep't of Corr., No. 3:09-cv-664-J-34MCR, 2010 WL 2103444, at *2 (M.D. Fla. May 25, 2010) (not reported in F.Supp.2d) (finding the petitioner's state-court conviction became final 90 days from when the appellate court denied the motion for rehearing). Respondents do not contend the motion for rehearing was untimely filed. This Court previously found Petitioner's conviction became final on January 22, 2001 (90 days after October 24, 2000, the date the Florida Supreme Court denied rehearing), not November 29, 2000, the date relied upon by Respondents. Of note, Respondents calculate that the tolling of the statute of limitations ended on April 13, 2006 when the mandate issued upon the Florida Supreme Court's affirmance of the denial of an amended Rule 3.851 motion, then began to run and expired on June 15, 2006. Response at 12 (Statute of Limitations Timing). This Court held, after the mandate issued on April 13, 2006, the limitation period began to run and expired 112 days later, on Thursday, August 3, 2006. See Order (Doc. 35) at 8. Nothing presented at the evidentiary hearing or otherwise convinces the Court that it has made a miscalculation or erred in its Order (Doc. 35).

[5] Petitioner is represented by counsel.

Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001), overruled in part on other grounds, Carey v. Saffold, 536 U.S. 214 (2002); Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999), cert. denied, 531 U.S. 1164 (2001); Laws v. Lamarque, 351 F.3d 919, 923 (9th Cir. 2013); and Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009) (per curiam). Petition at 11.

Petitioner also relies on a contention that he should be entitled to equitable tolling based on serious deficiencies in state post-conviction representation. Id. Although not fleshed out in the Petition, he suggests there may be some sort of abandonment or attorney misconduct that may be uncovered which would "qualify as a basis for equitable tolling." Id. at 11.

In his Memorandum, Petitioner claims he suffers from "severe schizophrenia and other mental health conditions that rendered him incompetent and unable to communicate with his attorneys or make rational decisions regarding his legal rights." Memorandum at 14. He contends mental illness can form the basis for equitable tolling, referencing cases he mentioned in the Petition and adding McSwain v. Davis, 287 F. App'x 450, 456 (6th Cir. 2008), cert. denied, 557 U.S. 919 (2009), for additional support. Memorandum at 14. He also claims counsel inexplicably failed to file a timely federal habeas petition due to egregious failures on counsel's part to do any work on Petitioner's case after the Florida Supreme Court affirmed the denial

of post-conviction relief. Id. at 14-15. See Reply at 9-10 ("Miller's AEDPA limitations deadline lapsed in 2006, under the watch of his state-appointed counsel.").

In their Response at 25, Respondents contend Robert Norgard, Esquire, Petitioner's post-conviction counsel, "intentionally missed the federal habeas deadline in this case and others in order to avoid his clients' inclusion on the list of defendants eligible for a death warrant." Respondents explain that, in Florida, before the Governor signs a warrant of execution, a defendant has to undergo executive clemency, and, generally, this review does not take place until after a federal petition for writ of habeas corpus has been denied in the federal district court and relief has been denied by the Eleventh Circuit Court of Appeals. Id.

Petitioner submits, his "incompetence justifies equitable tolling[,]" Reply at 7, relying on previously cited cases and citing Ata v. Scutt, 662 F.3d 736, 741 (6th Cir. 2011); Calderon v. United States District Court, 163 F.3d 530, 541 (9th Cir. 1998), abrogated on other grounds, Woodford v. Garceau, 538 U.S. 202 (2003), cert. denied, 526 U.S. 1060 (1999); Ryan v. Gonzales, 568 U.S. 57, 67-68 (2013); Smith v. Kelly, 301 F. App'x 375, 378 (5th Cir. 2008) (per curiam); and Trapp v. Spencer, 479 F.3d 53, 62 (1st Cir. 2007). Reply at 7-8. He contends his mental illness satisfies both the diligence and extraordinary

circumstances prongs. Id. at 9. Alternatively, Petitioner says his incompetence coupled with the "apparent abandonment by prior counsel" justifies equitable tolling and requires fact-finding by the Court, citing Schmid v. McCauley, 825 F.3d 348, 350 (7th Cir. 2016). Reply at 9. See Downs v. McNeil, 520 F.3d 1311, 1325 (11th Cir. 2008) (finding need for evidentiary hearing); Ata, 662 F.3d at 741 (same).

The Court, in its Order (Doc. 35), found numerous questions were raised by Respondents' contention that Mr. Norgard intentionally missed the federal habeas deadline, including but not limited to: (1) did Mr. Norgard intentionally miss the federal habeas deadline; (2) if Mr. Norgard intentionally missed the deadline, did Mr. Norgard discuss his strategy with Petitioner and did Petitioner agree with the strategy to attempt to delay the scheduling of his execution date by failing to timely file a federal petition or agree to some other strategy not yet revealed; (3) did Mr. Norgard negligently miss the deadline; (4) did Mr. Norgard's conduct amount to abandonment of the attorney-client relationship; (5) was there severance of the agency relationship; (6) did Mr. Norgard purposely act adversely to Petitioner's interests by acting or failing to act for the purpose of advancing Mr. Norgard's own interests or those of a third party; and (7) did Mr. Norgard take actions that were contrary to Petitioner's instructions and adverse to his interests. Order (Doc. 35 at 10-11).

Since Mr. Norgard represented Petitioner on the appeal of the denial of the Rule 3.851 motion, and since the federal one-year limitation period expired on August 3, 2006, under Mr. Norgard's watch, the Court scheduled an evidentiary hearing to address the conduct of Mr. Norgard and the related conduct of Petitioner. Order (Doc. 47). The Court expressed its concern as to whether Petitioner was informed of Mr. Norgard's strategy (if one existed) and agreed with an intentional strategy of not filing a timely federal petition or acquiesced in counsel's decision or some similar strategy as yet unrevealed. Order (Doc. 35 at 11-12).

The Court will first explore the cases cited by Petitioner in support of his contention that his mental illness satisfies both the diligence and extraordinary circumstances prongs. Petitioner relies on Bolarinwa, 593 F.3d at 231, which held, under the appropriate circumstances, mental illness can justify equitable tolling of the AEDPA's limitation period. The Second Circuit opined that sister circuits have held the same, citing McSwain, Laws, Nara, and Fisher. Respondents counter Petitioner's argument, pointing out that in Bolarinwa, the Second Circuit remanded the case to allow the petitioner to present evidence in support of her contention. Response at 21. Of importance, on remand, the United States Magistrate Judge reviewed the medical records concerning the petitioner's mental health care and treatment,

found that she undeniably suffers from a mental illness, but also found that she functioned, for the most part, in prison population, and "failed to carry her burden of establishing a basis to invoke equitable tolling" in order to resuscitate her untimely petition. Bolarinwa v. Kaplan, No. 9:07-CV-1113 (LEK-DEP), 2012 WL 2394819, at *1 (N.D.N.Y. May 8, 2012) (not reported in F.Supp.2d), report and recommendation adopted by 2012 WL 2402889 (N.D.N.Y. June 25, 2012).

Notably, in Bolarinwa, the petitioner had been adjudicated to be an incapacitated person, received treatment, was then found rehabilitated and fit to proceed to trial. Id. The medical records showed she suffered from episodes of depression, anxiety, and psychosis. Id. at *7. The Court determined an evidentiary hearing was unnecessary in light of the comprehensive nature of the records received by the court concerning the petitioner's mental health treatment, the extreme length of time involved, and the fact that the record fails to reflect evidence to support the claim for equitable tolling. Id. at *9 n.6. Ultimately, the court found she was not subjected to extraordinary circumstances that prevented her, despite due diligence, from filing a habeas petition. Id. at *10. In adopting the Magistrate Judge's report and recommendation, the District Judge found the petitioner had been pursuing her legal rights by filing and researching other

legal claims before filing her federal petition and she was engaged in various legal endeavors. Bolarinwa, 2012 WL 2402889, at *3. The Court found neither an exceptional circumstance nor due diligence. Id. at *4.

In Nara, 264 F.3d at 320, the Third Circuit acknowledged that mental incompetence is not a *per se* reason for tolling a statute of limitations. Instead, the court found that there must be a showing that mental incompetence prevented the petitioner from asserting his rights. Id. The court concluded that because the habeas petition was filed pro se and the petitioner had exhibited periods of mental incompetency, an evidentiary hearing was warranted. The court also found troubling allegations of abandonment by previous counsel, leading the court to find an evidentiary hearing in order to determine whether extraordinary circumstances would justify equitable tolling. Id. See Wallace v. Mahanoy, 2 F.4th 133, 145 (3rd Cir. 2021) (asking whether it was impossible for the petitioner to pursue post-conviction remedies during the entire relevant time).

Similarly, the Sixth Circuit found mental incompetence is not a *per se* reason to toll, but it may warrant equitable tolling. McSwain, 287 F. App'x at 456. Significantly, in McSwain, although the court found the petitioner suffered from a mental illness, the court still found no evidence to support a causal connection between her mental illness and her ability to file a timely

petition, noting that she was able to pursue her state court remedies notwithstanding her mental illness. Id. at 457. Of import, the court noted that the petitioner was represented by counsel in state court and at the time she filed her federal habeas petition. Id. In Ata v. Scutt, 662 F.3d 736, 741-42 (6th Cir. 2011), the Sixth Circuit, finding the reasoning of McSwain persuasive, held a petitioner's mental incompetence, which prevents the timely filing of a petition, constitutes an extraordinary circumstance that may warrant equitably tolling.

In Fisher, 174 F.3d at 711, the petitioner filed a pro se habeas petition in the federal court. He asked for equitable tolling for a period of seventeen days he spent in a psychiatric ward, confined, medicated, separated from his glasses and legally blind as a result, and denied any access to the courts. Id. at 715. Although recognizing: "**the possibility** that mental incompetency might support equitable tolling[,]" the court declined to require tolling under the circumstances. Id. at 716 (emphasis added). See Smith, 301 F. App'x at 378 (affirming the denial of equitable tolling, noting conclusory assertions of mental illness combined with a lack of due diligence).

The Ninth Circuit remanded a case to the district court to order discovery, expansion of the record, or an evidentiary hearing as is necessary to determine if the period should be equitably tolled by virtue of mental

incompetence. Laws, 351 F.3d at 924-95. The petitioner had proceeded pro se, with the help of a jailhouse lawyer, in filing his federal and state petitions. Id. at 922. The court found "a *pro se* inmate's actual mental incompetence may be at least as much of an external bar to his meeting AEDPA's strict deadlines as is a represented capital inmate's inability to rationally communicate a bar to his receiving effective representation." Id. at 923. See Calderon, 163 F.3d at 541 (finding mental incompetency justifies equitable tolling and noting the statutory right to counsel contemplates effective communication between lawyer and client),

Although Petitioner references Trapp, in Holmes v. Spencer, 822 F.3d 609, 611 n.1 (1st Cir. 2016), the First Circuit noted that Trapp had been overtaken by Holland v. Fla., 560 U.S. 631, 649 (2010) (professional misconduct could amount to egregious behavior and create an extraordinary circumstance), as underscored by Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 257 (2016) (the diligence prong covers those affairs within the litigant's control, "the extraordinary-circumstances prong, by contrast, is meant to cover matters outside its control"). Thus, a petitioner must show that an extraordinary circumstance stood in his way; therefore, the second prong is met, "only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." Id. at 257 (footnote omitted).

Petitioner did not mention a significant, post Holland First Circuit decision, Riva v. Ficco, 615 F.3d 35, 40 (1st Cir. 2010), which held, "mental illness can constitute an extraordinary circumstance, which may prevent a habeas petitioner from understanding and acting upon his legal rights and thereby equitably toll the AEDPA limitations period" but it does not *per se* toll the limitations period. Indeed, the court concluded that a petitioner must show "some causal link between a petitioner's mental illness and his ability seasonably to file for habeas relief." Id. In short, the court found the causation requirement would be satisfied if a petitioner shows that, during the relevant time frame, he both suffered from a mental illness or impairment that severely impaired his ability "either effectively to pursue legal relief to his own behoof or, if represented, effectively to assist and communicate with counsel." Id.

In Riva, the record confirmed "debilitating mental illness," with the petitioner being committed to a facility for seventeen years, suffering from paranoid schizophrenia and exhibiting bizarre delusions of a persecutory nature, paranoid ideation, auditory hallucinations, and somatic terrors. Id. at 41. The petitioner suffered from an extremely delusional and bizarre system accompanied by violent paranoid ideation. Id. Even with medication, the petitioner's psychosis continued, until he was finally placed on

a new medication. Id. at 42. Although at one point counsel was hired by the petitioner's father, counsel did not communicate with petitioner and filed a petition without petitioner's consent. Id. at 43. As such, the counseled filing did not enjoy "the petitioner's effective participation." Id. The court noted, the petitioner's obvious insanity at critical times discounted petitioner's pro se filings. Id. The First Circuit vacated and remanded for further proceedings. Id. at 44.

Ultimately, the district court found that the petitioner "had not shown that his mental illness prevented him from following through in litigation in a sustained way." Riva v. Ficco, 803 F.3d 77, 81 (1st Cir. 2015), cert. denied, 136 S. Ct. 1536 (2016). At times, Riva was not represented by counsel and made missteps. Id. at 82. However, the court found the petitioner failed to prove, "his illness prevented him from cooperating with counsel during that time period" as he communicated with counsel and exhibited his engagement in the litigation and his understanding of the proceedings. Id. Finally, the district court found the record supported the conclusion that petitioner cooperated with his counsel. Id. at 83. Thus, the First Circuit concluded the district court did not err in finding the petitioner "failed to demonstrate that his mental illness prevented him from cooperating with counsel." Id.

Petitioner referenced both Hunter and Gonzales in his pleadings and briefs. In Hunter the petitioner was without counsel; in Gonzales, the United States Supreme Court found no statutory right to competence.

III. Equitable Tolling

The AEDPA is applicable to Petitioner's case as his conviction became final after April 24, 1996, the effective date of AEDPA. Smith v. Jones, 256 F.3d 1135, 1143 (11th Cir. 2001) (by its terms, the state of limitations provision in AEDPA bars any petition filed more than a year after the conviction became final at the conclusion of direct appeal, absent exceptions and qualified tolling periods), cert. denied, 534 U.S. 1136 (2002). The AEDPA one-year limitation period is subject to equitable tolling. Holland, 560 U.S. at 651-52.

Petitioner contends he can establish that equitable tolling of the statute of limitations is warranted, claiming extraordinary circumstances beyond his control. Petitioner carries the burden of persuasion. He must satisfy a two-pronged test; he must demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." Id. at 649 (quotation marks omitted). See Christmas v. Judd, No. 20-14431, 2021 WL 4860927, at *1 (11th Cir. Oct. 19, 2021) (per curiam) (not reported in Fed. Rptr.) (same). Petitioner contends his mental illness satisfies both prongs, the diligence prong, and the

extraordinary circumstances prong. Apparently, if the Court is not convinced by this argument, Petitioner contends that his mental illness satisfies the diligence prong and "apparent abandonment" of counsel or the serious deficiencies of his post-conviction counsel satisfy the extraordinary circumstances prong.

Equitable tolling is an extraordinary remedy, only employed in "rare and exceptional circumstances and typically applied sparingly." Cadet v. Fla. Dep't of Corr., 853 F.3d 1216, 1221 (11th Cir. 2017) (quotations and citation omitted), cert. denied, 138 S. Ct. 1042 (2018). See Downs, 520 F.3d at 1318 (equitable tolling "is a remedy that must be used sparingly"). This heavy burden is not easily surmounted.

Concerning this Court's review for equitable tolling purposes, any failures of counsel that occurred after counsel missed the filing deadline are of no consequence because they did not cause unseasonable filing or prohibit timely filing. Ryder v. Sec'y, Dep't of Corr., No. 8:09-CV-2019-T-27MAP, 2012 WL 12895353, at *4 (M.D. Fla. June 6, 2012) (not reported in F. Supp.). "To obtain equitable tolling, . . . Petitioner must show extraordinary circumstances and demonstrate that those circumstances **caused him to miss the filing deadline**." Id. (citations omitted). Following the expiration of the one-year

limitation period, any failures of counsel did not prohibit Petitioner from timely filing his federal habeas petition.

As such, this Court's focus will be on a very precise period of time: that period after the mandate issued on April 13, 2006 and the one-year limitation period expiring 112 days later, on Thursday, August 3, 2006. To prevail on his contention that he is entitled to equitable tolling, Petitioner must show there is a causal connection between the alleged extraordinary circumstances and the late filing of his federal petition.

In Hunter, 587 F.3d at 1309-1310, the Eleventh Circuit found the petitioner presented evidence sufficient to raise a factual issue as to whether a causal connection existed between the petitioner's mental impairment and his ability to file a timely petition, but the petitioner did not have an attorney to assist him. The Eleventh Circuit looked to its previous decision in Lawrence v. Fla., 421 F.3d 1221, 1226-27 (11th Cir. 2005), in which the court determined that the petitioner's claim of long-term mental impairments combined with a full-scale IQ of 81 were insufficient to justify equitable tolling because they did not establish a causal connection between the alleged mental incapacity and the ability to file a timely petition. Hunter, 421 F.3d at 1308. The Eleventh Circuit, while noting that "mental impairment is not *per se* a reason to toll a statute of limitations[,]" Hunter, 587 F.3d at 1308, concluded

the petitioner had presented sufficient evidence to warrant further inquiry based on record evidence of severe, irreversible mental retardation. Id. at 1309-10.

Similarly, in Rabette v. Sec'y, Dep't of Corr., No. 5:14-cv-101, 2015 WL 6704418, at *4 - *5 (M.D. Fla. Nov. 2, 2015) (not reported in Fed. Supp.), the petitioner complained of his mental incapacity and reliance upon prison law clerks, but this Court found the petitioner's attempt to shoehorn the facts of his case to resemble those in Hunter unconvincing and insufficient to warrant equitable tolling.

More recently, in O'Connor v. Inch, No. 17-60234-CV-COHN/REID, 2019 WL 11029408, at *2 (S.D. Fla. Sept. 24, 2019), the petitioner argued equitable tolling was appropriate because he suffers from mental illness, he was effectively abandoned by counsel, and he was deprived of personal property and legal materials during transfers between facilities. In pertinent part, the court held: "[m]ental impairment, without a showing of how such impairment affects a petitioner's ability to file a timely petition, is insufficient reason to equitably toll the limitations period under the AEDPA." Id. at *3 (citing Lawrence (contention that individual suffered from mental illness all his life is not sufficient reason to justify equitable tolling) and Hunter).

The record demonstrates, in Petitioner's case, he was not relying on his own skills or that of prison law clerks or inmates to assist him in filing a federal habeas petition. Petitioner had experienced capital registry counsel: Mr. Robert Norgard. Mr. Norgard had extensive criminal law experience as both an assistant public defender and in private practice. EH at 25-27. He had extensive experience handling capital cases. Id. at 26. He also handled federal death-penalty cases. Id. at 28. He had been involved in handling post-conviction cases since approximately 1996. Id. Mr. Norgard confirmed that as appointed registry counsel, an attorney under the registry contract is obliged to handle subsequent litigation. Id. at 29.

Mr. Norgard received an appointment as registry co-counsel. Id. at 29-30. He was well aware that he was responsible throughout all postconviction capital proceedings, including federal habeas corpus proceedings. Id. at 29. Although Petitioner had been represented by Capital Collateral Representatives North, the agency was disbanded and Heidi Brewer, who had been representing Mr. Miller leading up to his post-conviction evidentiary hearing, contacted Mr. Norgard to assist with the evidentiary hearing. Id. at 30-31. Mr. Norgard explained he was brought in because he had both post-conviction and appellate experience. Id. at 31. Mr. Norgard filed a notice of appearance that was filed with the clerk on October 6, 2003. Id. at 32. Ms.

Brewer eventually withdrew, and Mr. Norgard took over the case. Id. Mr. Norgard eventually withdrew in 2013 after a meeting on August 9, 2013, in which Petitioner was "unequivocal in his request that I pursue him being a death volunteer." Id. at 35. Mr. Norgard explained that his law firm of Norgard & Norgard was Petitioner's sole representation from June 2004 through August 2013.[6] Id. at 36.

Under oath, Mr. Norgard stated he did not file a federal habeas petition on Petitioner's behalf because, "Mr. Miller specifically did not authorize me to file a federal habeas, and he indicated if I did, that he would seek to have it dismissed and make the Court aware of his wish to be a death volunteer." Id. Mr. Norgard explained that mental health issues affected Mr. Miller throughout most of his life, and there were extensive mental health records from North Carolina, including evidence that Mr. Miller's capacity to appreciate criminality had been impaired at the time of the North Carolina offense, and his mental illness "impacted on his prior criminal behavior." Id. at 37.

Petitioner was present for part of the state court evidentiary hearing. Id. Mr. Norgard attested Petitioner was competent to proceed with the court

[6] Mr. Norgard's wife and legal partner, worked with Mr. Norgard and provided some legal assistance.

matters, even though he had mental health issues. Id. Mr. Norgard believed Petitioner "would be competent to be executed under the legal standards related to that." Id. Mr. Norgard also felt Petitioner was competent to waive matters that he could waive in his case. Id. at 38. Nevertheless, Mr. Norgard felt that Petitioner's desires to take certain actions, like volunteer for death and waive his appeal, were because of his mental health issues. Id.

Although Mr. Norgard attested if Petitioner had insisted on becoming a volunteer for death or in waiving the appeal of the denial of the Rule 3.851 motion, Mr. Norgard would have requested a mental health evaluation, he was "very pessimistic about an expert finding him not to be competent to waive those matters." Id. Mr. Norgard explained that his opinion was based on the low threshold of what is considered to be competent to appear at trial or to waive matters. Id. He noted, a defendant can be a paranoid schizophrenic but still be found competent to proceed to trial. Id. Although concerned about Petitioner's mental health, Mr. Norgard firmly believed Mr. Miller would be found competent. Id. at 40.

Mr. Norgard conducted the state evidentiary hearing on November 4th and November 5th of 2003 and did the examination of witnesses. Id. at 40-41. Under the registry, Mr. Norgard was co-counsel for Petitioner. Id. at 41. Mr. Norgard was aware of Petitioner's significant mental health issues, id. at

49, including that he had reported an auditory hallucination back on September 6, 1983. See Petitioner's Exhibit Limited Evidentiary Hearing October 21, 2021,[7] Petitioner's Exhibit 6, Tab 3 at 121. Mr. Norgard reiterated, he felt Petitioner was competent, but at the same time, he felt that if Petitioner did not have his mental health issues, he would not move towards being a death volunteer. Id. at 60.

Mr. Norgard believed Petitioner met the competency factors to waive rights. Id. at 61. Mr. Norgard elaborated:

> I guess the simplest way of putting it, we have somebody with a history of suicide and the fact that he wanted to kill himself and had trouble living with his mental illness doesn't surprise me.
>
> I mean, it's almost like state-assisted suicide in this case, and he'd certainly tried to do it on his own before.

Id.

[7] The Court will refer to these Exhibits as "Petitioner's Exhibit" and also reference the particular tab, if applicable. The Court will refer to the page numbers found on the lower right-hand corner of the exhibits. Of note, Petitioner's Exhibits 6, 7, and 8 are filed under seal. See Order (Doc. 62). However, the Court finds it necessary to reference the content of these exhibits in order to explain its decision as to whether Petitioner has satisfied the test to qualify for equitable tolling. Of note, Petitioner's mental disorder and the manifestations of that disorder have already been extensively revealed through the Petition (Doc. 15), the Appendix Record of State Proceedings (Doc. 32), and in published decisions, Miller v. State, 770 So. 2d 1144 (Fla. 2000) (per curiam) and Miller v. State, 926 So. 2d 1243 (2006) (per curiam).

With regard to specific conversations about filing a federal habeas petition, Mr. Norgard related that the initial conversation concerning this topic occurred at the state-court evidentiary hearing. Id. The court allowed counsel to talk to Petitioner privately, and the issue was discussed. Id. at 62. Mr. Norgard stated he kept track of when the federal petition would be due in the summer of 2006. Id. The first day of the evidentiary hearing, the discussion took place, and Petitioner agreed to "at least waive his appearance at the evidentiary hearing and not pursue the other matters he had indicated to us and waived his appearance and I believe he was taken back that same day." Id.

Of import, Mr. Norgard attested that he spoke to Mr. Miller after the mandate issued on April 13, 2006, specifically through a phone call made on April 26, 2006, to see if Mr. Miller had changed his mind about whether to file a federal petition.[8] Id. at 85. Mr. Norgard said he had also talked to Petitioner previously, prior to the mandate being issued, asking that same question, to confirm Petitioner had a continuing desire not to pursue his federal remedies. Id.

[8] Mr. Norgard testified that he believed the Florida Department of Corrections' records were inaccurate as they failed to show a number of phone calls counsel made to Petitioner noted in Mr. Norgard's office records, including the April 26, 2006 phone call.

Mr. Norgard did not have any question as to Petitioner's competency. Id. at 86. Mr. Norgard stated he tried to get his client to submit himself to a mental health examination, but he refused. Id. As far as being prepared to file a federal petition, Mr. Norgard attested that he had identified the issues and would have been prepared to move forward in a timely manner. Id. But, "from the time of the evidentiary hearing through that last call, [Petitioner] would not hear anything about any further appeals[.]" Id. Mr. Norgard said Petitioner repeatedly talked about wanting to be a death volunteer, but after speaking with Mr. Norgard on each occasion, Petitioner would, "at least be equivocal and end the call." Id. As for billing, Mr. Norgard explained that anything he did in preparation for the federal habeas he would not have billed to the state; therefore, he did not submit any bills for his work post mandate. Id. at 87-88. Notably, he would have been paid more for federal work than state work. Id. at 87.

At the evidentiary hearing, the following question was asked: "[d]id you intentionally miss the deadline in either Mr. Miller or Mr. Jones' [another death-sentenced inmate] case to keep them off of a warrant-eligible list?" Id. at 109. Mr. Norgard responded no. Id. Finally, on direct, Mr. Norgard said he did not have federal habeas experience in 2006. Id. at 118.

On cross-examination, Mr. Norgard attested that Petitioner made the decision to forgo the filing of a 2254 petition. Id. at 119. Petitioner first told Mr. Norgard of his decision at the evidentiary hearing in November 2003. Id. at 119-20. After the mandate on the denial of his Rule 3.851 motion, Mr. Norgard reached out to Petitioner again and Petitioner confirmed his desire to forgo filing a 2254 petition. Id. at 120. At no time did Petitioner ask Mr. Norgard to file a federal petition. Id. Petitioner never communicated with Mr. Norgard any desire to file a federal petition. Id. at 122.

Mr. Norgard believed Petitioner to be competent at the evidentiary hearing. Id. at 120. During the state-court evidentiary hearing, Petitioner wanted to abort the hearing. Id. at 120-21. Apparently, he had been reluctant to file the post-conviction motion. In a pause in the proceedings, during a private conversation, the following transpired:

> We were allowed to have a private conversation with him. He told us that he didn't even want to file the motion. He didn't want the hearing to continue. We talked him out of that by getting him to agree we could just send him back to the prison, and we'd just do what we needed to do.

Id. at 121.

During his tenure working on Petitioner's case, Mr. Norgard testified that he never saw anything in any mental health reports or through the

communication with any mental health experts that Petitioner was incompetent to proceed. Id. at 123-24. At the capital phase of the trial, Petitioner apologized to the family of the victim, apologized to the surviving victim, and expressed remorse for his actions. Id. at 124.

On re-direct, Mr. Norgard explained his conviction that Petitioner was competent, noting that Ms. Brewer was having issues with Petitioner being reluctant to sign and submit a Rule 3.851 motion, and during this particular time period, Petitioner was seen by a mental health expert three times. Id. at 125. After the evidentiary hearing, Mr. Norgard made three phone calls to Petitioner, one of which was refused, and visited Petitioner once. Id. at 126. Mr. Norgard specified he had two particular reasons for maintaining contact with Petitioner: "to keep a lid on his wish to be a death volunteer, and to assess whether he still wanted to waive his appeals[.]" Id.

Mr. Norgard described Petitioner as lucid and able to understand his counsel. Id. Petitioner reiterated that he did not want to continue the litigation and wanted to be a death volunteer. Id. Mr. Norgard said Petitioner "would express very lucid reasons as to why he wanted to just die and finish it up and get it over with." Id. Petitioner even wrote the state court about his desire to be a death volunteer. Id. at 127. Mr. Norgard wanted to keep a lid on Petitioner's desire to be a death volunteer. Id.

When asked if, when Mr. Norgard stated he wanted to avoid initiation of the process, he was referring to clemency review, Mr. Norgard responded no. Id. at 129. He explained he was trying to keep Petitioner from revealing he wanted to be a death volunteer, like when he contacted the state court. Id. Mr. Norgard agreed that Petitioner's case "flew under the radar[.]" Id. at 130.

In closing argument, Petitioner's current counsel, Mr. Gregory Brown, asked the Court to not credit Mr. Norgard's testimony about "additional phone calls" because various records and billing statements do not reflect these calls. Id. at 131-32. Mr. Brown argued, the evidence shows Mr. Norgard did not communicate with his client at all regarding the filing of a federal habeas petition. Id. at 133. Further, Mr. Brown claims there was constructive abandonment based on Mr. Norgard's failure to visit or speak with his client in a meaningful way. Id. Mr. Brown submits that no mental health expert evaluated Mr. Miller to determine if he was competent to make the decision to waive his federal habeas petition. Id. at 134. Finally, Mr. Brown asked for an additional evidentiary hearing to establish that Petitioner's "mental health is an extraordinary circumstance and affects his diligence in filing the federal habeas petition." Id. at 135.

In closing, Respondents' counsel, Mr. Michael Kennett, said Mr. Norgard testified Petitioner was the one who decided to forgo filing a 2254 petition,

Petitioner failed to rebut that testimony with any direct evidence, and Petitioner failed to meet his burden to establish equitable tolling. Id.

IV. Findings and Conclusions

The Court credits the testimony of Mr. Norgard. He is an officer of the Court. He testified under oath he was very experienced counsel at the time of Petitioner's state court evidentiary hearing. See Hardwick v. Benton, 318 F. App'x 844, 846 n. 2 (11th Cir. 2009) (per curiam) ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.") (quoting Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)). Petitioner did not take the stand to discredit counsel's testimony as to what occurred during Mr. Norgard's representation of Petitioner. As such, Mr. Norgard's testimony that Petitioner decided to forego his federal remedies and reported his decision to Mr. Norgard at the state court evidentiary hearing and during a post-mandate phone conversation before the limitation period expired essentially went unrebutted.[9] Mr. Norgard abided by his client's directive to not file a federal

[9] The Court is not convinced that the absence of any reference to telephone calls in the Florida Department of Corrections' records means telephone conversations did not occur as Mr. Norgard attested otherwise, based on his office records. Even if this Court were to discount some or all of these telephone conversations, at the state court evidentiary hearing, Petitioner told Mr. Norgard he did not want to pursue federal remedies.

habeas petition. As such, there was no abandonment by counsel or constructive abandonment by counsel.

As for Respondents' unsupported theory that Mr. Norgard adopted a strategy to avoid clemency review and decided to forego federal habeas proceedings in order to implement this strategy, that theory is unsupported by the record.[10] Mr. Norgard testified his strategy did not include efforts to avoid

---

[10] Based on the state of Florida clemency law as of December 9, 2004, Respondents' contention that Mr. Norgard developed some scheme to avoid clemency review by intentionally failing to file a federal petition is non-sensical. Mr. Norgard began his representation of Petitioner in 2003. Mr. Norgard represented Petitioner at the state court evidentiary hearing on the Rule 3.851 motion. The mandate issued on April 13, 2006. The one-year limitation period expired on August 3, 2006. During that time, the Florida Rules of Executive Clemency, effective December 9, 2004, included the following provision:

> The investigation by the Parole Commission shall begin at such time as designated by the Governor. If the Governor has made no such designation, the investigation shall begin immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals, so long as all post-conviction pleadings, both state and federal, have been filed in a timely manner as determined by the Governor. **An investigation shall commence immediately upon any failure to timely file the initial motion for post-conviction relief in state court, and any appeal therefrom, or the initial petition for writ of habeas corpus in federal court, and any appeal therefrom. . . . The Parole Commission's Capital Punishment Research Specialist shall routinely monitor and track death penalty cases beyond direct appeal for this purpose.**

Id. Rule 15(C) (emphasis added). See Petitioner's Notice of Supplemental Authority (Doc. 66), Attachment A (December 9, 2004 Florida Rules of Executive Clemency) (Doc. 66-1). These rules remained effective until April 5, 2007, but the April 5, 2007 Rules also contain a comparable provision. Petitioner's Exhibit 22 (April 5, 2007 Florida Rules of Executive Clemency) (Doc. 63-1). Thus, the initiation of a clemency investigation by the Governor was due to commence immediately upon Petitioner's failure to file a timely initial petition in

clemency review. He stated he did not intentionally miss the deadline to keep Petitioner off a warrant-eligible list. In response to questioning as to whether Mr. Norgard was prepared to file a federal petition, he stated he had identified the issues and would have been prepared to move forward in a timely manner and would have timely filed a federal petition but for his client's adamant disapproval of counsel seeking any further appeals.

Mr. Norgard's focus was on two things: to attempt to keep a lid on Petitioner's desire to be death volunteer and to assess whether Petitioner wanted to waive his federal appeals. Although Petitioner managed to write and inform the state court of his desire to be a death volunteer, Mr. Norgard re-confirmed with Petitioner that he still wanted to forego further review of his judgment and sentence after completion of state post-conviction review. As a consequence of Petitioner not pursuing federal habeas relief, Petitioner's case may have fallen off of the Governor's and others' radar concerning the implementation of clemency proceedings or, just as a matter of circumstance or other reasons, these proceedings were not initiated. See Notice to Court Regarding Clemency (Doc. 64).

---

federal court. As such, Respondents' assertion that Mr. Norgard intentionally missed the deadline as part of a litigation strategy to avoid consideration for a warrant by not completing one round of federal litigation is without merit and contrary to the state of the law at the time Mr. Norgard represented Petitioner during the one-year limitation period.

In sum, the Court finds Mr. Norgard did not intentionally miss the federal habeas deadline in order to implement a strategy to avoid or delay the scheduling of an execution date. Also, Mr. Norgard did not negligently miss the deadline. Mr. Norgard's conduct did not amount to abandonment of the attorney-client relationship. There was no severance of the agency relationship. Mr. Norgard did not purposely act adversely to Petitioner's interests by acting or failing to act for the purpose of advancing Mr. Norgard's own interests or those of a third party. Finally, and of great import, Mr. Norgard did not take actions that were contrary to Petitioner's instructions and adverse to his interests. Petitioner instructed Mr. Norgard not to file a federal petition and further appeal his judgment and sentence. Mr. Norgard abided by his client's wishes. Mr. Norgard neither abandoned nor "constructively" abandoned Petitioner. In short, the Court finds there was no attorney misconduct or egregious failures of counsel to pursue further appeals.

On the record of the state court evidentiary hearing on November 4 and 5, 2003, Petitioner stated on the record, "I want to cancel these proceedings and go back to prison. I want to drop all my appeals." Ex. 29 at 949. The court declined to entertain Petitioner's request at that time but allowed that Petitioner could discuss the matter with counsel at lunch break. Id. After conferring with their client, Ms. Brewer, co-counsel for Petitioner, announced

Petitioner's presence at the proceeding was waived with Petitioner's consent. Id. at 979. After some discussion, the court granted Petitioner's request to leave the proceeding. Id. at 987-88.

To establish that he is entitled to equitable tolling during the period of Attorney Norgard's representation, Petitioner must demonstrate both that he diligently pursued his federal habeas rights and extraordinary circumstances prevented his timely filing of a federal habeas petition. In order to get to the heart of the matter, the Court assumes without deciding that Petitioner has diligently pursued his rights. See O'Connor, 2019 WL 11029408, at *2 (assuming same). The question remains whether Petitioner has shown an extraordinary circumstance warranting equitable tolling. In order to obtain equitable tolling for the period following the issuance of the mandate on April 13, 2006 through the expiration of the one-year limitation period on August 3, 2006, not only must Petitioner show extraordinary circumstances he must also demonstrate those circumstances caused him to miss the filing deadline.

The record demonstrates the following. Petitioner has depression and has been diagnosed with alcohol abuse. Miller, 926 So. 2d at 1250. He suffers from a personality disorder, but not a major mental illness like psychosis or schizophrenia. Id. Since at least 1983, he has exhibited this mixed personality disorder, involving features of being avoidant, schizoid, and

paranoid. Id. He performs well on intelligence tests but has an impairment of frontal lobe functions. Id. Dr. Krop found Petitioner to be mentally competent when he committed the murder and mentally competent to participate in the trial proceedings. Id. at 1251. In brief, Petitioner has been diagnosed with "alcohol and drug abuse, frontal lobe defects, and schizoid personality traits." Miller, 770 So. 2d at 1147.

The record shows Petitioner has suffered from long-term mental health and emotional illness and drug and alcohol dependencies. Although Petitioner was found to have mental problems reducing his culpability for a 1986 murder in North Carolina, that was not the case for the 1997 murder of Albert Floyd. Of note, Petitioner was convicted of both murders and served time for both.

Debra Lee, a social worker and substance abuse counselor, testified at the state court evidentiary hearing that Petitioner had been diagnosed with schizoid personality disorder on November 22, 1996. Id. at 1004. Dr. Joseph Chong Sang Wu, the clinical director for the University of California Irvine Brain Imaging Center, agreed Petitioner had frontal lobe deficit. Id. at 1053-54. He attested the PET scan provides additional corroborative evidence of frontal lobe deficit. Id. at 1057.

Dr. Harry Krop, a licensed psychologist, attested that he had reviewed the records, including records from various psychiatric facilities, the file related to the 1986 murder case, prison record, VA psychiatric records, and others, before giving his opinion to trial counsel. Id. at 1098-99, 1112. He specifically stated he would have reviewed the records of the 1983 involuntary hospitalization. Id. at 1112. Dr. Krop testified Dr. Wu's findings from the PET scan were consistent with Dr. Krop's findings of his "neurpsyche." Id. at 1099. In response to the question as to whether Dr. Krop had found Petitioner had schizoid personality traits, Dr. Krop responded affirmatively. Id. at 1100. He explained:

> Yes, one of my diagnoses was – and I don't recall when the DSM switched over. It may have been referred to back then as a mixed personality disorder or now it would be a personality disorder not otherwise specified, in my opinion, with – I diagnosed him with **avoidance, schizoid and paranoid features and pretty much he's been diagnosed with somewhat of a similar diagnosis by the various facilities and doctors he's seen over the years.**

Id. (emphasis added).

Dr. Krop found his evaluation was generally inconsistent with any major mental illness, but he found Petitioner to be suspicious with paranoid tendencies. Id. at 1102. After the neuropsychological test and evaluation, Dr. Krop found cognitive deficits in the frontal lobe. Id. at 1103. He also

found Petitioner of a "decent intellectual level," with some adjustment disorders. Id. at 1106. Dr. Krop described Petitioner as leading a "schizoid lifestyle." Id. at 1113. Dr. Krop stated that there was no record that Petitioner was "psychotic," leading to Dr. Krop's conclusion that he was not psychotic at the time of the offense. Id. at 1114. Again, Dr. Krop said Petitioner was diagnosed with adjustment disorder, alcohol abuse, and mixed personality disorder with avoidance, schizoid and borderline features. Id.

Of import, at the state-court evidentiary hearing, Dr. Krop testified his opinion had not changed from when he testified in 1997 or 1998 to date. Id. at 119. He opined that Dr. Wu's PET scan and findings strengthened Dr. Krop's original findings of frontal lobe deficits but did not alter or change his original opinion. Id. Dr. Krop reconfirmed that Petitioner does not suffer from any major mental illness, like psychoses, a debilitating mood disorder, or severe depressive mental illness. Id. at 1125-26.

There is an abundance of mental and psychological records in the record before the Court, including those submitted by Petitioner at the federal evidentiary hearing on November 21, 2021. There is evidence of a petition for involuntary commitment in 1983 requesting commitment based on the individual being mentally ill or inebriated who is dangerous to himself or others. Ex. 26 at 646. A commitment order followed. Id. at 647. The

North Carolina Division of Mental Health, Mental Retardation and Substance Abuse Services document of admission, dated September 3, 1983, shows Petitioner reported he was drunk and had a black out experience. Id. at 649. Petitioner became aggressive and threatening, he drank again, and attempted to cut himself. Id. On July 16, 1986, in his second mental health center admission in North Carolina, he reported he had been found competent to proceed to trial. Id. at 656. Records from November 1996 show the assessment of alcohol and drug abuse as well as an Axis II schizoid personality disorder. Id. at 497, 501.

Dr. Krop's letter of October 30, 1997, to Alan Chipperfield, contains Dr. Krop's conclusion that Petitioner "is viewed as Competent to Proceed" after Dr. Krop's clinical interview, the administration of a battery of psychological testing, and a review of the records. Id. at 662. He found: "[t]here is also no evidence to suggest that he would have been unable to appreciate the nature, quality, and wrongfulness of his actions. However, Mr. Miller is an intelligent individual with an extensive history of alcohol and substance abuse." Id. Dr. Krop further stated, the evaluation is generally inconsistent with any major mental illness, although he found Petitioner a suspicious individual with paranoid tendencies. Id. He found the evaluation inconsistent with an Antisocial Personality Disorder. Id. Extensive notes are attached, including

notations as to the documents Dr. Krop reviewed and the interviews he undertook. Id. at 664-71.

The record shows Dr. Krop testified at the penalty phase of the trial. Ex. 13 at 893. In a nutshell, he testified to the following:

> The type of personality disorder which he was diagnosed in '83 and later in '85, and also my own evaluation are very consistent with that, is a personality disorder which we call mixed or mixed personality disorder, which means it has features from different types of personality traits.
>
> And the most consistent personality traits that he has been diagnosed as having are avoidant, schitzoid [sic] and paranoid. Schitzoid [sic] and paranoid are the type of personality traits that really cause a person problems.
>
> I think paranoia is a pretty commonly used term and it's when a person is overly suspicious, thinks people are out to get him, et cetera, et cetera, not to the point where he is not in touch with reality, but to a point where it causes problems with that person adjusting in society.
>
> Schitzoid [sic], again, is like schitzophrenia [sic], but not to the point where the person is out of contact with reality. Schitzoid [sic] individuals typically are very aloof. They try and distance themselves and sort of view themselves as different and others view them as different, and they don't fit in with society.
>
> So those kinds of traits have been constantly assigned to Mr. Miller from '83, and my psychological testing was very consistent. So that would be his

> diagnosis, that personality disorder plus alcohol abuse both from '83 on, as well as my current evaluation.

Id. at 900-901.

Dr. Krop found Petitioner sane at the time of the offense, noting he clearly knew right from wrong. Id. at 903. Dr. Krop also found Petitioner competent to proceed. Id. Dr. Krop did not find that Petitioner had an anti-social personality disorder, nor has he been diagnosed as such in the past. Id. Dr. Krop found Petitioner to be of average intellectual ability but he did not do well on tests measuring frontal lobe functions. Id. at 906. Dr. Krop explained that part of the brain controls behavior or inhibition. Id. Upon being interviewed, Petitioner expressed to Dr. Krop that he felt guilty, remorseful, and responsible, said he deserved to be punished, and accepted responsibility for his actions. Id. at 910. Dr. Krop said Petitioner expressed the same in the taped confession he provided in Louisiana. Id. Dr. Krop testified that he believed, at the time Petitioner committed the murder he was mentally competent, and he believed Petitioner was competent to participate in his trial ("Yes, very much."). Id. at 919. Dr. Krop testified Petitioner was lucid, was not delusional, and was oriented in time, place, and situation. Id. at 919-20. Of note, Dr. Krop recorded that Petitioner was not hallucinating and not suffering from any major mental illness. Id.

At trial, Petitioner took the stand and apologized to the surviving victim, Ms. Linda Fullwood (aggravated battery), and apologized to the family of the deceased, Mr. Albert Floyd. Id. at 937.

Although Petitioner submits that several other doctors should have been called at the state post-conviction evidentiary hearing, Petitioner has not provided the Court with any evidence that Petitioner was, at the time of the state post-conviction evidentiary hearing or during the time Mr. Norgard represented Petitioner, incompetent, insane, or suffering from a major mental illness. See Petition at 87-89. Petitioner mentions Dr. Herkov but makes no mention how his testimony would have differed from the experts that were called to testify. Id. at 87-88. Certainly, post-conviction counsel called the expert witnesses who best supported Petitioner's contention of serious mental impairment.

Petitioner asserts Dr. Satterfield said had he been aware of additional information, "he **would likely** have diagnosed Miller with full-blown schizophrenia[,]" not that he did diagnose Petitioner as suffering from schizophrenia. Id. at 88 (emphasis added). Finally, Petitioner mentions a Dr. Eddy Regnier, and contends, "**his findings are consistent with other evidence in Miller's case** demonstrating that Miller suffers from schizophrenia." Id. (emphasis added). If his findings are consistent with

other evidence, that evidence, based on the testimony and reports of numerous experts, shows Petitioner has a personality disorder identified as mixed or mixed personality disorder with avoidant, schizoid and paranoid personality traits, or something comparable to that diagnosis, along with frontal lobe impairment.

As noted in repeated orders of the Court, the conduct of Mr. Norgard and the related conduct of Petitioner were to be the focus of the evidentiary hearing. (Docs. 44, 46, 47). For purposes of equitable tolling, this Court looks to the period and the actions of the attorney "who represented petitioner at the time when [Petitioner's] federal habeas petition was due to be filed." Christeson v. Roper, 574 U.S. 373, 382 (2015) (per curiam) (Alito, J., dissenting).

Although given the opportunity, Petitioner did not take the stand at the evidentiary hearing. He sat silent and did not dispute Mr. Norgard's testimony that Petitioner, in a lucid and forthright manner, told counsel not to file a federal habeas petition and continued in this vein through the expiration of the one-year limitation period. The Court observed Petitioner's behavior in the courtroom. He appeared to be lucid, engaged, and oriented. He communicated with his counsel and observed all courtroom decorum. He

never disrupted the proceedings or acted inappropriately in the courtroom. As such, Mr. Norgard's testimony remains unrebutted and will be credited.

Petitioner makes an unsupported allegation that effective communication was virtually impossible between Petitioner and his counsel. Petition at 11. Based on Mr. Norgard's testimony, there were no barriers to communication. Petitioner lucidly expressed his desires to Mr. Norgard at both the state court evidentiary hearing and afterwards. Petitioner did not want Mr. Norgard to file a federal habeas petition and Petitioner expressed his wishes to counsel. Mr. Norgard abided by Petitioner's decision and directives. Mr. Norgard reached out to Petitioner to make sure Petitioner had not changed his mind after the state-court evidentiary hearing, and Petitioner reiterated his decision and directive not to file anything further. Mr. Norgard did not observe or describe any active delusions or hallucinations during the evidentiary hearing or during post-hearing communications. Further, he did not describe any behavior suggestive or indicative of active psychosis on Petitioner's part. Based on Mr. Norgard's testimony, the Court concludes there were no barriers to effective communication between Petitioner and his counsel.

As such, Petitioner has failed to show Mr. Norgard engaged in any serious attorney misconduct qualifying as an extraordinary circumstance.

Petitioner has not shown bad faith, dishonesty, divided loyalty, or mental impairment on the part of his counsel. Cadet, 853 F.3d at 1236. Additionally, this record "does not suggest abandonment or any other form of serious misconduct rising to the level of an 'extraordinary circumstance.'" Robinson v. Jones, No. 1:17cv198-MW-CJK, 2018 WL 6920351, at *4 (N.D. Fla. Nov. 6, 2018), report and recommendation adopted by 2019 WL 77508 (N.D. Fla. Jan. 2, 2019), affirmed by 808 F. App'x 894 (11th Cir. 2020), cert. denied, 141 S. Ct. 2764 (2021) (per curiam).

Unlike counsel in Thomas v. Attorney General, 992 F.3d 1162, 1167 (11th Cir. 2021), petition for cert. filed, (U.S. Oct. 20, 2021), Mr. Norgard did not abdicate his duty of loyalty to Petitioner so he could promote his own interests or the interests of others. Crediting Mr. Norgard's uncontroverted testimony, Mr. Norgard did not misinterpret the one-year deadline, he did not fail to conduct research and contemplate the issues to be raised in a federal petition, and he did not walk away from the attorney-client relationship. See id. at 1183; Cadet, 853 F.3d at 1234 ("Abandonment denotes renunciation or withdrawal, or a rejection or desertion of one's responsibilities, a walking away from a relationship."). Furthermore, there is no evidence that Mr. Norgard acted in bad faith. Thomas, 992 F.3d at 1184. In sum, there has not been a showing of "professional misconduct" or some other extraordinary

circumstance for equitable tolling purposes. Walters v. Fla. Dep't of Corr., No. 3:18-cv-1088-TJC-PDB, 2021 WL 3172120, at * 3 (M.D. Fla. July 7, 2021). See Holland, 560 U.S. at 651 ("professional misconduct . . . could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling").

This does not mean Mr. Norgard's representation was flawless. Robinson v. State Att'y for Fla., 808 F. App'x 894, 898 (11th Cir. 2020) (per curiam), cert. denied, 141 S. Ct. 2764 (2021). But negligence, even gross or egregious negligence, does not, by itself, rise to the level of abandonment. Id. Mr. Norgard's overall conduct, "is not of the kind that would indicate attorney abandonment." Id. at 899. Petitioner continued to have a functioning attorney of record, even though Petitioner had told counsel to stand down as far as pursuing federal remedies and further appeals. Cadet, 853 F.3d at 1235. Here, counsel followed Petitioner's express wishes; Mr. Norgard consulted with his client, making "a reasonable effort to discover the defendant's wishes." Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000). Thus, he performed in a professionally reasonable manner. Id.

Since Petitioner has failed to prove an alleged extraordinary circumstance of abandonment, it is unnecessary for this Court to consider whether Petitioner was "adequately diligent or not." Robinson, 808 F. App'x

at 899. Indeed, for equitable tolling purposes, this Court need not address one element when Petitioner has failed to satisfy the other. Menominee Indian Tribe of Wis., 577 U.S. at 256.

Next, this Court will inquire as to whether Petitioner has shown some other extraordinary circumstance, an external obstacle to timely filing. Id. This extraordinary circumstance must have stood in Petitioner's way. Id. (citation omitted). Of note, equitable tolling is unavailable if a litigant "was responsible for its *own* delay." Id. at 257. As such, if the matter was within the petitioner's control, the extraordinary-circumstances prong cannot be met. Id. Again, the second prong is met only where the circumstances that caused the delay are both extraordinary *and* beyond its control. Id.

A conclusory assertion of mental illness will not suffice. Smith, 301 F. App'x at 378. Moreover, simply because a petitioner is not mentally competent does not "eviscerate the statutory right to counsel in federal habeas proceedings." Gonzales, 568 U.S. at 68 (internal quotation marks omitted). As the Supreme Court found, "[g]iven the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence." Id. This is borne out by the fact that the federal court's review pursuant to 28 U.S.C. § 2254(d)(1) is limited to the record before the state court

that adjudicated the claim on the merits. Id. (quoting Cullen v. Pinholster, 563 U.S. 170, 181 (2011)). As found in Gonzales, "[a]ttorneys are quite capable of reviewing the state-court record, identifying legal errors, and marshaling relevant arguments, even without their clients' assistance." Id. at 68.

Here, Mr. Norgard attested that he had identified the issues and was prepared to initiate a federal habeas case if Petitioner so desired. Mr. Norgard was in a position to undertake this review as Petitioner's state habeas registry counsel. He was well-versed in the post-conviction issues. However, based on Petitioner's express wishes, Mr. Norgard did not file a federal petition.

Petitioner has not shown that his mental impairment constrained Petitioner's ability to file a timely petition. Petitioner communicated with his counsel. Mr. Norgard spoke with Petitioner after the mandate issued to confirm that he did not want to pursue his federal remedies. In no uncertain terms, Petitioner told his attorney he did not want to pursue his federal remedies. Any failure of counsel to stay in touch after the missed federal deadline is of no import as any failures at that point did not cause Petitioner to miss the filing deadline. Ryder, 2012 WL 12895353, at *4.

The petitioner in Bolarinwa, upon which Petitioner relies, was found to be incapacitated at one point in her life, then rehabilitated and fit to proceed to trial. Bolarinwa suffered from depression, anxiety, and psychosis, but the court still found she was not subjected to extraordinary circumstances that prevented her from filing a federal habeas petition in a timely fashion. Nara, Laws, and Hunter are distinguishable because the petitioners either initially filed pro se or with just the help of jailhouse clerks, not attorneys. Similarly, the court in McSwain, rejected a claim for equitable tolling because the petitioner was able to pursue her state court remedies notwithstanding her mental illness and she was represented by counsel for the federal proceeding. And, in Fisher, the Fifth Circuit agreed that there is a possibility that mental incompetency might support equitable tolling, but the court still declined to apply equitable tolling.

Here, the Court must look for the causal link between Petitioner's mental illness and his ability to seasonably file a petition. The record shows Petitioner was not expected to pursue legal relief on his own. He was appointed registry counsel, versed in the deadlines and procedures. There is no evidence that Petitioner was unable to communicate with Mr. Norgard. Mr. Norgard spoke with Petitioner in person and through telephone conversations. Even in Riva, 803 F.3d at 83, where there was a record that

the petitioner had been committed to a facility for seventeen years, suffered from diagnosed paranoid schizophrenia, exhibited bizarre delusions of a persecutory nature, paranoid ideation, auditory hallucinations, and somatic terrors, the court still found that the petitioner had not shown that his mental illness prevented him from following through with his litigation.

Here too there is no evidence that Petitioner's mental impairment prevented him from conferring with counsel and making litigation decisions. There is no evidence that Petitioner refused all communication with counsel. Indeed, counsel explained that Petitioner made his position clear, both in person and on the telephone; he did not want to pursue further appeals. Under these circumstances, the Court is not convinced that Petitioner has shown that his mental illness prevented him from communicating with counsel and pursuing his litigation if he were so inclined. The record demonstrates Petitioner had an attorney to assist and educate him. See Hunter, 587 F.3d at 1309 (no counsel to assist and educate the petitioner). Petitioner is of average intelligence. See id. (due to severe irreversible mental retardation, Hunter was not able to understand and comply with filing requirements on his own, or even if he had counsel, he would have had a very difficult time assisting others). Although Petitioner may have impulse issues due to frontal lobe

damage, he scored well on intelligence tests and was able to converse with counsel, express his opinions and concerns, and assist counsel.

There is no evidence that Petitioner was unable to understand his legal rights or act upon them. This is evidenced by the fact that he was found to be competent to proceed in both North Carolina and Florida. Simply suffering from mental impairments, as Petitioner admittedly does, is insufficient to establish that there is a causal connection between his alleged mental deficiencies or disorder and his ability to relate to counsel that he desires to pursue his federal remedies. See Lawrence, 421 F.3d at 1227.

Petitioner needs to show that his mental illness was so profound and debilitating, he was unable to file a timely habeas petition, given his mental limitations, even with the assistance of knowledgeable counsel. See Lewis v. Howerton, No. 1:07-cv-2803-JEC-WEJ, 2012 WL 4514044, at *16 (N.D. Ga. Sept. 30, 2012) (not reported in F.Supp.2d) (must show inability to file based on debilitating mental condition), cert. denied, 137 S. Ct. 132 (2016). Petitioner has not shown that he has an inability to understand and appreciate federal law and procedure due to a mental disorder. Indeed, it is quite apparent on this record that Petitioner fully understood that there was a timeline and there were avenues open to him to pursue federal remedies, but he elected not to pursue those remedies and chose not to meet the

requirements, and purposefully declined to take further action by telling his counsel not to act, first at the evidentiary hearing, and later on during the one-year limitation period. There was no extraordinary circumstance that stood in Petitioner's way. Petitioner was given the opportunity, with the assistance of counsel, to pursue his federal remedies in a timely fashion. Petitioner chose not to pursue those remedies.

Although Petitioner was advised that the hearing would concern "the conduct of Mr. Robert Norgard, Esquire, and the related conduct of Petitioner[,]" Order (Doc. 47), Petitioner did not take the stand at the evidentiary hearing. Instead, he chose to submit exhibits, all admitted at the hearing without objection.[11] See Petitioner's Exhibit Limited Evidentiary Hearing October 21, 2021. Petitioner's Exhibit 2 shows Mr. Norgard became sole registry counsel for Petitioner effective June 15, 2004. Petitioner's Exhibit 6 contains an extensive Background Packet of confidential attorney-client materials. These documents show Petitioner, although honorably discharged from military service, exhibited substandard performance during

[11] The Court has reviewed the entirety of Petitioner's Exhibits and the other exhibits contained in the record before the Court. Upon review, there is an abundance of evidence concerning Petitioner's mental disorder and condition. These exhibits include multiple experts' assessments of Petitioner's mental state over the years, and particularly of interest to the Court, assessments made closer to the time period at issue. These expert evaluations and assessments resulted in strikingly similar diagnoses.

his tenure of service in the Navy from 1978-81. Id., Tab 2. His 1983 discharge summary from his September 3, 1983 admission to Forsyth-Stokes Mental Health Center, dated September 19, 1983, shows Petitioner diagnosed with Axis I "Adjustment Disorder with Depressed Mood," placed on no medication, diagnosed with no Axis III diagnosis, and encouraged to seek out outpatient services for therapeutic issues. Id., Tab 3 at 80-81. He had been admitted on petition when he became both violent and suicidal, explaining he had been drinking and had a blackout experience. Id. at 80. Notes by the psychiatrist reflect, "no indication of psychotic thinking" but patient exhibited depression. Id. at 116. The psychiatrist's initial impression was "[d]ysthymic disorder with suicidal intent. Possible alcohol dependence." Id. at 117. On September 6, 1983, Petitioner reported an auditory hallucination, depression, crying spells, a suicide attempt, and the use of marijuana. Id. at 121.

For his second admission to the Forsyth-Stokes Mental Health Center in North Carolina, dated July 16, 1986, it was noted that Petitioner was awaiting trial for murder. Id. at 137. He reported, "not experiencing any psychiatric symptoms." Id. He admitted to drinking heavily and exhibiting violent impulses when drinking. Id. He denied "any hallucinations, delusions or unusual thoughts." Id. at 138. The social worker found, "intact mental

status" and said Petitioner "admits to no real psychiatric or behavioral disordering except when he is drinking." Id. The diagnosis on the discharge summary of October 2, 1986 is as follows: Axis I 305.03 Alcohol Abuse in remission; Axis I 312.34 Intermittent explosive disorder; Axis II None; Axis III None. Id. at 141. He was found to be well oriented with no unusual thought content. Id. at 141. Petitioner was again discharged without medication. Id. at 142. Generally, Petitioner was found to be of average intelligence with good verbal and social skills while suffering from alcohol and cocaine dependence. Id. at 143.

Petitioner's Exhibit 6, Tab 4, the records for Dorothea Dix Hospital, Raleigh, North Carolina, dated March 28, 1986, refer to the charge of murder with the following diagnosis: Axis I 309.40 Adjustment disorder with mixed disturbance of emotions and conduct; Axis I 305.03 alcohol abuse by history; Axis II 301.89 personality disorder, mixed, with avoidant, schizoid, paranoid and borderline features; Axis III No diagnosis. As far as Petitioner's mental status, it was noted that Petitioner was sad, apathetic, and asthenic, with no evidence of hallucinations or delusions. Id. at 150. He presented no evidence of hallucinations or delusions. Id. His Slosson Intelligence score was 101, placing him in the average range of intelligence. Id. at 151. Although there is a notation, "[d]iagnosis of schizoid personality and schizophrenia are the

most commonly found [sic] with this described profile[,]" the actual diagnosis by the forensic psychiatrist, Patricio P. Lara, M.D., is: Aix I Adjustment disorder with mixed disturbance of emotions and conduct; Axis I Alcohol abuse by history; Axis II Personality disorder, mixed, with avoidant schizoid paranoid and borderline features; Axis III None. Id. at 153. Again, Petitioner was discharged on no medication. Id. Finally, and of significance, the psychiatrist found Petitioner competent to stand trial. Id.

In 1996, Veteran's Administration (VA) Medical Center (admission date October 31, 1996; discharge date November 27, 1996) recorded the following diagnosis, in relevant part: Axis I Alcohol dependence, cocaine, and nicotine dependence with physiological dependence and cannabis abuse; Axis II Schizoid personality disorder. Petitioner's Exhibit 6, Tab 6 at 262. Petitioner denied hallucinations, Delirium Tremens (DT's) or seizures. Id. The doctor, J. Dasari, M.D., found no evidence of psychosis or delusions. Id. at 263. Dr. Dasari referred Petitioner to a psychologist for "continued assessment of his depressed mood, his anger, and his schizoid personality disorder." Id. at 264.

Of import, on October 30, 1997, Dr. Krop wrote Petitioner's defense counsel, Alan Chipperfield, Assistant Public Defender, that Dr. Krop's evaluation, after a battery of psychological testing, "is generally inconsistent

with any major mental illness, although Mr. Miller appears to be a suspicious individual with paranoid tendencies. The evaluation is inconsistent with an Antisocial Personality Disorder[.]" Petitioner's Exhibit 6, Tab 8 at 393. Dr. Krop found, "Mr. Miller understands his legal options and is viewed as Competent to Proceed." Id. Dr. Krop reviewed extensive records. Id. at 395-402.

At trial, the defense called Dr. Krop as an expert witness in forensic psychology. Petitioner's Exhibit 6, Tab 9 at 405. He attested he reviewed multiple records prior to his evaluation. Id. at 406-407 (school records, military records, psychiatric records from various facilities, prison records, VA psychiatric records, reports from Louisiana, Petitioner's taped confession, and depositions of relevant witnesses). Dr. Krop also interviewed family members and Petitioner. Id. at 407. Dr. Krop said Petitioner's past psychiatric records "have been pretty consistent as far as their diagnosis and their recommendations." Id. at 409. Over the years, Petitioner has been diagnosed with depression and alcohol abuse with violence related to drinking. Id. at 409-410. Historically, Petitioner has been diagnosed with some form of a personality disorder; however, "it's not considered a major mental illness, such as psychosis or schizophrenia[.]" Id. at 410. In short, Dr. Krop opined Petitioner has a "mental disorder" not a major mental illness. Id.

More specifically, Dr. Krop diagnosed: a mixed or mixed personality disorder, with the most consistent diagnosis of personality traits of "avoidant, schitzoid [sic] and paranoid." Id. at 411. To clarify, Dr. Krop explained that schizoid is like schizophrenia, "but not to the point where the person is out of contact with reality." Id. Dr. Krop did not diagnose Petitioner with an anti-social personality disorder. Id. at 414. Dr. Krop found Petitioner "competent to proceed." Id.

Dr. Krop said Petitioner was sane at the time of the offense, clearly knowing right from wrong. Id. Once again, Petitioner was found to be of average intellectual ability, but his frontal lobe functions were found to be diminished, that is, those functions involving inhibition and impulse control. Id. at 417-18. Dr. Krop opined Petitioner's impaired frontal lobe functions coupled with alcohol abuse, further reduced Petitioner's inhibition and impulse control. Id. at 419-20. This combined with Petitioner's "schitzoid [sic] traits and paranoid traits" resulted in Petitioner being seriously disturbed and engaging in impulsive behavior. Id. at 420. Dr. Krop described Petitioner as leading a schizoid type of existence, where Petitioner neither followed-up with treatment for his personality disorder or for alcohol abuse. Id. at 419.

Dr. Krop pointed out that Petitioner turned himself in, accepted responsibility for his actions, and apparently felt guilt and remorse. Id. at

421. Petitioner chose to turn himself in, after deciding to rob the deceased and to hit him in the head to disable him. Id. at 423-24, 429. Dr. Krop said Petitioner admitted he made a choice [to rob the victim], "and psychologically I believe that he did, yes." Id. at 423. Dr. Krop opined that Petitioner's actions were influenced by alcohol but Petitioner knew the difference between right and wrong. Id. at 425-26.

Ultimately, Dr. Krop found Petitioner was mentally competent at the time of the murder and at the time of the trial. Id. at 430. Upon examination, Petitioner was found to be lucid, not suffering from hallucinations and not delusional. Id. at 430-31. He was well oriented as to time, place, and situation. Id. at 431. Dr. Krop said he found no evidence of "any major mental illness" and Petitioner had the ability to conform his behavior and make the decision to kill. Id. at 431-32.

Petitioner's Exhibit 7 is the report of the PET-scan of Petitioner by Dr. Joseph C. Wu, dated October 10, 2002. Dr. Wu reports an abnormal scan with "metabolic decreases in orbitofrontal cortex," exhibiting a pattern consistent with encephalopathy. Id. at 1. He related, "[t]he most probable cause of the PET scan abnormalities is schizophrenia spectrum disorder." Id. at 2.

Dr. Charles Golden, a licensed psychologist conducted a neuropsychological assessment of Petitioner and provided a report dated

March 20, 2003. Petitioner's Exhibit 8. After conducting an Rorschach Inkblot Test, Dr. Golden found the results consistent with individuals with anterior brain dysfunction or schizoid/schizophrenic disorders. Id. at 3-4. Dr. Golden noted the PET scan was consistent and supportive of the analysis of anterior brain dysfunction. Id. at 7. Of importance, Dr. Golden provided the following diagnosis: Axis I Cognitive Disorder NOS, Multiple drug abuse (by history), Intermittent explosive disorder secondary to drug use (by history), Personality Disorder NOS. Id.

Yes, Petitioner suffers from a mental disorder, but Petitioner's own expert at trial, Dr. Krop, said Petitioner was not suffering from a major mental illness, nor did he loose contact with reality. Although Petitioner has been diagnosed with some form of a personality disorder, he has not been diagnosed with psychosis or full-blown schizophrenia. Although there has been some conjecture that Petitioner suffers from a schizophrenia spectrum disorder, the overwhelming evidence contained in the record shows Petitioner's frontal lobe functions are diminished and he has a personality disorder with avoidant, schizoid, paranoid, and borderline features, not a major mental illness, such as schizophrenia.

On the contrary, over the years, the diagnoses have been very consistent. The record is replete with documentation that Petitioner is living a schizoid

type of existence, described as Axis II schizoid, paranoid and borderline features; personality disorder, mixed, with avoidant, schizoid, paranoid and borderline features; personality disorder, mixed, with avoidant schizoid paranoid and borderline features; schizoid personality disorder; a mixed or mixed personality disorder, with personality traits that are avoidant, schizoid and paranoid; and Axis I Cognitive Disorder NOS, Multiple drug abuse (by history), Intermittent explosive disorder secondary to drug use (by history), Personality Disorder NOS.

Notably, experts have found Petitioner competent, both when he committed crimes and to stand trial. Experts have also found Petitioner sane. Petitioner has not provided the Court with any evidence that Petitioner was, at the time of the state post-conviction evidentiary hearing and during the period immediately following the hearing up until the one-year period expired, incompetent, insane, or suffering from a major mental illness rendering him incapable of communicating with counsel. Repeatedly, after examination and assessment, experts have opined that Petitioner was not delusional or experiencing hallucinations. Additionally, Mr. Norgard testified he found Petitioner both lucid and oriented.

The Court recognizes Petitioner's frontal lobe functions are diminished, resulting in a lack of impulse control, exacerbated by the abuse of alcohol.

Admittedly, Petitioner is both paranoid and depressed and readily exhibits his depression and that paranoia. The record also shows Petitioner has expressed suicidal ideation, both verbally and outwardly. Of import, Petitioner has been found to be of average intelligence and does not suffer from an intellectual disability. Both Dr. Krop and Mr. Norgard describe Petitioner as lucid and well able to consult with counsel. In fact, Mr. Norgard said that Petitioner told him, in no uncertain terms, he did not want Mr. Norgard to prepare and file a habeas petition for the federal court. Petitioner repeated this directive when Mr. Norgard made an additional inquiry after the mandate came down. No evidence has been presented that Petitioner changed his mind during the one-year limitation period or that he contacted Mr. Norgard and told him to seasonably file a petition in the federal court.

Based on all of the above, the Court finds Petitioner is not entitled to equitable tolling of the period from the date mandate issued, on April 13, 2006, until the one-year period expired 112 days later, on August 3, 2006. Petitioner was not diagnosed as suffering from schizophrenia or any other major mental illness. He was not rendered incompetent or insane during the relevant period. He was certainly able to communicate with counsel, as evidenced by Mr. Norgard's testimony and the assessment of medical professionals who found Petitioner sane, competent, lucid, and able to assist counsel. Although

Petitioner seeks an additional evidentiary hearing, EH at 130, an additional evidentiary hearing is unnecessary in light of the comprehensive nature of the records received by the Court concerning Petitioner's mental health assessment and treatment, the extreme length of time that has passed, and the fact that the record before the Court fails to exhibit evidence supporting the claim for equitable tolling.

No exceptional circumstances have been shown. The Court acknowledges that Petitioner has long-standing mental health issues, but he has failed to show a causal connection between his mental condition and his ability to timely file, particularly in light of the fact that Petitioner was provided with experienced counsel to educate and assist him. Counsel was well-versed in the case and ready to assist Petitioner in the filing of a federal petition. In addition, the record is clear that Petitioner did not suffer from a mental illness that severely impaired Petitioner's ability to effectively assist and communicate with his counsel. Petitioner has failed to show his mental condition prevented communication with counsel or prevented Petitioner from understanding the process and the proceedings. Petitioner's showing of mental deficiencies or impairments throughout most of his life is not sufficient to justify equitable tolling. Petitioner's "mixed personality disorder" with avoidant, schizoid, paranoid and borderline features or "schizoid personality

disorder," combined with impaired frontal lobe functions did not render Petitioner incapable of communicating with Mr. Norgard or in understanding the proceedings and the consequences of Petitioner's choices. Indeed, even though Petitioner decided not to pursue additional post-conviction remedies, counsel enjoyed Petitioner's "effective participation" as demonstrated by Petitioner's communications with counsel.

In conclusion, Petitioner has not presented any justifiable reason why the dictates of the one-year limitation period should not be imposed upon him. Petitioner has failed to show Mr. Norgard engaged in any serious attorney misconduct qualifying as an extraordinary circumstance. There was no attorney abandonment during the relevant period and no scheme adopted by Mr. Norgard to avoid clemency review or a unilateral decision on his part to forego federal habeas relief.

The record shows, during the relevant period, Petitioner was not suffering from any major mental illness, like psychosis or schizophrenia, that caused him to miss the filing deadline. His diagnosed mental impairment was not so profound and debilitating that he was unable to communicate with his counsel or unable to understand and appreciate the law and proceedings. Indeed, the record demonstrates Petitioner understood his legal options and

he had the lucidity necessary to effectively pursue legal redress with the aid of counsel. The record also shows he was not insane at critical times.

In sum, the record demonstrates Petitioner was not mentally incapable of filing a federal habeas corpus petition in a timely manner during the pertinent time period, until the limitation period expired, particularly in light of the fact that he had the assistance of counsel. In sum, the mental illness Petitioner suffered was not so profound and debilitating that he would have been unable to file a timely habeas petition, given his limitations.

For purposes of this opinion, the Court assumes due diligence, but the Court finds Petitioner has not shown he is entitled to extraordinary relief. Indeed, the Court finds Petitioner has not shown extraordinary circumstances stood in his way and prevented him from timely filing a federal petition. Equitable tolling is a remedy that should be used sparingly, and Petitioner has failed to show an extraordinary circumstance and he has not met the burden of showing that equitable tolling is warranted.

This is not to say that the Court is not disturbed by this result, but this is the state of the law. Petitioner is sentenced to death and is barred from seeking federal relief due to the AEDPA one-year limitation period. Petitioner had qualified counsel for the purpose of investigating, preparing, and timely filing a federal habeas corpus petition. This is not a case where

the petitioner's attorney simply failed to meet the deadlines due to negligence, miscalculation, abandonment, professional misconduct, or otherwise. Here, Petitioner directed his attorney not to file a federal petition and the attorney was certain Petitioner would be found competent, as he had been found in the past. At the time, Petitioner was not delusional or hallucinating. Nothing external to Petitioner, something that cannot be fairly attributed to him, was at play. Thomas, 992 F.3d at 1181. As such, Petitioner does not qualify for equitable tolling as he has failed to satisfy one of the two-pronged requirements, the extraordinary circumstances prong.

Finally, Petitioner does not assert or demonstrate that he has new evidence establishing actual innocence. He has not pointed to any evidence demonstrating it is more likely than not that no juror, acting reasonably, would have found him guilty beyond a reasonable doubt in light of new evidence. See McQuiggan v. Perkins, 569 U.S. 383, 395 (2013) (restricting the miscarriage of justice exception to a severely confined category of cases in which new evidence shows it is more likely than not that no reasonable juror would have convicted the petitioner).[12]

---

[12] To the extent this Court should broadly construe the Petition as claiming legal innocence, not factual innocence, that will not save the day. Although Petitioner claims mental illness and frontal lobe impairment, Petitioner is required to show factual innocence, not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623 (1998). See Rozzelle v. Sec'y Fla. Dep't of Corr., 672 F.3d 1000, 1012-13 (11th Cir. 2012) (per curiam) (factual innocence

Focusing its inquiry on the circumstances surrounding Petitioner's late filing of the Petition, Petitioner is not excused from complying with the time constraints for filing a federal petition. He has not presented any justifiable reason why the dictates of the one-year limitation period should not be imposed upon him and he has failed to demonstrate he is entitled to equitable tolling. Furthermore, he has made no attempt to make a credible showing of actual innocence by offering new evidence that is directly probative of his innocence. Because Petitioner has not shown an adequate reason why the dictates of the one-year limitation period should not be imposed upon him, the Court will dismiss the Petition (Doc. 15) and the case with prejudice pursuant to 28 U.S.C. § 2244(d) as untimely.

V. Motion for Protective Order

Petitioner's Notice of Intent to Request Redaction of October 21, 2021 Evidentiary Hearing Transcript and Opposed Motion for Protective Order (Motion) (Doc. 69) is pending before the Court. Petitioner seeks redaction of some of the transcript and further requests a protective order that an unredacted version of the transcript be filed under seal, accessible to the parties and this Court. Motion at 1. He argues that allowing the evidentiary

---

required). Petitioner has not made a credible showing of actual innocence.

hearing transcript extensively discussing the content of the Exhibits 6, 7, and 8, currently under seal, to be placed on the record without redaction, would submit Petitioner to an invasion of privacy, embarrassment, and mental anguish. Id. at 2. The Court has carefully reviewed the content of the portions of the transcript Petitioner's seeks to have redacted. See id. at 2-3. The Court finds the Motion is due to be denied. An explanation follows.

The law is clear, "a protective order may be issued for good cause to protect a person from annoyance, embarrassment, [and] oppression[.]" Thomas v. Seminole Electric Coop. Inc., No. 8:16-CV-3404-T-35JSS, 2017 WL 2447722, at *2 (M.D. Fla. June 6, 2017) (not reported in F. Supp.). In this case, however, Petitioner placed his mental health at issue by alleging that he is entitled to equitable tolling of the AEDPA limitation period because his mental illness satisfies the diligence and extraordinary circumstances prongs of the two-pronged test. Therefore, Petitioner has waived any privilege in any confidential materials related to his mental health as these matters are relevant to Petitioner's contention that he is entitled to equitable tolling because he allegedly suffers from a major mental illness.

Also of note, the portions of the October 21, 2021 evidentiary hearing transcript Petitioner requests to be redacted concern matters revealed and discussed at length in the Petition (Doc. 15), the Appendix Record of State

Proceedings (Doc. 32), and in published decisions. In fact, Petitioner publicly articulated most, if not all of his claimed mental deficits in his Petition.

As previously noted, the Court found it necessary to reference some of the content of Petitioner's exhibits placed under seal to adequately address and explain its decision as to whether Petitioner satisfied the test to qualify for equitable tolling. Indeed,

> "'[c]ourts have routinely held that, by putting one's medical condition at issue in a lawsuit, a plaintiff waives any privilege to which he may have otherwise been entitled as to his privacy interests in his medical records.'" Lozman v. City of Riviera Beach, No. 08-80134-Civ-Hurley/Hopkins, 2014 WL 12692766, at *1, 2014 U.S. Dist. LEXIS 195855, at *3-4 (S.D. Fla. May 2, 2014) (quoting Stogner v. Sturdivant, 2011 U.S. Dist. LEXIS 107571, 2011 WL 4435254, *5 (M.D. La. Sept. 22, 2011)); Barlow v. Dupree Logistics, LLC, No. 1:14-BE-1808-E, 2015 WL 4646812, at *8, 2015 U.S. Dist. LEXIS 102371, at *24 (N.D. Ala. July 5, 2015)[.]

Oldaker v. Giles, No. 7:20-CV-00224 (WLS), 2021 WL 3412551, at *3 (M.D. Ga. Aug. 4, 2021), reconsideration denied, 2021 WL 3779837 (M.D. Ga. Aug. 25, 2021).

It may be argued that this case is different because it is a criminal case, not a civil case for damages. But, in this instance, the medical records are directly relevant to the issue at bar and Petitioner put the matter at issue through the filing of his Petition. Furthermore, almost all of the sensitive and

private information in play is already a matter of public record. See United States v. Bradley, No. 405CR059, 2007 WL 1703232, at *5 (S.D. Ga. June 11, 2007) (not reported in F.Supp.2d) (discussing privacy interests after a criminal trial).

Ordinarily, in criminal cases, there is a "presumption of openness[.]" Id. The Court finds, however, **Petitioner's Exhibits 6, 7, and 8 shall remain under seal**. As many of the additional details contained in Exhibits 6, 7, and 8, are not relevant to the parties' contentions, the Court finds it is unnecessary to reveal the underlying details of Petitioner's mental health assessment and treatment contained in those exhibits, except those which have already been found to be relevant and necessary for purposes of rendering this Court's decision. See Order (Doc. 62).

In conclusion, the Court denies the request for proposed redactions of the October 21, 2021 evidentiary hearing transcript and denies the request for a protective order.

Accordingly, it is now

ORDERED AND ADJUDGED:

1. Petitioner's Motion (Doc. 69) is **DENIED**.

2. The **Clerk** is directed to maintain **Petitioner's Exhibits 6, 7, and 8 under seal.**

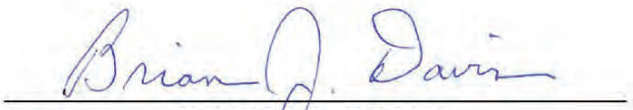
3. The Petition for Writ of Habeas Corpus (Doc. 15) and the case are **DISMISSED with prejudice**.

4. The **Clerk** shall enter judgment dismissing the Petition (Doc. 15) with prejudice and dismissing the case with prejudice.

5. The **Clerk** shall close the case.

6. If Petitioner appeals the dismissal of the Petition for Writ of Habeas Corpus (Doc. 15),[13] the Court denies a certificate of appealability. Because this Court has determined that a certificate of appealability is not warranted, the Clerk shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

DONE AND ORDERED at Jacksonville, Florida, this 17th day of November, 2021.



BRIAN J. DAVIS
United States District Judge

[13] This Court should issue a certificate of appealability only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Upon due consideration, this Court will deny a certificate of appealability.

sa 11/8
c:
Counsel of Record

APPENDIX A-4

January 25, 2022, District Court Order Denying Rule 59(e) Motion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v. Case No. 3:17-cv-932-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

This Cause is before the Court's on Petitioner's Motion to Alter or Amend Judgment (Motion) (Doc. 74), which includes a request that the Court reconsider its order denying a certificate of appealability as to the decision to deny equitable tolling. Pursuant to Rule 59(e), Federal Rules of Civil Procedure, Petitioner moves this Court to alter or amend the judgment as reflected in the Court's November 18, 2021 Order (Doc. 72) dismissing with prejudice the Petition (Doc. 15). Although Respondents apparently expressed opposition, they did not file a response. See Motion at 26 (Local Rule 3.01(g) Certification).

Rule 59(e) affords the Court discretion to reconsider an order which it has entered. See Mincey v. Head, 206 F.3d 1106, 1137 (11th Cir. 2000), cert. denied, 532 U.S. 926 (2001); O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992). Therefore, under Rule 59(e), "a district court may 'alter or amend a judgment.'" Jenkin v. Anton, 922 F.3d 1257, 1263 (11th Cir. 2019). However, "[t]he only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir.) (per curiam) (quotations and citations omitted), cert. denied, 552 U.S. 1040 (2007).

This Court has interpreted those parameters to include "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice." Lamar Advertising of Mobile, Inc. v. City of Lakeland, Fla., 189 F.R.D. 480, 489 (M.D. Fla. 1999). The purpose of Rule 59 is not to ask the Court to reexamine an unfavorable ruling in the absence of a manifest error of law or fact. Jacobs v. Tempur-Pedic Int'l., Inc., 626 F.3d 1327, 1344 (11th Cir. 2010). As such, Rule 59(e) cannot be used "to relitigate old matters, raise argument **or present evidence that could have been raised prior to the entry of judgment**." Michael

Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005) (emphasis added); see also O'Neal, 958 F.2d at 1047.

Petitioner has not shown the existence of an error of fact or law as it relates to the Order and Judgment in this case. He has failed to present facts or law of a strongly convincing nature that would induce this Court to reverse its prior decision. On the contrary, Petitioner is attempting to relitigate matters already considered and rejected by the Court. See Friedson v. Sheriff David Shoar, et al.,, No. 20-14803, 2021 WL 5175656, at *5 (11th Cir. Nov. 8, 2021) (per curiam) (not reported in Fed. Rptr.) (disavowing use of a Rule 59(e) motion to relitigate old matters or raise new arguments that could have been raised prior to entry of judgment).

Petitioner has not demonstrated any basis under Rule 59 warranting the Court's granting of a motion to alter or amend its Order (Doc. 74) dismissing with prejudice the Petition (Doc. 15). Petitioner has not identified any change in the law or clear error by the Court. A review of the applicable law convinces this Court that it has not committed a clear error in interpreting the law or the facts. As such, this is not a case in which the extraordinary remedy of granting a motion to alter or amend judgment should be employed.

Petitioner submits he has newly discovered evidence, not presented in prior pleadings. Motion at 23-26. The Court is not convinced that the underlying substance of this evidence was not presented in prior pleadings nor that the substance could not have been raised prior to the entry of judgment. An explanation follows.

Petitioner attaches to his Motion (Doc. 74) Attachment 1, the Confidential Forensic Psychological Evaluation of Petitioner by Eddy Regnier, a Licensed Psychologist. The underlying evaluation dates provided by Dr. Regnier are September 28, 2018, September 30, 2019, and October 10, 2021, all prior to the evidentiary hearing conducted in this Court on October 21, 2021 and prior to the Court's November 18, 2021 ruling on equitable tolling.

Of import, Petitioner refers to Dr. Regnier's assessment in the Petition (Doc. 15 at 88), asserting, Dr. Regnier's findings "are consistent with other evidence in Miller's case demonstrating that Miller suffers from schizophrenia." Notably, a rather comprehensive report by Dr. Regnier is attached to Petitioner's Reply (Doc. 33-1), referencing the evaluations undertaken September 28, 2018, and September 30, 2019 (Report dated October 7, 2019). In this report, Dr. Regnier provides a diagnosis: "History of Major Depression, recurrent, Severe, Schizotypal Personality Disorder, R/O

Schizoaffective Disorder, Bipolar Type, Polysubstance Dependence, in remission secondary to incarceration, Alcohol Dependence, in remission due to incarceration, Post Traumatic Stress Disorder, and Victim of physical and emotional abuse as a child." (Doc. 33-1 at 14-15). As such, the Court is certainly not convinced that Dr. Regnier's current report constitutes "newly" discovered evidence.

Petitioner's contention otherwise is rather disingenuous. Petitioner was well aware of the deadlines he faced. See Order setting deadlines (Doc. 25). Back on July 8, 2019, Respondents filed their Response (Doc. 29). Petitioner filed his Reply (Doc. 33) October 7, 2019. On July 14, 2021, the Court directed the parties to select an evidentiary hearing date, and the parties agreed on the date of October 21, 2021. Order (Doc. 44). On August 9, 2021, the Court scheduled the evidentiary hearing for October 21, 2021. Order (Doc. 47). It was not until the month of the evidentiary hearing (a year after the Reply was filed) that Petitioner obtained an additional evaluation from Dr. Regnier, although Petitioner now claims the September 30, 2019 evaluation indicated "the need for more evaluation or testing for a definitive diagnosis." Motion at 24. This smacks of manipulation of the judicial system.

Nevertheless, upon review, Dr. Regnier's report of December 16, 2021 is certainly comparable to his earlier report dated October 7, 2019. Although in the December report Dr. Regnier refers to "Schizoaffective Disorder, Bipolar Type" rather than "R/O Schizoaffective Disorder, Bipolar Type" (the terminology used in the October 7, 2019 report), throughout the December report Dr. Regnier uses qualifiers and couches his diagnosis in terms of uncertainty or provisional diagnosis ("likely interfered with his ability to participate with filing"; "appears to function in the prodromal phase"; "**appears to fit the following clinical diagnoses**"; "appears to have been experiencing . . . altered mental status"; "appears to suffer from mental health problems"; "was likely responding to delusional ideas"; and "may have been unable to understand"). (Doc. 74-1 at 17-19, 24) (emphasis added).

The Court is not convinced that Petitioner is presenting newly discovered evidence as he previously relied on Dr. Regnier's evaluation and diagnosis and represented as early as the Petition that Dr. Regnier's findings were consistent with other evidence in the case. Indeed, Petitioner was well aware of Dr. Regnier's diagnosis and presented his diagnosis through both the Petition and the Reply. Although Dr. Regnier has somewhat solidified his diagnosis, he

still presents what can be readily characterized as a qualified diagnosis, finding: "Mr. Miller appears to fit" the clinical diagnoses. (Doc. 74-1 at 19).

Petitioner has simply not shown that his mental illness prevented him from following through with his litigation. As noted in the Court's Order (Doc. 72), Mr. Norgard testified he found Petitioner both lucid and oriented and Dr. Krop found Petitioner both lucid and able to consult with counsel. Furthermore, the Court determined, during the relevant time period, Petitioner was neither delusional nor hallucinating. As such, the Court found Petitioner was able to confer with counsel and make litigation decisions and concluded there was no causal link between Petitioner's mental illness and his ability to seasonably file a federal petition.

Significantly, there were numerous mental health assessments made closer to the time period at issue. Of import, Dr. Regnier's December 16, 2021 assessment was rendered fifteen years after the period of concern (that period after the mandate issued on April 13, 2006 and the one-year limitation period expired on August 3, 2006). As found in the Court's Order (Doc. 72 at 58) (emphasis added), "an additional evidentiary hearing is unnecessary in light of the comprehensive nature of the records received by the Court concerning Petitioner's mental health assessment and treatment, **the extreme length of**

time that has passed, and the fact that the record before the Court fails to exhibit evidence supporting the claim for equitable tolling."

The Court finds this is not a case in which the extraordinary remedy of 59(e) is warranted; therefore, Petitioner is not entitled to the relief he has requested, and the motion to alter or amend the judgment is due to be denied.

Petitioner also asks that the Court reconsider its decision denying a certificate of appealability and requests that the Court grant a certificate of appealability as to the decision to deny equitable tolling. Motion at 26. Upon due consideration, the Court will decline Petitioner's request to grant a certificate of appealability. See Order (Doc. 72 at 66).

Accordingly, it is now

ORDERED:

1. Petitioner's Motion to Alter or Amend Judgment (Doc. 74), which includes a request that the Court reconsider its order denying a certificate of appealability as to the decision to deny equitable tolling, is **DENIED.**

2. If Petitioner appeals the denial of the Motion (Doc. 74), **the Court denies a certificate of appealability**.[1] Because this Court has determined

[1] This Court should issue a certificate of appealability only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v.

that a certificate of appealability is not warranted, the **Clerk** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

DONE AND ORDERED at Jacksonville, Florida, this 25th day of January, 2022.

BRIAN J. DAVIS
United States District Judge

sa 1/25
c:
Counsel of Record

Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Upon due consideration, this Court will deny a certificate of appealability.

APPENDIX A-5

October 21, 2021, Evidentiary Hearing Exhibits 8, 14, 16
(Marked exhibit copy from the October 21, 2021, hearing)

EXHIBIT 8

U.S. District Court
Middle District of Florida

PLAINTIFF'S EXHIBIT

Exhibit Number: **8**

Case Number: 3:17-cv-932-BJD-JBT

David Miller, Jr.,
v.
Secretary, FL DOC, et. al.

Date Identified: 10/21/21

Date Admitted: 10/21/21

Affidavit of Charles Golden, Ph.D.

1. My name is Charles J. Golden, Ph.D. I am a Professor of P: Nova Southeastern University. I am a licensed psychologis Florida, and board certified in clinical psychology, neuropsy psychological assessment.

2. I was retained by David Miller, Jr.'s counsel in either late 2(2002 to do a neuropsychological assessment of David Mille this assessment, I reviewed numerous records provided by c conducted an interview of Mr. Miller, Jr. in January, 2002. [illegible] neuropsychological examination report dated March 20, 2003.

3. The March 20, 2003 neuropsychological assessment report attached to this affidavit is a true and correct copy of the report I provided to Mr. Miller, Jr.'s counsel.

I certify under penalty of perjury that the foregoing is true and correct. Executed on this 19th day of October, 2021.

Charles J. Golden, Ph.D.

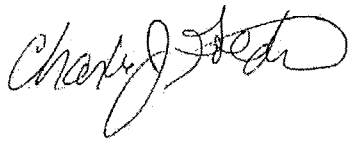
Affidavit of Charles Golden, Ph.D.

1. My name is Charles J. Golden, Ph.D. I am a Professor of Psychology at Nova Southeastern University. I am a licensed psychologist in the State of Florida, and board certified in clinical psychology, neuropsychology, and psychological assessment.

2. I was retained by David Miller, Jr.'s counsel in either late 2001 or early 2002 to do a neuropsychological assessment of David Miller, Jr. As part of this assessment, I reviewed numerous records provided by counsel, and conducted an interview of Mr. Miller, Jr. in January, 2002. I also produced a neuropsychological examination report dated March 20, 2003.

3. The March 20, 2003 neuropsychological assessment report attached to this affidavit is a true and correct copy of the report I provided to Mr. Miller, Jr.'s counsel.

I certify under penalty of perjury that the foregoing is true and correct. Executed on this 19th day of October, 2021.



Charles J. Golden, Ph.D.

NEUROPSYCHOLOGICAL ASSESSMENT

Client Name: David Miller
Age: 42 **Date of Interview:** January 23, 2002
Date of Birth: September 6, 1959
Education: 12

Presenting Problem

Mr. Miller is being seen at the request of his attorneys regarding his psychological and neuropsychological status in regards to ongoing legal procedures involving a murder charge and conviction for a crime which took place in March of 1997.

Records Reviewed:

1. Mental Health Records from North Carolina 1983-1996
2. Family history
3. Testimony of Dr. Krop at original penalty phase
4. Opening statements at original hearing.
5. Statement re:crime 5/20/97 to Jacksonville police
6. Miller Testimony at Trial
7. Closing arguments at Trial
8. Penalty phase mitigation testimony
9. School records
10. Military records
11. Prison records
12. Records of Valnice Miller

History of Current Problem

Mr. Miller has a long history of interpersonal and other serious difficulties. School records indicate he graduated from high school in 1978 with generally poor grades, ending up in the middle of his class rankings and testing nationally at the 33rd percentile. In the military, he initially performed at an average level for about one year and then his performance declined. He was sent for non-judicial military punishment 5 times over the next two years, and then was honorably discharged prior to the end of his enlistment because he was judged "a burden to the command due to substandard performance and failure to adapt to military service." There were no mental health or psychological records which I found for the military.

In 1983, after discharge, he was admitted as an inpatient due to a commitment which stated he had "been violent and destructive for the past 2-4 hours. He knocked a glass out of the front door and injured himself with stab wounds in the abdomen. He chased his younger bother up the street with a knife and threatened to kill himself and his brother."

He was found to be remorseful but potentially suicidal. He was reported to have been drinking with a blackout experience. He was diagnosed as an Adjustment Disorder with Depressed Mood.

He was admitted a second time in 1986 while awaiting trial on murder charges in which he had been drinking and shot a man in his rooming house. He reported a history of blackouts. He reported continued drinking since 1983 as well as a religious experience so that he spent his time praying and reading the Bible. He was reported to have violent impulses when drinking. He was diagnosed with Alcohol Abuse and a rule out of anti-social personality disorder. Psychological testing was performed on 3/24/86 where he got a normal IQ. His MMPI suggested he had a poor self-concept, lability, and dysphoria. He was seen as an excessive worrier, introspective, withdrawn, and hypersensitive. He was described as someone with anger control problems and a lack of adequate defenses for normal interpersonal interactions. The profile was consistent with diagnosis of schizoid or schizophrenia. There was current evidence of psychological deterioration. A report on March 21, 1986, from Dorthea Dix Hospital, reported mild paranoia. His mother stated that his problems had begun while he was in the Navy. He was reported to have periods of stuttering and confusion. The discharge report suggested a personality disorder with paranoid and borderline features, "with a history of impulse control, explosive behavior, and withdrawn, avoidant social patterns." He was found competent to stand trial. While in jail at that time, he was given an MMPI which was largely normal using correctional facility norms.

He was seen for a psychiatric admission again in October-November, 1996 at Salisbury VAMC. His diagnoses included alcohol, cocaine, nicotine, and cannabis dependence / abuse, along with a schizoid personality disorder. He was described as homeless, unemployed, and with legal and financial problems. He described emotional and verbal abuse with bad beatings and whippings as a child. There were inconsistent reports of sexual abuse of both him and his sister. He reported being rebellious but not violent as an adolescent. It will recommended he be monitored for depression and was told to notify the hospital after discharge if he felt he was going to be out of control. He agreed not to hurt himself or others. A social history at the time shows he had a long drug history which escalated when he entered the Navy. He was released from prison in 1993 and thereafter continued to abuse substances and was chronically unemployed. His life centered around crack cocaine. There was no evidence of positive social support. His parents divorced when he was 12. He had one brother and sister (Valnice) who was diagnosed as schizophrenic and committed suicide. He did work as a roofer for three years prior to his decline in function and jail.

A psychological report at that time found some evidence of PTSD (Memory, concentration and anger problems, detachments from others) as well as possible dissociation during his earlier murder event. He was found to evidence paranoia, a flat affect, and depression, leading to an overall diagnosis of schizoid.

After the murder charges were filed, he was evaluated by Dr. Harry Krop on October 29, 1997 and November 26, 1997. His neuropsychological examination found normal

intelligence but showed poor performance on frontal lobe tests consistent with the presence of frontal lobe brain injury or dysfunction. In his interview of the defendant at that time, it was reported that the Mr. Miller had consumed three or four quarts of beer the night of the murder, some seven to ten hours before the murder. He also reported crack cocaine use that evening. The crime was apparently an attempt to get money to support his drug habit. He attacked the man in order to disable him so he could get the money.

Previous Neuropsychological Testing (Dr. Krop):

General Intelligence

Intelligence testing on the WAIS-III revealed overall normal functioning level

Memory Functioning

Performance was in the low normal range.

Executive Functioning

The Wisconsin Card Sorting Test (WCST) assess the ability to form abstract concepts and to shift and maintain cognitive sets. On the WCST, Mr. Miller performed extremely poorly. The Category Test measures one's nonverbal concept formation ability. On the Category Test, he also performed poorly. The Trail Making Test is divided into two different subtests, A and B. Trails A is a test designed to measure visual-motor speed, visual-spatial functioning, and sequencing. Mr. Miller completed Trails A in 45 seconds and Trails B in a poor 122 seconds.

Other Tests

He was also administered a drug survey, the Mooney Problem checklist, BDI II, MAST, Aphasia Screening, and the MMPI-2. The MMPI-2 was in the normal range for a prison population.

Additional Test Results (2002)

As most of the basic tests necessary for diagnosis were completed close to the time of the crime, those tests are the best measure of his functioning at that time. However, there was an omission of a Rorschach Inkblot Test which could better elucidate the presence and extent of an emotional disorder. Therefore, the Rorschach was administered when the client was seen in 2002.

Mr. Miller's test results on the Rorschach Inkblot Test are listed below:

Core Section

R = 16	L = 2.2	EB = 0:0.5	EA = 0.5	EBPer = No
eb = 0:5	es = 5	D = -1	Adj es = 3	Adj D = 0

The Core section of the Rorschach provides information about the personality style and how it relates to a client's ability to tolerate stress. The client is extremely defensive, constricted, anxious, having an excessive amount of affective detachment, often screening out relevant information from the environment, often avoids complexities of a stimulus, and often develops "tunnel vision." He has no ability to deal with emotional stimuli or stress. He sees the world as a hostile and dangerous place which he has no idea how to handle. Such individuals often have high levels oif fear and anxiety and will turn to drugs or alcohol as "self-treatment."

Affect

FC:CF+C = 1:0	Pure C = 0	Afr: = 0.23	
S = 5	Blends:R = 1:16		CP = 0

The Affect section of the results assesses the way the individual handles and expresses emotions. Here Mr. Miller is found to be overly constricted, and has little contact with his emotions. Such individuals are unable to deal with emotional stimuli and may be easily overwhelmed. This pattern is not unusual in individuals with anterior brain dysfunction or in individuals with schizoid/schizophrenic disorders.

Interpersonal

COP = 0	AG = 0	GHR:PHR = 0:5	a:p = 0:0	Food = 0
SumT = 0	Human Content = 5		Pure H = 1	PER = 0
Isolation Index = 0.0				

The Interpersonal section of the results refers to Mr. Miller's interpersonal relationships and his needs, coping styles, and attitudes surrounding them. A COP and AG score of zero indicates that Mr. Miller is uncomfortable in social interactions and tends to be more removed in group situations possibly due to a misinterpretation of the social environment. Social relationships tend to be unrewarding due to his limited interpersonal effectiveness. He therefore, has a detachment from the real world and tends to engage in a world of fantasy. His relations with other people are fragmented and generally poor. He does not understand how or why other people behave and lacks the ability to form true relationships.

Ideation

a:p = 0:0	Sum6 = 5	Ma:Mp = 0:0	Lvl-2 = 0	2AB+(Art+Ay) = 3
Wsum6 = 8	MOR = 0	M- = 0	M none = 0	

The Ideation section reflects the degree to which Mr. Miller is able to integrate his perceptions into meaningful organization and the extent of his cognitive flexibility. A

significant impairment with Mr. Miller is his ability to perceive and think. The quality of his thinking, despite a normal intelligence, is poor in regard to analytic skills moderated by the anterior areas of the brain despite normal performance on measures of posterior brain function. These impairments are most likely to arise when emotional stimuli or stress is involved, as cognitive testing shows that there is better performance when he is calmer and material is more concrete in nature.

Mediation

X-% = 0.19 S- = 0 P = 1 X+% = 0.38 Xu% = 0.44

The Mediation portion of the data reflects the degree to which Mr. Miller is able to make conventional and acceptable responses. Results here show a significant distortion in his way of responding to situations. Mr. Miller has poor ties with reality and difficulty developing accurate abstractions especially when emotional material is involved. He is unable to perceive the world as other people do, leading to multiple misunderstandings with others.

Processing

Zf = 7	W:D:Dd = 6:1:9	W:M = 6:0	Zd = -2.5
PSV = 0	DQ+ = 0	DQv = 0	

The Processing section of the results evaluates the quality and efficiency with which Mr. Miller processes information. Mr. Miller was found to obsess over processing information, focusing either on small, irrelevant details rather than seeing the whole picture, leading him to inappropriate conclusions.

Self Perception

3r+(2)/R = 0.00	Fr + rF = 0	SumV = 0	FD = 0	An + Xy = 0
MOR = 0	H: (H) + Hd + (Hd) = 1:4			

The Self-Perception portion of the results reflects the way in which Mr. Miller recognizes his own self-esteem and his perception of himself. Mr. Miller has negative feelings of self worth and he feels conflicted regarding a self-image. Mr. Miller's self-image and/or self-value tend to be based as much on imaginary as real experiences. These individuals are usually less mature and frequently have very distorted notions of themselves. This more limited self-awareness will sometimes serve negatively in decision-making and problem-solving activity and creates difficulty in relating to others.

Special Indices

Post-Traumatic Stress Index= 0
Depression Index= 5
Coping Deficit Index = 4

Suicide Constellation = 7
Hypervigilance = No
Obsessive = No

The Coping Deficit Index shows that Mr. Miller is likely to have unsatisfying and somewhat meaningless interpersonal relationships, largely because they will find it difficult to effectively deal with everyday requirements. His history typically includes social ineptness, poor success in interpersonal relationships, and times when he feels overwhelmed by interpersonal demands. He also shows substantial indications of depression, consistent with his history.

Diagnostic Formulation:

David Miller is a forty-two year old, male (at the time of the examination) referred by his attorney. Mr. Miller is currently on death row and appealing his sentence. Mr. Miller has a long history of interpersonal and other serious difficulties. School records indicate he graduated from high school in 1978 with generally poor grades, ending up in the middle of his class rankings and testing nationally at the 33rd percentile. In the military, he initially performed at an average level for about one year and then his performance declined. He was honorably discharged prior to the end of his enlistment because he was judged "a burden to the command due to substandard performance and failure to adapt to military service.

In 1983, after discharge, he was admitted as an inpatient due to a commitment due to violence towards his family and himself. He was found to be remorseful but potentially suicidal. He was reported to have been drinking with a blackout experience. He was diagnosed as an Adjustment Disorder with Depressed Mood. He was admitted a second time in 1986 while awaiting trial on murder charges in which he had been drinking and shot a man in his rooming house. He reported a history of blackouts. He reported continued drinking since 1983. He was diagnosed with Alcohol Abuse and a rule out of anti-social personality disorder. Psychological testing was performed on 3/24/86 where he got a normal IQ. His MMPI suggested he had a poor self-concept, lability, and dysphoria. He was seen as an excessive worrier, introspective, withdrawn, and hypersensitive. He was described as someone with anger control problems and a lack of adequate defenses for normal interpersonal interactions. The profile was consistent with diagnosis of schizoid or schizophrenia.

. A report on March 21, 1986, from Dorthea Dix Hospital, reported mild paranoia. His mother stated that his problems had begun while he was in the Navy. He was reported to have periods of stuttering and confusion. The discharge report suggested a personality disorder with paranoid and borderline features, "with a history of impulse control, explosive behavior, and withdrawn, avoidant social patterns. While in jail at that time, he was given an MMPI which was largely normal using correctional facility norms.

He was seen for a psychiatric admission again in October-November, 1996 at Salisbury VAMC. His diagnoses included alcohol, cocaine, nicotine, and cannabis dependence /

abuse, along with a schizoid personality disorder. He was described as homeless and unemployed. It will recommended he be monitored for depression and was told to notify the hospital after discharge if he felt he was going to be out of control. He agreed not to hurt himself or others. His life centered around crack cocaine. There was no evidence of positive social support. A psychological report at that time found some evidence of PTSD (memory, concentration and anger problems, detachments from others) as well as possible dissociation during his earlier murder event. He was found to evidence paranoia, a flat affect, and depression, leading to an overall diagnosis of schizoid.

After the murder charges were filed, he was evaluated by Dr. Harry Krop on October 29, 1997 and November 26, 1997. His neuropsychological examination found normal intelligence but showed poor performance on frontal lobe tests consistent with the presence of frontal lobe brain injury or dysfunction.

Evaluation of the past test results support the conclusions that the client has both organic and emotional disorders, with the latter secondary both to his childhood upbringing as well as his brain dysfunction which is likely life long. The test results show he is an individual with significant social and interpersonal difficulties. The client is someone who lacks the appropriate ability to process information form the environment in an accurate and conventional manner. Mr. Miller is someone who does not live in a reality based world but in one that is more fantast oriented. The client's idiosyncratic perceptions of the environment result in odd and eccentric behavior seen by others. These problems are exacerbated by his addiction to drugs and alcohol which apparently became serious while he was in the Navy. His mother's report of a decline in functioning while he was in the Navy is consistent with the Navy records that indicate initially adequate performance for one year followed by a steep decline which caused the Navy to terminate his tour of duty before his enlistment was completed.

Cognitively, the client has normal skills as mediated by the posterior areas of the brain but has substantial impairment in both the cognitive and social emotional skills mediated by the anterior areas of the brain and subcortical anterior areas of the brain. These deficits have caused difficulties in vast areas of his life such as in vocational, social and interpersonal settings. As a result of this evaluation, A PET scan was requested to confirm the diagnosis of anterior brain dysfunction. Results of the PET scan were consistent with and supportive of the analysis.

Diagnosis:

Axis I:	Cognitive Disorder NOS Multiple drug abuse (by history) Intermittent explosive disorder secondary to drug use (by history) Personality Disorder NOS
Axis II:	**NA**
Axis III:	Deferred

Axis IV: Legal problems.

Axis V: NA

Thank you for the very interesting referral.

Charles Golden, Ph.D.
Licensed Psychologist
PY5226

3/20/03
Date

EXHIBIT 14

FLORIDA DEPARTMENT of CORRECTIONS

Governor
RON DESANTIS

Secretary
MARK S. INCH

501 South Calhoun Street, Tallahassee, FL 32399-2500

www.dc.state.fl.us

CERTIFICATE

STATE OF FLORIDA
COUNTY OF Union

I, Sherry Shoup, HEREBY CERTIFY that I am employed by the Florida Department of Corrections as a Correctional Sentence Specialist. As part of my duties and responsibilities, I maintain official records of the Florida Department of Corrections.

I FURTHER CERTIFY that the records attached to this Certificate are true and correct copies of Miller, David DC# J08118 08/01/2000-10/01/2013 Legal Calls/Visits maintained in the course of regular business conducted by the Department of Corrections, a state agency, in order to comply with the provisions of Chapter 119, Florida Statutes.

Sherry Shoup
Correctional Sentence Specialist

The foregoing instrument was acknowledged before me this 28 day of September, 2021, by Sherry Shoup.

(Seal)

Notary Public State of Florida
Stephanie M Smith
My Commission GG 243114
Expires 07/30/2022

Signature of Notary Public

Stephanie Smith
Print, Type/Stamp Name of Notary

Personally known: _____
OR Produced Identification: X
Type of Identification Produced: State Employment ID.

UNION ~~CORRECTIONAL~~ INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : *MAY 30, 2001*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *HEIDI BREWER, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32314-5498*

DATE AND HOUR OF INTERVIEW ***THURSDAY, MAY 31, 2001***
9:00AM-11:30AM & 1:15PM-3:15PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	*J08118*	*1218*		*9:00AM-10:0*

P/N/O

WILL HAVE A BOX OF LEGAL MATERIAL AND A LUGGAGE CART TO TRANSPORT.
****LEGAL MATERIAL FOR I/M WAY.***

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

COLONEL'S OFFICE

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : *JUNE 13, 2001*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW

INTERVIEWER NAME AND TITLE *MICHAEL BAGGETT, INVESTIGATOR*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32314-5498*

DATE AND HOUR OF INTERVIEW ***THURSDAY**, JUNE 14, 2001*
~~*1:15PM - 4:30PM*~~

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	*J08118*	*1218*		*1:15PM-4:30P*

P/N/O

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

COLONEL'S OFFICE
CONTROL ROOM

ION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : JULY 10, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

TERVIEWER NAME AND TITLE: HEIDI BREWER, ATTORNEY & SONIA LOI, LEGAL INTERN
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

OM (CITY AND STATE): TALLAHASSEE, FLORIDA 32314-5498

TE AND HOUR OF INTERVIEW: **WEDNESDAY, JULY 11, 2001**
10:00AM-11:30AM & 1:15PM-3:30PM

'LEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

AME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
LLER, D. [redacted]	J08118	1218		2:30PM-3:00PM [redacted]

P/N/O

INSTITUTIONAL APPROVAL

AL DISTRIBUTION:

NEL'S OFFICE

A000114

UNION CORRECTIONAL INSTITUT
RAIFORD FLORIDA

MEMORANDUM:

DATE : AUGUST 15, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE MARC LEVI, INVESTIGATOR/SONIA LOI, LEGAL INTERN
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW **THURSDAY**, AUGUST 16, 2001
2:30PM - 4:00PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		

MICHAEL BAGGETT, INVESTIGATOR & HARDEEP SANGHA, LEGAL INTERN

MILLER, D.	J08118	1218	2:30PM-3:30PM

P/N/O

INSTITUTIONAL APPROVAL

PECIAL DISTRIBUTION:

:OLONEL'S OFFICE
:ONTROL ROOM
1AIN GATE

'ILE (2)

UNION CORRECTIONAL INSTITUT
RAIFORD FLORIDA

MEMORANDUM:

DATE : AUGUST 15, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELO

INTERVIEWER NAME AND TITLE MARC LEVI, INVESTIGATOR/SONIA LOI, LEGAL INTERN
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW **THURSDAY**, AUGUST 16, 2001
~~2:30PM - 4:00PM~~

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTIO

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		

MICHAEL BAGGETT, INVESTIGATOR & HARDEEP SANGHA, LEGAL INTERN

MILLER, D.	J08118	1218	2:30PM-3:3

P/N/O

INSTITUTIONAL APPROVAL

PECIAL DISTRIBUTION:

:OLONEL'S OFFICE
:ONTROL ROOM
1AIN GATE

'ILE (2)

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : SEPTEMBER 26, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW

INTERVIEWER NAME AND TITLE HEIDI BREWER, ATTORNEY
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW **THURSDAY**, SEPTEMBER 27, 2001
~~10:00AM - 11:30AM~~

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J08118	1218		10:00AM-10:30
[redacted]		[redacted]		[redacted]

P/N/O

NOTARY - ALL

P/N/O

INSTITUTIONAL APPROVAL

A000117

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : OCTOBER 4, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW

INTERVIEWER NAME AND TITLE AMANDA REGAN-WORL / JOHN JACKSON, ATTORNEYS
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW FRIDAY, OCTOBER 5, 2001
9:00AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				[redacted]
MILLER, D.	J08118	1218		10:00AM-10:3[redacted]
[redacted]				[redacted]
JOHN JACKSON [redacted]	[redacted]	[redacted]		[redacted]

P/N/O

INSTITUTIONAL APPROVAL

A000118

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : DDECEMBER 11, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE AMANDA REGAN-WORL, ATTY. / ROSA GREENBAUM, INVESTIGATOR
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW WEDNESDAY, DECEMBER 12, 2001
1:15PM - 4:00PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		[redacted]
MILLER, D.	J08118	1218		3:00PM-3:45
ROSA GREENBAUM				
[redacted]		[redacted]		[redacted]

B Henderson
INSTITUTIONAL APPROVAL

A000119

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : DECEMBER 20, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW

INTERVIEWER NAME AND TITLE JOHN JACKSON, ASSISTANT & MICHAEL BAGGETT, INVESTIGATOR CAPITAL COLLATERAL COUNSEL - NORTHERN (850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW **FRIDAY**, DECEMBER 21, 2001 9:00AM - 11:00AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		[redacted]
MICHAEL BAGGETT [redacted]	[redacted]	[redacted]		[redacted]
MILLER, D. [redacted]	J03118 [redacted]	1218 [redacted]		10:00AM-10:3 [redacted]

P/N/O

INSTITUTIONAL APPROVAL

A000120

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : JANUARY 16, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DOR1)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE DR. CHARLES GOLDEN, PH.D
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32301

DATE AND HOUR OF INTERVIEW THURSDAY, JANUARY 17, 2002
9:30AM-11:30AM & 1:15PM-4:30PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
TELLER, D.	J08113	1218		9:30AM-11:30AM & 1:15PM-4:30PM

STANDARD TESTING EQUIPMENT, MAY INCLUDE A TAPE RECORDER AND/OR LAP TOP COMPUTER.
REQUEST HANDCUFFS BE REMOVED AT SOME POINT DURING VISIT.

A000121

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : JANUARY 17, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE AMANDA REGAN-WORK, ATTORNEY
CAPITAL COLLATERAL COUNSEL - NORTHERN
(350) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW FRIDAY, JANUARY 18, 2002
9:45AM - 11:15AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J08118	1213		9:45AM-10:15AM
[redacted]				

P/N/D

A000122

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : FEBRUARY 7, 2002

TO : SPECIAL DISTRIBUTION

RE : APPROVED INTERVIEWS AT UCI
(P-DORM)

VIA FACSIMILE

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE HEIDI BREWER, ATTORNEY
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW FRIDAY, FEBRUARY 8, 2002
8:30AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				
MILLER, D.	J08118	1218		10:30AM-11:00AM
[redacted]				

P/N/O

A000123

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : FEBRUARY 7, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE DR. MICHAEL HERKOV, PH.D
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW FRIDAY, FEBRUARY 8, 2002
2:30PM - 4:30PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J08118	1218		2:30PM-4:30PM

STANDARD TESTING EQUIPMEMNT, MAY INCLUDE A TAPE RECORDER AND/OR LAP TOP COMPUTER.
HANDCUFFS REMOVED AT SOME POINT DURING INTERVIEW.

A000124

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : FEBRUARY 11, 2002

TO : SPECIAL DISTRIBUTION

RE : APPROVED INTERVIEWS AT UCI
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE MICHAEL BAGGETT, INVESTIGATOR
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW TUESDAY, FEBRUARY 12, 2002
9:00AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J03118	1218		9:00AM-10:30AM
[redacted]				

P/N/O

B Hurdle
INSTITUTIONAL APPROVAL

A000125

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE FEBRUARY 21, 2002

TO **SPECIAL DISTRIBUTION**

RE **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE DR. MICHAEL HERKOV, PH.D
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW FRIDAY, MARCH 1, 2002
1:30PM - 4:30PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J08118	1218		1:30PM-4:30PM

STANDARD TESTING EQUIPMENT, TAPE RECORDER AND/OR LAPTOP. MAY REQUEST HANDCUFFS BE REMOVED DURING SOME POINT IN EVALUATION.

A000126

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MARCH 5, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *HEIDI BREWER, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *THURSDAY, MARCH 7, 2002*
8:30AM-11:30AM & 1:15PM-4:15PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				
MILLER, D.	J08118	1218	NOTARY	2:45PM-3:30PM
[redacted]				

P/N/O

A000127

INSTITUTIONAL APPROVAL

03/r

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MARCH 8, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *JONITA WHITEHEAD/DANIEL ASHTON, INV. AMANDA REGAL-WORL, ATTY. CAPITAL COLLATERAL COUNSEL - NORTHERN*

(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *MONDAY, MARCH 11, 2002 1:15PM - 2:15PM*

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
*MILLER, D.	J08118	1218		1:15PM-2:00PM

P/N/O

***WHITEHEAD AND ASHTON**

****REGAN-WORL / WHITEHEAD AT 2:00PM**

INSTITUTIONAL APPROVAL

A000128

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MARCH 20, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *DOUGLAS PARTYKA, INVEST. / HEIDI BREWER, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *FRIDAY, MARCH 22, 2002*
9:00AM - 10:45AM(11:30AM)

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				
HEIDI BREWER	[redacted]			
MILLER, D.	*J08118*	*1218*		*9:30AM-10:00AM*
[redacted]				

P/N/O

A000129

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MAY 9, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *DANIEL J. ASHTON, INVESTIGATOR*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *MONDAY, MAY 13, 2002*
10:00AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
MILLER, D.	*J08118*	*1218*		*11:00AM-11:30*

P/N/O

A000130

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MAY 13, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *AMANDA REGAN-WORL, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *THURSDAY, MAY 16, 2002*
9:00AM-11:30AM & 1:15PM-3:15PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		[redacted]
MILLER, D.	*J08118*	*1218*		*10:30AM-11:00A*
[redacted]		[redacted]		[redacted]

P/N/O

A000131

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : *JUNE 24, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *DANIEL ASHTON, INVESTIGATOR*
CAPITAL COLLATERAL REGIONAL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32301*

DATE AND HOUR OF INTERVIEW ~~*THURSDAY, JUNE 27, 2002*~~ ***9:00AM - 9:30AM***

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	*J08118*	*1218*		*9:00AM-9:30A*

P/N/O

W. Phillips
INSTITUTIONAL APPROVAL

A000132

SPECIAL DISTRIBUTION:

NION CORRECTIONAL INSTITUTIO.
RAIFORD FLORIDA

MEMORANDUM:

DATE : *July 25, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *Mr. Daniel Ashton, Investigator Capital Collateral Northern Region*

FROM (CITY AND STATE) *Tallahassee, Florida*

DATE AND HOUR OF INTERVIEW *THURSDAY, July 25, 2002*

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				[redacted]
MILLER, D.	*J08118*	*P1-218S*		*11:00AM-11:30.*
[redacted]				[redacted]

*XXXX

...ON CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

...EMORANDUM:

...ATE : *AUGUST 19, 2002*

...O : **SPECIAL DISTRIBUTION**

...E : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

NTERVIEWER NAME AND TITLE *LAVERN NELSON/DAN ASHTON, INVES./TIFFANY MURPHY, ATTORNEY*
CAPITAL COLLATERAL REGIONAL - NORTHERN
(850) 488-7200
ROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32301*
DATE AND HOUR OF INTERVIEW *TUESDAY, AUGUST 20, 2002*
~~*1:15AM - 3:45PM*~~

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
MILLER, D.	*J08118*	*1218*	***ASHTON/MURPHY***	*3:15PM-3:45PM*
[redacted]	[redacted]	[redacted]		[redacted]

P/N/O

INSTITUTIONAL APPROVAL

For Capt Walmsley

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : NOVEMBER 4, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE JONITA WHITEHEAD, INVESTIGATOR
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32301

DATE AND HOUR OF INTERVIEW WEDNESDAY, NOVEMBER 6, 2002
9:00AM - 10:45AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	J03118	1218	P/N/O	9:45AM-10:45AM

D.A. Mallard Jr.
INSTITUTIONAL APPROVAL

A000135

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *NOVEMBER 21, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *TIFFANY MURPHY, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32301*

DATE AND HOUR OF INTERVIEW *FRIDAY, NOVEMBER 22, 2002*
9:00AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
MILLER, D.	*J08118*	*1218*		*10:30AM-11:00AM*
[redacted]		[redacted]		[redacted]

P/N/O

A000136

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD, FLORIDA

MEMORANDUM:

DATE : **May 7, 2004**

TO : **SPECIAL DISTRIIBUTION**

RE : **APPROVED INTERVIEWS AT UCI (P-DORM)**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **Heidi Brewer, Attorney**
ATORNEY AT LAW
(850) 422-1115

FROM (CITY AND STATE) **Tallahassee, Florida 32301**

DATE AND HOUR OF INTERVIEW **WEDNESDAY, May 12, 2004**
9:30am – 11:30am

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				[redacted]
MILLER, D.	J08118	1105		.11:00AM-11:30AM

P/N/O

A000137

SPECIAL DISTRIBUTION:

INSTITUTIONAL APPROVAL

.ION CORRECTIONAL INSTITUTI
RAIFORD, FLORIDA

MEMORANDUM:

DATE : **June 4, 2004**

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI (P-DORM)**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **Heidi E. Brewer, Attorney**
ATTORNEY AT LAW
(850) 422-1115

FROM (CITY AND STATE) **Tallahassee, Florida 32301**

DATE AND HOUR OF INTERVIEW **FRIDAY, June 4, 2004**
1:15pm –4:30pm

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
MILLER, D.	J08118	1105		4:15PM-4:30PM

P/N/O

A000138

UNION CORRECTIONAL INSTITUTION
RAIFORD, FLORIDA

MEMORANDUM:

DATE : **WEDNESDAY JANUARY 17, 2007**

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS FOR THE NORTHEAST UNIT P-DORM**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **ROSALIE BOLIN, INVESTIGATOR**
CRIMINAL SPECIALISTS INVESTIGATIONS
1503 SEVENTH AVE. EAST
FROM CITY & STATE: **TAMPA, FLORIDA 33605**
(813) 241-9153

DATE AND HOUR OF INTERVIEW : **FRIDAY JANUARY 19, 2007**
1030-1145 & 1300-1630

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	DC NUMBER	CELL	TIME	CASE NUMBER	INTERVIEW WITH
Miller, David	J08118	P3-208S	1030-1145	97-6680-CFA	Rosalie Bolin, Investigator
[redacted]					

P/N/O

STANDARD EQUIPMENT:
CASE LAW AND/OR LEGAL DOCUMENTS AND/OR RECORDS MAY BE LEFT WITH CLIENT AND BE RECEIVED FROM CLIENT

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:
HALLWAY (1)
MAIN GATE #5, (2)
FILE (1)
WARDEN'S OFFICE (1)

Criminal Specialist Investigations, Inc.

Fax Cover Sheet

Send To : UCI From : Rosalie Bolin

Attention : Ms. Cox Date : 01/16/07

Fax Number : 386-431-2479

Total Pages, Including Cover : 1

Comments :

Ms. Cox,

Please be advised that a legal visit with the following inmates on Friday, January 19, 2007, will be necessary.

[illegible] 1 [illegible] 1 :30 a.m. until 11:45 a.m.

~~[illegible] 1 [illegible] until 4:30 p.m.~~

[illegible] legal documents for the [illegible] picking [illegible] legal document.

Respectfully,

[illegible] Bolin
[illegible] Mitigation Specialist

[illegible]

'ON CORRECTIONAL INSTITUTION
RAIFORD, FLORIDA

MEMORANDUM:

DATE : **Thursday, March 01, 2007**

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS FOR THE NORTHEAST UNIT P-DORM**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **Rosalie Bolin, Investigator**

FROM CITY & STATE: **P.O. Box 75038**
Tampa, FLORIDA 33675
(813) 241-9158

DATE AND HOUR OF INTERVIEW: **FRIDAY, MARCH 02, 2007**
1030-1130
1300-1600

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	DC NUMBER	CELL	TIME	CASE NUMBER	INTERVIEW WITH
Miller, David	J08118	P3-208	1030-1100		Rosalie Bolin, Investigator
[redacted]					

P/N/O

STANDARD EQUIPMENT:
CASE LAW AND/OR LEGAL DOCUMENTS AND/OR RECORDS MAY BE LEFT WITH CLIENT AND BE RECEIVED FROM CLIENT.

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:
HALLWAY (1)
MAIN GATE #5, (2)
FILE (1)
WARDEN'S OFFICE (1)
ATTORNEY GENERAL (1)

02/27/2007 08:46 8132419159 CSI PAGE 01/01

Criminal Specialist Investigations, Inc.



Fax Cover Sheet

Send To : UCI

From : Rosalie Bolin

Attention : Ms. Rice

Date : 02/27/07

Fax Number : 386-431-2015

Total Pages, Including Cover : 1
Comments :

Ms. Rice:

Please be advised that a legal visit with the following inmate is necessary on Friday, March 2, 2007.

David Miller from 10:30 a.m. until 11:00 a.m. P3-208 J09118

[redacted]

I will be bringing legal documents for their review.

Respectfully,

Rosalie C. Bolin

Rosalie C. Bolin
Investigator/Mitigation Specialist

A000142



TIME	1000 1030
CELL	1-117

NORTHEAST UNIT INMATE TELEPHONE CALLS

DATE: 9-22-11 LEGAL X PERSONAL _____

INMATE'S NAME: Miller, David DC# 508118

PERSON CALL: Robert Norgard, Attorney

CITY & STATE: Bartow, Fl

PHONES NUMBER: 863-533-8556

TIME STARTED _____ TIME COMPLETED _____

PHONE CALL DIALED BY _____

PHONE CALL APPROVED BY R. Norgard

ROBERT A. NORGARD
ATTORNEY AT LAW

Post Office Box 811
310 East Main St.
Bartow, FL 33830-1084

(863)533-8556
(863)533-1334 Fax

Fax Transmittal Form

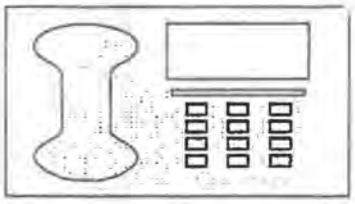
To: **Union Correctional Inst.**
Attn: **Ms. Nocgel**
From: Robert A. Norgard
Fla. Bar No. 322059
Date Sent: September 19, 2011
Number of Pages: 1
Fax: 386-431-2479

P1-117

I am requesting a legal phone call with my Client, **DAVID MILLER JR., DC# J08118.** I would like Mr. Miller to call his above-attorney collect at 863-533-8556 on **THURSDAY, SEPTEMBER 22, 2011 at 10:00 A.M.** (Eastern Standard Time) to discuss legal matters.

Thank you.

PRIVELEGED AND CONFIDENTIAL – All information transmitted hereby is intended only for the use of the addressee(s) named above. If the reader of this message is note the intended recipient(s) or the employee or agent responsible for delivering



DATE	5-3-12
CELL	P1-117

NOTHEAST UNIT INMATE TELEPHONE CALLS

DATE: 5-3-12 LEGAL ✓ PERSONAL _____

INMATE'S NAME: David Miller DC# J08118

PERSON CALL: Robert Norgard - Attorney

@ 1030 hrs

CITY & STATE: Bartow, Fl.

PHONE NUMBER: 1-863-533-8556

TIME STARTED: _____ TIME COMPLETED: _____

PHONE CALL DIALED BY: _____

PHONE CALL APPROVED BY: _____

ENTERED ON [redacted] SCREEN: _____

ROBERT A. NORGARD
ATTORNEY AT LAW

Post Office Box 811
310 East Main St.
Bartow, FL 33830-1084

(863)533-8556
(863)533-1334 Fax

Fax Transmittal Form

To: **Union Correctional Inst.**
Attn:
From: Robert A. Norgard
Fla. Bar No. 322059
Date Sent: April 24, 2012
Number of Pages: 1
Fax: 386-431-2264

PI-112

I am requesting a legal phone call with, **DAVID MILLER JR., DC# J08118.** I would like Mr. Miller to call the above-attorney collect at 863-533-8556 on **THURSDAY, MAY 3, 2012 at 10:30 A.M.** (Eastern Standard Time) to discuss legal matters.

Thank you.

PRIVELEGED AND CONFIDENTIAL – All information transmitted hereby is intended only for the use of the addressee(s) named above. If the reader of this message is note the intended recipient(s) or the employee or agent responsible for delivering the message to the intended recipient(s), please note that any distribution or copying of this communication is strictly prohibited.

UNION CORRECTIONAL INSTITUTION
RAIFORD, FLORIDA

MEMORANDUM:

DATE : FRIDAY, AUGUST 9, 2013

TO : SPECIAL DISTRIBUTION

RE : APPROVED INTERVIEWS FOR THE NORTHEAST UNIT P-DORM

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **Robert A. Norgard, Attorney**
Florida Bar # 322059

FROM (CITY AND STATE): **NORGARD & NORGARD,**
Attorneys at Law
310 E. Main Street
Bartow Fl. 33830-3765
863-533-8556

DATE AND HOUR OF INTERVIEW : **FRIDAY, AUGUST 9, 2013**
1300-1530 HOURS

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	DC NUMBER	CELL	TIME	CASE NUMBER	INTERVIEW BY
MILLER, DAVID	J08118	P1226	1300-1330	N/A	Robert A. Norgard, Attorney
[redacted]					

P/N/O

STANDARD EQUIPMENT:
CASE LAW AND/OR LEGAL DOCUMENTS AND/OR RECORDS MAY BE LEFT WITH CLIENTAND RECEIVED FROM CLIENT

NORGARD and NORGARD
Attorneys at Law

P.O. Box 811
Bartow, FL 33831
863-533-8556
norgardlaw@verizon.net

310 East Main St.
Bartow, FL 33830
(F) 863-533-1334
www.norgardlaw.com

MEMORANDUM

TO: U.C.I.

FROM: Robert A. Norgard, Attorney at Law

DATE: July 1, 2013

RE: Attorney/Client Visit

PAGES: 1 including cover

EMAIL: taylor.kelley@mail.dc.state.fl.us

I am requesting an Attorney/Client visit for **FRIDAY, AUGUST 9, 2013** with the following inmates:

1. David Miller DC# J08118 P1226 1:00 – 1:30 pm
2. [redacted]
3.
4.

Robert A. Norgard
Fla. Bar No. 322059
DOB: 9-23-62
DL# [redacted]
Phone#: 863-533-8556
Fax #: 863-533-1334

I will only be bringing in paperwork.

FLORIDA DEPARTMENT of CORRECTIONS

Governor
RON DESANTIS

Secretary
MARK S. INCH

501 South Calhoun Street, Tallahassee, FL 32399-2500

www.dc.state.fl.us

CERTIFICATE

STATE OF FLORIDA
COUNTY OF Union

I, Sherry Shoup, HEREBY CERTIFY that I am employed by the Florida Department of Corrections as a Correctional Sentence Specialist. As part of my duties and responsibilities, I maintain official records of the Florida Department of Corrections.

I FURTHER CERTIFY that the records attached to this Certificate are true and correct copies of Miller, David DC# J08118 08/01/2000-10/01/2013 Legal Calls/Visits maintained in the course of regular business conducted by the Department of Corrections, a state agency, in order to comply with the provisions of Chapter 119, Florida Statutes.

Sherry Shoup
Correctional Sentence Specialist

The foregoing instrument was acknowledged before me this 28 day of September, 2021, by Sherry Shoup.

(Seal)

Notary Public State of Florida
Stephanie M Smith
My Commission GG 243114
Expires 07/30/2022

Signature of Notary Public

Stephanie Smith
Print, Type/Stamp Name of Notary

Personally known: ____
OR Produced Identification: X
Type of Identification Produced: State Employment ID.

UNION ~~CORRECTIONAL~~ INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : *MAY 30, 2001*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *HEIDI BREWER, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32314-5498*

DATE AND HOUR OF INTERVIEW ***THURSDAY, MAY 31, 2001***
9:00AM-11:30AM & 1:15PM-3:15PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	*J08118*	*1218*		*9:00AM-10:0*

P/N/O

WILL HAVE A BOX OF LEGAL MATERIAL AND A LUGGAGE CART TO TRANSPORT.
****LEGAL MATERIAL FOR I/M WAY.***

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

COLONEL'S OFFICE

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : *JUNE 13, 2001*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW

INTERVIEWER NAME AND TITLE *MICHAEL BAGGETT, INVESTIGATOR*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32314-5498*

DATE AND HOUR OF INTERVIEW ***THURSDAY**, JUNE 14, 2001*
~~*1:15PM - 4:30PM*~~

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	*J08118*	*1218*		*1:15PM-4:30P*

P/N/O

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

COLONEL'S OFFICE
CONTROL ROOM

ION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : JULY 10, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

TERVIEWER NAME AND TITLE: HEIDI BREWER, ATTORNEY & SONIA LOI, LEGAL INTERN
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

OM (CITY AND STATE): TALLAHASSEE, FLORIDA 32314-5498

TE AND HOUR OF INTERVIEW: **WEDNESDAY, JULY 11, 2001**
10:00AM-11:30AM & 1:15PM-3:30PM

'LEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

AME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
LLER, D. [redacted]	J08118	1218		2:30PM-3:00PM [redacted]

P/N/O

INSTITUTIONAL APPROVAL

AL DISTRIBUTION:

NEL'S OFFICE

A000152

UNION CORRECTIONAL INSTITUT
RAIFORD FLORIDA

MEMORANDUM:

DATE : AUGUST 15, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE MARC LEVI, INVESTIGATOR/SONIA LOI, LEGAL INTERN
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW **THURSDAY**, AUGUST 16, 2001
2:30PM - 4:00PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		

MICHAEL BAGGETT, INVESTIGATOR & HARDEEP SANGHA, LEGAL INTERN

MILLER, D.	J08118	1218	2:30PM-3:30PM

P/N/O

INSTITUTIONAL APPROVAL

PECIAL DISTRIBUTION:

:OLONEL'S OFFICE
:ONTROL ROOM
1AIN GATE

'ILE (2)

UNION CORRECTIONAL INSTITUT
RAIFORD FLORIDA

MEMORANDUM:

DATE : AUGUST 15, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELO

INTERVIEWER NAME AND TITLE MARC LEVI, INVESTIGATOR/SONIA LOI, LEGAL INTERN
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW **THURSDAY**, AUGUST 16, 2001
~~2:30PM - 4:00PM~~

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTIO

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		

MICHAEL BAGGETT, INVESTIGATOR & HARDEEP SANGHA, LEGAL INTERN

MILLER, D.	J08118	1218	2:30PM-3:3

P/N/O

INSTITUTIONAL APPROVAL

PECIAL DISTRIBUTION:

:OLONEL'S OFFICE
:ONTROL ROOM
1AIN GATE

'ILE (2)

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : SEPTEMBER 26, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW

INTERVIEWER NAME AND TITLE HEIDI BREWER, ATTORNEY
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW **THURSDAY**, SEPTEMBER 27, 2001
~~10:00AM - 11:30AM~~

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J08118	1218		10:00AM-10:30
[redacted]		[redacted]		[redacted]

P/N/O

NOTARY - ALL

P/N/O

INSTITUTIONAL APPROVAL

A000155

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : OCTOBER 4, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW

INTERVIEWER NAME AND TITLE: AMANDA REGAN-WORL / JOHN JACKSON, ATTORNEYS
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE): TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW: FRIDAY, OCTOBER 5, 2001
9:00AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				[redacted]
MILLER, D.	J08118	1218		10:00AM-10:3[redacted]
[redacted]				[redacted]
JOHN JACKSON [redacted]	[redacted]	[redacted]		[redacted]

P/N/O

INSTITUTIONAL APPROVAL

A000156

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : DDECEMBER 11, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE AMANDA REGAN-WORL, ATTY. / ROSA GREENBAUM, INVESTIGATOR
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW WEDNESDAY, DECEMBER 12, 2001
1:15PM - 4:00PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		[redacted]
MILLER, D.	J08118	1218		3:00PM-3:45
ROSA GREENBAUM				
[redacted]		[redacted]		[redacted]

B Henderson
INSTITUTIONAL APPROVAL

A000157

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : DECEMBER 20, 2001

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW

INTERVIEWER NAME AND TITLE JOHN JACKSON, ASSISTANT & MICHAEL BAGGETT, INVESTIGATOR
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32314-5498

DATE AND HOUR OF INTERVIEW **FRIDAY**, DECEMBER 21, 2001
9:00AM - 11:00AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		[redacted]
MICHAEL BAGGETT [redacted]	[redacted]	[redacted]		[redacted]
MILLER, D. [redacted]	J03118 [redacted]	1218 [redacted]		10:00AM-10:3 [redacted]

P/N/O

INSTITUTIONAL APPROVAL

A000158

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : JANUARY 16, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DOR1)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE DR. CHARLES GOLDEN, PH.D
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32301

DATE AND HOUR OF INTERVIEW THURSDAY, JANUARY 17, 2002
9:30AM-11:30AM & 1:15PM-4:30PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
TELLER, D.	J08113	1218		9:30AM-11:30AM & 1:15PM-4:30PM

STANDARD TESTING EQUIPMENT, MAY INCLUDE A TAPE RECORDER AND/OR LAP TOP COMPUTER.
REQUEST HANDCUFFS BE REMOVED AT SOME POINT DURING VISIT.

A000159

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : JANUARY 17, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE AMANDA REGAN-WORK, ATTORNEY
CAPITAL COLLATERAL COUNSEL - NORTHERN
(350) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW FRIDAY, JANUARY 18, 2002
9:45AM - 11:15AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J08118	1213		9:45AM-10:15AM
[redacted]				

P/N/D

A000160

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : FEBRUARY 7, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

VIA FACSIMILE

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE HEIDI BREWER, ATTORNEY
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW FRIDAY, FEBRUARY 8, 2002
8:30AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				
MILLER, D.	J08118	1218		10:30AM-11:00AM
[redacted]				

P/N/O

A000161

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : FEBRUARY 7, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE DR. MICHAEL HERKOV, PH.D
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW FRIDAY, FEBRUARY 8, 2002
2:30PM - 4:30PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J08118	1218		2:30PM-4:30PM

STANDARD TESTING EQUIPMEMNT, MAY INCLUDE A TAPE RECORDER AND/OR LAP TOP COMPUTER.
HANDCUFFS REMOVED AT SOME POINT DURING INTERVIEW.

A000162

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : FEBRUARY 11, 2002

TO : SPECIAL DISTRIBUTION

RE : APPROVED INTERVIEWS AT UCI
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE MICHAEL BAGGETT, INVESTIGATOR
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW TUESDAY, FEBRUARY 12, 2002
9:00AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J03118	1218		9:00AM-10:30AM
[redacted]				

P/N/O

A000163

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE FEBRUARY 21, 2002

TO **SPECIAL DISTRIBUTION**

RE **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE DR. MICHAEL HERKOV, PH.D
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32031

DATE AND HOUR OF INTERVIEW FRIDAY, MARCH 1, 2002
1:30PM - 4:30PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	J08118	1218		1:30PM-4:30PM

STANDARD TESTING EQUIPMENT, TAPE RECORDER AND/OR LAPTOP. MAY REQUEST HANDCUFFS BE REMOVED DURING SOME POINT IN EVALUATION.

A000164

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MARCH 5, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *HEIDI BREWER, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *THURSDAY, MARCH 7, 2002*
8:30AM-11:30AM & 1:15PM-4:15PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				
MILLER, D.	J08118	1218	NOTARY	2:45PM-3:30PM
[redacted]				

P/N/O

A000165

INSTITUTIONAL APPROVAL

03/r

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MARCH 8, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *JONITA WHITEHEAD/DANIEL ASHTON, INV. AMANDA REGAL-WORL, ATTY.*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *MONDAY, MARCH 11, 2002*
1:15PM - 2:15PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
*MILLER, D.	J08118	1218		1:15PM-2:00PM

P/N/O

WHITEHEAD AND ASHTON

****REGAN-WORL / WHITEHEAD AT 2:00PM***

A000166

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MARCH 20, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *DOUGLAS PARTYKA, INVEST. / HEIDI BREWER, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *FRIDAY, MARCH 22, 2002*
9:00AM - 10:45AM(11:30AM)

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				
HEIDI BREWER	[redacted]			
MILLER, D.	*J08118*	*1218*		*9:30AM-10:00AM*
[redacted]				

P/N/O

A000167

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MAY 9, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *DANIEL J. ASHTON, INVESTIGATOR*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *MONDAY, MAY 13, 2002*
10:00AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
MILLER, D.	*J08118*	*1218*		*11:00AM-11:30*

P/N/O

A000168

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *MAY 13, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *AMANDA REGAN-WORL, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32031*

DATE AND HOUR OF INTERVIEW *THURSDAY, MAY 16, 2002*
9:00AM-11:30AM & 1:15PM-3:15PM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]		[redacted]		[redacted]
MILLER, D.	*J08118*	*1218*		*10:30AM-11:00A*
[redacted]		[redacted]		[redacted]

P/N/O

A000169

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM:

DATE : *JUNE 24, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *DANIEL ASHTON, INVESTIGATOR*
CAPITAL COLLATERAL REGIONAL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32301*

DATE AND HOUR OF INTERVIEW *THURSDAY, JUNE 27, 2002*
9:00AM - 9:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
MILLER, D.	*J08118*	*1218*		*9:00AM-9:30A*

P/N/O

W Phillips
INSTITUTIONAL APPROVAL

A000170

SPECIAL DISTRIBUTION:

,NION CORRECTIONAL INSTITUTIO.
RAIFORD FLORIDA

MEMORANDUM:

DATE : *July 25, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT U.C.I.**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *Mr. Daniel Ashton, Investigator Capital Collateral Northern Region*

FROM (CITY AND STATE) *Tallahassee, Florida*

DATE AND HOUR OF INTERVIEW *THURSDAY, July 25, 2002*

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				[redacted]
MILLER, D.	*J08118*	*P1-218S*		*11:00AM-11:30.*
[redacted]				[redacted]

*XXXX

...ON CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

...EMORANDUM:

...ATE : *AUGUST 19, 2002*

...O : **SPECIAL DISTRIBUTION**

...E : **APPROVED INTERVIEWS AT U.C.I.**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

NTERVIEWER NAME AND TITLE *LAVERN NELSON/DAN ASHTON, INVES./TIFFANY MURPHY, ATTORNEY*
CAPITAL COLLATERAL REGIONAL - NORTHERN
(850) 488-7200
ROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32301*
DATE AND HOUR OF INTERVIEW *TUESDAY, AUGUST 20, 2002*
~~*1:15AM - 3:45PM*~~

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
MILLER, D.	*J08118*	*1218 ASHTON/MURPHY*		*3:15PM-3:45PM*
[redacted]	[redacted]	[redacted]		[redacted]

P/N/O

INSTITUTIONAL APPROVAL
For Capt Walmsley

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : NOVEMBER 4, 2002

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE JONITA WHITEHEAD, INVESTIGATOR
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) TALLAHASSEE, FLORIDA 32301

DATE AND HOUR OF INTERVIEW WEDNESDAY, NOVEMBER 6, 2002
9:00AM - 10:45AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	J03118	1218	P/N/O	9:45AM-10:45AM

D.A. Mallard II, A000173
INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:

UNION CORRECTIONAL INSTITUTION
RAIFORD FLORIDA

MEMORANDUM :

DATE : *NOVEMBER 21, 2002*

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI**
(P-DORM)

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE *TIFFANY MURPHY, ATTORNEY*
CAPITAL COLLATERAL COUNSEL - NORTHERN
(850) 488-7200

FROM (CITY AND STATE) *TALLAHASSEE, FLORIDA 32301*

DATE AND HOUR OF INTERVIEW *FRIDAY, NOVEMBER 22, 2002*
9:00AM - 11:30AM

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
MILLER, D.	*J08118*	*1218*		*10:30AM-11:00AM*
[redacted]		[redacted]		[redacted]

P/N/O

A000174

INSTITUTIONAL APPROVAL

UNION CORRECTIONAL INSTITUTION
RAIFORD, FLORIDA

MEMORANDUM:

DATE : **May 7, 2004**

TO : **SPECIAL DISTRIIBUTION**

RE : **APPROVED INTERVIEWS AT UCI (P-DORM)**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **Heidi Brewer, Attorney**
ATORNEY AT LAW
(850) 422-1115

FROM (CITY AND STATE) **Tallahassee, Florida 32301**

DATE AND HOUR OF INTERVIEW **WEDNESDAY, May 12, 2004**
9:30am – 11:30am

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]				[redacted]
MILLER, D.	J08118	1105		.11:00AM-11:30AM

P/N/O

A000175

SPECIAL DISTRIBUTION:

INSTITUTIONAL APPROVAL

.ION CORRECTIONAL INSTITUTI
RAIFORD, FLORIDA

MEMORANDUM:

DATE : **June 4, 2004**

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS AT UCI (P-DORM)**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **Heidi E. Brewer, Attorney**
ATTORNEY AT LAW
(850) 422-1115

FROM (CITY AND STATE) **Tallahassee, Florida 32301**

DATE AND HOUR OF INTERVIEW **FRIDAY, June 4, 2004**
1:15pm –4:30pm

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	NUMBER	CELL ASSIGNMENT	JOB ASSIGNMENT	TIME
[redacted]	[redacted]	[redacted]		[redacted]
MILLER, D.	J08118	1105		4:15PM-4:30PM

P/N/O

A000176

UNION CORRECTIONAL INSTITUTION
RAIFORD, FLORIDA

MEMORANDUM:

DATE : **WEDNESDAY JANUARY 17, 2007**

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS FOR THE NORTHEAST UNIT P-DORM**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **ROSALIE BOLIN, INVESTIGATOR**
CRIMINAL SPECIALISTS INVESTIGATIONS
1503 SEVENTH AVE. EAST
FROM CITY & STATE: **TAMPA, FLORIDA 33605**
(813) 241-9153

DATE AND HOUR OF INTERVIEW : **FRIDAY JANUARY 19, 2007**
1030-1145 & 1300-1630

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	DC NUMBER	CELL	TIME	CASE NUMBER	INTERVIEW WITH
Miller, David	J08118	P3-208S	1030-1145	97-6680-CFA	Rosalie Bolin, Investigator
[redacted]					

P/N/O

STANDARD EQUIPMENT:
CASE LAW AND/OR LEGAL DOCUMENTS AND/OR RECORDS MAY BE LEFT WITH CLIENT AND BE RECEIVED FROM CLIENT

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:
HALLWAY (1)
MAIN GATE #5, (2)
FILE (1)
WARDEN'S OFFICE (1)

Criminal Specialist Investigations, Inc.

Fax Cover Sheet

Send To : UCI From : Rosalie Bolin

Attention : Ms. Cox Date : 01/16/07

Fax Number : 386-431-2479

Total Pages, Including Cover : 1

Comments :

Ms. Cox,

Please be advised that a legal visit with the following inmates on Friday, January 19, 2007, will be necessary.

[illegible] 1 [illegible] 1 :30 a.m. until 11:45 a.m.

~~[illegible] 6,1 [illegible] until 4:30 p.m.~~

[illegible] legal documents for the [illegible] picking [illegible] legal document.

Respectfully,

[illegible] Bolin
[illegible] Mitigation Specialist

[illegible]

'ON CORRECTIONAL INSTITUTION
RAIFORD, FLORIDA

MEMORANDUM:

DATE : **Thursday, March 01, 2007**

TO : **SPECIAL DISTRIBUTION**

RE : **APPROVED INTERVIEWS FOR THE NORTHEAST UNIT P-DORM**

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **Rosalie Bolin, Investigator**

FROM CITY & STATE: **P.O. Box 75038**
Tampa, FLORIDA 33675
(813) 241-9158

DATE AND HOUR OF INTERVIEW: **FRIDAY, MARCH 02, 2007**
1030-1130
1300-1600

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	DC NUMBER	CELL	TIME	CASE NUMBER	INTERVIEW WITH
Miller, David	J08118	P3-208	1030-1100		Rosalie Bolin, Investigator
[redacted]					

P/N/O

STANDARD EQUIPMENT:
CASE LAW AND/OR LEGAL DOCUMENTS AND/OR RECORDS MAY BE LEFT WITH CLIENT AND BE RECEIVED FROM CLIENT.

INSTITUTIONAL APPROVAL

SPECIAL DISTRIBUTION:
HALLWAY (1)
MAIN GATE #5, (2)
FILE (1)
WARDEN'S OFFICE (1)
ATTORNEY GENERAL (1)

02/27/2007 08:46 8132419159 CSI PAGE 01/01

Criminal Specialist Investigations, Inc.



Fax Cover Sheet

Send To : UCI

From : Rosalie Bolin

Attention : Ms. Rice

Date : 02/27/07

Fax Number : 386-431-2015

Total Pages, Including Cover : 1
Comments :

Ms. Rice:

Please be advised that a legal visit with the following inmate is necessary on Friday, March 2, 2007.

David Miller from 10:30 a.m. until 11:00 a.m. P3-208 J09118

[redacted]

I will be bringing legal documents for their review.

Respectfully,

Rosalie C. Bolin

Rosalie C. Bolin
Investigator/Mitigation Specialist

A000180



TIME	1000 1030
CELL	1-117

NORTHEAST UNIT INMATE TELEPHONE CALLS

DATE: 9-22-11 LEGAL X PERSONAL _____

INMATE'S NAME: Miller, David DC# 508118

PERSON CALL: Robert Norgard, Attorney

CITY & STATE: Bartow, Fl

PHONES NUMBER: 863-533-8556

TIME STARTED _____ TIME COMPLETED _____

PHONE CALL DIALED BY _____

PHONE CALL APPROVED BY R. Norgard

ROBERT A. NORGARD
ATTORNEY AT LAW

Post Office Box 811
310 East Main St.
Bartow, FL 33830-1084

(863)533-8556
(863)533-1334 Fax

Fax Transmittal Form

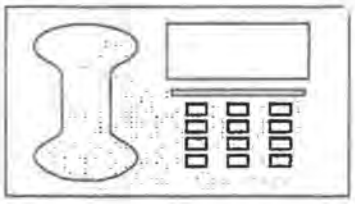
To: **Union Correctional Inst.**
Attn: **Ms. Nocgel**
From: Robert A. Norgard
Fla. Bar No. 322059
Date Sent: September 19, 2011
Number of Pages: 1
Fax: 386-431-2479

P1-117

I am requesting a legal phone call with my Client, **DAVID MILLER JR., DC# J08118.** I would like Mr. Miller to call his above-attorney collect at 863-533-8556 on **THURSDAY, SEPTEMBER 22, 2011 at 10:00 A.M.** (Eastern Standard Time) to discuss legal matters.

Thank you.

PRIVELEGED AND CONFIDENTIAL – All information transmitted hereby is intended only for the use of the addressee(s) named above. If the reader of this message is note the intended recipient(s) or the employee or agent responsible for delivering



DATE	5-3-12
CELL	P1-117

NOTHEAST UNIT INMATE TELEPHONE CALLS

DATE: 5-3-12 LEGAL ✓ PERSONAL _____

INMATE'S NAME: David Miller DC# J08118

PERSON CALL: Robert Norgard - Attorney

@ 1030 hrs

CITY & STATE: Bartow, Fl.

PHONE NUMBER: 1-863-533-8556

TIME STARTED: _____ TIME COMPLETED: _____

PHONE CALL DIALED BY: _____

PHONE CALL APPROVED BY: _____

ENTERED ON [redacted] SCREEN: _____

ROBERT A. NORGARD
ATTORNEY AT LAW

Post Office Box 811
310 East Main St.
Bartow, FL 33830-1084

(863)533-8556
(863)533-1334 Fax

Fax Transmittal Form

To: **Union Correctional Inst.**
Attn:
From: Robert A. Norgard
Fla. Bar No. 322059
Date Sent: April 24, 2012
Number of Pages: 1
Fax: 386-431-2264

PI-112

I am requesting a legal phone call with, **DAVID MILLER JR., DC# J08118.** I would like Mr. Miller to call the above-attorney collect at 863-533-8556 on **THURSDAY, MAY 3, 2012 at 10:30 A.M.** (Eastern Standard Time) to discuss legal matters.

Thank you.

A000184

PRIVELEGED AND CONFIDENTIAL – All information transmitted hereby is intended only for the use of the addressee(s) named above. If the reader of this message is note the intended recipient(s) or the employee or agent responsible for delivering the message to the intended recipient(s), please note that any distribution or copying of this communication is strictly prohibited.

UNION CORRECTIONAL INSTITUTION
RAIFORD, FLORIDA

MEMORANDUM:

DATE : FRIDAY, AUGUST 9, 2013

TO : SPECIAL DISTRIBUTION

RE : APPROVED INTERVIEWS FOR THE NORTHEAST UNIT P-DORM

THIS IS TO ADVISE SPECIAL DISTRIBUTION AS NOTED BELOW OF APPROVED INTERVIEWS AS OUTLINED BELOW.

INTERVIEWER NAME AND TITLE: **Robert A. Norgard, Attorney**
Florida Bar # 322059

FROM (CITY AND STATE): **NORGARD & NORGARD,**
Attorneys at Law
310 E. Main Street
Bartow Fl. 33830-3765
863-533-8556

DATE AND HOUR OF INTERVIEW : **FRIDAY, AUGUST 9, 2013**
1300-1530 HOURS

PLEASE HAVE THE INMATE (S) AND AN INTERVIEW ROOM AVAILABLE UPON THEIR ARRIVAL AT THE INSTITUTION.

NAME	DC NUMBER	CELL	TIME	CASE NUMBER	INTERVIEW BY
MILLER, DAVID	J08118	P1226	1300-1330	N/A	Robert A. Norgard, Attorney
[redacted]					

P/N/O

STANDARD EQUIPMENT:
CASE LAW AND/OR LEGAL DOCUMENTS AND/OR RECORDS MAY BE LEFT WITH CLIENTAND RECEIVED FROM CLIENT

NORGARD and NORGARD
Attorneys at Law

P.O. Box 811
Bartow, FL 33831
863-533-8556
norgardlaw@verizon.net

310 East Main St.
Bartow, FL 33830
(F) 863-533-1334
www.norgardlaw.com

MEMORANDUM

TO: U.C.I.

FROM: Robert A. Norgard, Attorney at Law

DATE: July 1, 2013

RE: Attorney/Client Visit

PAGES: 1 including cover

EMAIL: taylor.kelley@mail.dc.state.fl.us

I am requesting an Attorney/Client visit for **FRIDAY, AUGUST 9, 2013** with the following inmates:

1. David Miller DC# J08118 P1226 1:00 – 1:30 pm
2. [redacted]
3.
4.

Robert A. Norgard
Fla. Bar No. 322059
DOB -62
DL#[redacted]
Phone#: 863-533-8556
Fax #: 863-533-1334

I will only be bringing in paperwork.

EXHIBIT 16

DISP

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

CASE No.: 97-6680 CFA

FILED
MAR 15 2004
CLERK CIRCUIT COURT

STATE OF FLORIDA,

Plaintiff,

v.

DAVID MILLER, JR.,

Defendant.

_____/

MOTION FOR ORDER DIRECTING PAYMENT OF APPROVED EXPENSES (NORGARD)

COMES NOW, the Defendant, **DAVID MILLER, JR.**, by and through undersigned counsel, and hereby moves this honorable Court for an Order Directing Payment of Approved Expenses. In support hereof, the following is submitted:

1. Undersigned counsel represents Mr. Miller as registry counsel pursuant to Fla. Stat. 27.710 *et. seq.* Additionally, undersigned counsel required the assistance of co-counsel Robert J. Norgard, designated co-counsel, pursuant to Fla. Stat. 27.710 (6).

2. Fla. Stat. 27.711, Section (6), provides for the reimbursement to undersigned counsel of expenses incurred in the furtherance of her duties as registry counsel. Mr. Norgard invoiced undersigned counsel for expenses he incurred in furtherance of Mr. Miller's case, including travel and lodging expenses for a witness.

3. As required, undersigned counsel submitted this invoice to the Department of Financial Services, Contract Manager for expenses incurred in Mr. Miller's case. The Contract

Manager has ***approved*** these expenses. (See Attachment). These expenses were necessary as part of undersigned's representation of Mr. Miller in his post conviction proceedings.

4. Accordingly, the Defendant moves this honorable Court for an Order Directing the Payment of Approved Expenses in the amount of $1162.61, warrant payable to: Heidi E. Brewer, Esquire.

5. Undersigned counsel hereby certifies that no amount of money or hours that relate to the requested payment were spent in initiating or prosecuting or assisting in the prosecution of any civil suit, except habeas corpus proceedings, and appointed counsel has not represented the Defendant or participated in civil or criminal litigation on behalf the Defendant in any other state; further the undersigned attorney has not engaged in conduct that was calculated to delay the orderly disposition of the defendant's case.

WHEREFORE, undersigned counsel respectfully requests this Court Grant the instant motion and enter an Order Directing the Payment of Approved Expenses in the amount of $1162.61 warrant payable to Heidi E. Brewer, Esquire. A proposed order is enclosed.

I HEREBY CERTIFY that the foregoing has been provided by U.S. Mail, First Class, to: **The Honorable L. Haldane Taylor**, Circuit Court Judge, Fourth Judicial Circuit, Duval County Courthouse, 330 E. Bay Street, Jacksonville, Florida 32202; and provided by facsimile transmission to **Jackie Knight**, CIA, Capital Collateral Contract Manager, Department of Financial Services, Bureau of Auditing, 200 East Gaines Street, Tallahassee, Florida 32399-0355 this 9th day of March, 2004.

Heidi E. Brewer

HEIDI E. BREWER
Fla. Bar No.: 0046965
2006 Atapha Nene
Tallahassee, Florida 32301
(850) 422-1115
Attorney for Mr. Miller

DEPARTMENT OF FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER

March 1, 2004

Heidi E. Brewer
2006 Atapha Nene
Tallahassee, Florida 32301

Re: State of Florida vs. David Miller
Case Number: 97-6680-CFA

Dear Ms. Brewer:

The Department of Financial Services received your request for payment on February 26, 2004, for miscellaneous expert witness travel expenses totaling $1,162.61. Enclosed is the approval of your request pursuant to Section 27.711(6), Florida Statutes. Please forward to us the signed motion for payment for these expenses at your earliest convenience.

Please include in the court order the total approved of $1,162.61 and also state that the warrant be made payable to Heidi E. Brewer, Esquire. Return the signed court order, certified copy or true copy of signed order to the following address:

Jackie Knight
Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

Please call me if you have any questions (850) 410-9294 or e-mail at jknight@dfs.state.fl.us

Sincerely,

Jackie Knight
Capital Collateral Contract Manager

Enclosures

JACKIE KNIGHT • PROFESSIONAL ACCOUNTANT SPECIALIST • DIVISION OF ACCOUNTING AND AUDITING/BUREAU OF AUDITING
200 EAST GAINES STREET • TALLAHASSEE, FLORIDA 32399-0355 • (850) 410-9294 • FAX (850) 410-9337

Affirmative Action / Equal Opportunity Employer

RECEIVED
FEB 26 2004
BUREAU OF AUDITING

HEIDI E. BREWER
Attorney at Law
2006 Atapha Nene
Tallahassee, Florida 32301
(850) 422-1115

26 February 2004

VIA FACSIMILE TRANSMISSION

To: Susan Cureton, CIA, Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

Re: Invoice for Expert Expenses Incurred by Registry Attorney pursuant to Fla. Stat. 27.711(4)(6): State v. David Miller, Duval County Case No.: 97-6680-CFA.

INVOICE FOR ATTORNEY EXPENSES INCURRED

Dear Ms. Cureton:

Attached for approval, please find the receipts for expenses incurred by co-counsel, Robert J. Norgard, whose services were necessary in the development and presentation of Mr. Miller's case. Mr. Norgard's expenses total $1162.61 (witness travel = $993.50; witness lodging & meal – $169.11). These expenses are authorized under Fla. Stat. Sec. 27.711(6).

Your prompt attention to this matter is appreciated.

Sincerely,

Heidi E. Brewer
Attorney at Law

Attachment

Department of Financial Services
has no objections to this billing
By: Jackie Enright
Date: 3/1/04

U·S AIRWAYS

ELECTRONIC TICKETING
CUSTOMER RECEIPT AND ITINERARY

WITNESS: DEBORAH LEE TRAVEL

ROBERT NORGARD
PO BOX 811
BARTOW, FL 33831

TO: ROBERT NORGARD
RECORD LOCATOR BYZDYY DATE OF ISSUE - 03NOV05

Thank you for choosing US Airways, we look forward to seeing you on board.

PLEASE NOTE THE FOLLOWING IMPORTANT INFORMATION:

New security regulations require that all passengers present both a boarding pass and government issued photo identification at the security-screening checkpoint. You may check in and be issued your boarding pass before arriving at the airport at usairways.com. Or, at the airport you may check in, check luggage and be issued your boarding pass at our self service check-in kiosks, at curbside or the main ticket counter.

PASSENGER	TICKET NUMBER	FARE-USD	TRANS TAX	OTHER TAXES	TICKET TOTAL
DEBRAMS LEE	0372171859074	909.76	68.24	15.80	993.80
					993.80

Payment Type -Master Card XXXXXXXXXXXX0299

03NOV - MONDAY
LV CHARLOTTE 555P FLT1222 US AIRWAYS
AR JACKSONVILLE FL 707P COACH
DEBRAMS LEE SEAT 6E

04NOV - TUESDAY
LV JACKSONVILLE FL 605P FLT948 US AIRWAYS
AR CHARLOTTE 720P COACH
DEBRAMS LEE SEAT 14A

Requests to change your itinerary may result in a change fee plus any increase in fare.

Tickets are valid for one year from date of ticket issuance and can only be used by the person whose name appears on the ticket. Travel is subject to conditions of contract. Notice of incorporated terms and liability are available at US Airways airport locations.

Departure Requirements: Passengers with seat assignments must obtain boarding passes at least 20 minutes (45 minutes – international) before scheduled departure. Passengers must present themselves at the designated boarding gate at least 15 MINUTES (30 minutes – international) prior to scheduled departure. In the event passengers do not comply with these departure requirements, all reservations and seat assignments (including [illegible] and return tickets) may be canceled.

ROBERT A. NORGARD, ESQ.
Attorney at Law
BOARD CERTIFIED CRIMINAL TRIAL LAWYER

Mailing:
P.O. Box 811
Bartow, FL 33831-0811
Fax (86) 533-1334

Office:
341 W. Davidson St., Suite 302
Bartow, Florida 33830-3765

FOR WITNESS DEBORAH LEE

FOLIO

adam's mark.
jacksonville

All Adam's Mark hotels and facilities provide service to all persons, without regard to race or color, and Adam's Mark is committed to providing quality service and treatment to all of its guests and patrons. If you believe that you have experienced discrimination or have been treated unequally because of your race or color, Adam's Mark urges you to share your concerns with our Compliance Officer by calling the toll-free number at 877-754-9940.

225 COASTLINE DRIVE • JACKSONVILLE, FL 32202 • (904) 633-9095
Adam's Mark Hotels, A Division of HBE Corporation

NORGARD, ROBERT 2/2
101 PRATT ST
BELMONT, NC
28012

ARRIVAL 11/03/03
DEPART 11/04/03
NO. IN PARTY 1
RATE 139.00

ACCOUNT NO. 199129 ROOM NO. 958

NUMBER	DATE	DESCRIPTION			AMOUNT
		A-GUEST FOLIO			
1	11/03/03	ROOM	958	1070	$139.00
2	11/03/03	ROOM TAX	958	1071	$19.46
3	11/04/03	RIVERFRONT CAFE 09:42	958	7681	$10.65
4	11/04/03	AMERICAN EXPRESS	958	[illegible]	$169.11CR
		GOLD MARK REWARDS			
C/O	Clerk-JSS	Time- 14:35 * BALANCE DUE			$.00

SIMPLY REWARDING
800-627-MARK (6275)
Enroll Today and Start Earning!

GUEST ACCEPTS FULL LIABILITY FOR ANY CHARGES INCURRED.

SIGNATURE Deborah D L COMPANY STREET CITY/STATE ZIP CODE

A SAFE IS PROVIDED FOR DEPOSIT OF VALUABLES. THE HOTEL CANNOT BE RESPONSIBLE FOR VALUABLES NOT DEPOSITED.

A000193

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing, consisting of 10 pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 4 day of OCT A.D., 2021.

Clerk, Circuit and County Courts
Duval County, Florida

By _____
Deputy Clerk

A000194

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

CASE NO.: 97-6680 CF A

CRC

STATE OF FLORIDA,

Plaintiff,

v.

DAVID MILLER, JR.,

Defendant.

_____/

FILED IN COMPUTER G.R.

FILED
AUG 13 2004
CLERK CIRCUIT COURT

MOTION FOR ORDER DIRECTING PAYMENT OF APPROVED ATTORNEY'S (NORGARD) FEES

COMES NOW, undersigned counsel, former registry attorney for David Miller, Jr., and hereby files this Motion for Order Directing Payment of Approved Attorney's Fees. The following is submitted in support hereof:

1. Undersigned counsel formerly represented Mr. Miller as Registry Counsel from July, 2003 to June 14, 2004.

2. Pursuant to Fla. Stat. 27. 711, undersigned counsel designated Robert Norgard, Esquire, as co-counsel.

3. Attorney Norgard assisted in the representation of Mr. Miller, including in preparation for, and at the evidentiary hearing held in this case November 4-5, 2003, and closing arguments thereon, regarding Mr. Miller's Fla. R. Crim. P. 3.850/3.851 motion for post conviction relief.

4. Fla. Stat. 27.711(4)(c) provides:

The attorney is entitled to $100 per hour, up to a maximum of $20,000, after the trial court issues a final order granting or denying the capital defendant's motion for postconviction relief.

5. Mr. Norgard submitted his invoice for attorney's fees which undersigned counsel submitted as required to the Capital Collateral Contract Manager, Department of Financial Services, Division of Accounting & Auditing, State of Florida. The Contract Manager has approved payment for Mr. Norgard in the amount of $7,880.00. (See Attached). This amount, in addition to attorneys fees paid to undersigned counsel, is within the $20,000 cap and permitted under Fla. Stat. Sect. 27.711 (4)(c).

6. Accordingly, having performed these services, having met the requirements of Fla. Stat. Sect. 27.111 (4)(c), and having been approved for payment by the Contract Manager, Mr. Norgard is entitled to $7,880.00 for compensation for his services in this case.

7. Undersigned attorney hereby certifies that no amount of money or hours that relate to the requested payment were spent in initiating or prosecuting or assisting in the prosecution of any civil suit, except habeas corpus proceedings, and counsel has not represented the Defendant or participated in civil or criminal litigation on behalf of the Defendant in any other state; further the undersigned attorney has not engaged in conduct that was calculated to delay the orderly disposition of the defendant's case.

WHEREFORE, undersigned counsel respectfully requests this honorable Court grant the instant Motion for Order Directing Payment of Approved Attorney's fees in the amount of $7,800.00 for compensation for Mr. Norgard's services, warrant payable to Heidi E. Brewer. A proposed order is enclosed.

Respectfully Submitted,

Heidi E. Brewer
Fla. Bar No.: 0046965
2006 Atapha Nene
Tallahassee, Florida 32301
(850) 422-1115

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished to: **The Honorable L. Haldane Taylor**, Circuit Court Judge, Fourth Judicial Circuit, Duval County Courthouse, 330 E. Bay Street, Rm. 201, Jacksonville, Florida 32202; **Robert Norgard**, Esquire, P.O. Box 811, Bartow, Florida 33831; and **Jackie Knight**, Capital Collateral Contract Manager, Department of Financial Services, Bureau of Auditing, 200 East Gaines Street, Tallahassee, Florida 32399-0355 this 10th day of August, 2004.

HEIDI E. BREWER
Fla. Bar No.: 0046965
2006 Atapha Nene
Tallahassee, Florida 32301
(850) 422-1115

DEPARTMENT OF FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER

June 9, 2004

Heidi E. Brewer
2006 Atapha Nene
Tallahassee, Florida 32304

Re: State of Florida vs. David Miller
Case Number 97-6680-CFA

Dear Ms. Brewer:

The Department of Financial Services received your request for payment on June 8, 2004, for attorney fees totaling $8,300.00. Enclosed is the partial approval of your request for attorney fees in the amount of $7,880.00, pursuant to Section 27.711(4)(c), Florida Statutes. Please forward to us the signed motion for payment for these expenses at your earliest convenience.

Please include in the court order the total approved of $7,880.00 and also state that the warrant be made payable to Heidi E. Brewer, Esquire. Return the signed court order, certified copy or true copy of signed order to the following address:

Jackie Knight
Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

Your bill was reduced by $420.00 because, pursuant to the provisions delineated in Section 27.711(4)(c), Florida Statutes, an attorney is entitled to a maximum of $20,000 for attorney fees. To date, you have already been paid $12,120.00 for attorney fees under this section. Therefore, the Department lacks statutory authority to approve your request or authorize payment absent specific judicial findings that your request is both reasonable and that extraordinary circumstances in your case justify the excess payment.

Please call me if you have any questions (850) 410-9294 or e-mail at jknig[illegible]@dfs.state.fl.us

Sincerely,

Jackie Knight
Capital Collateral Contract Manager

JACKIE KNIGHT • PROFESSIONAL ACCOUNTANT SPECIALIST • DIVISION OF [illegible]
200 EAST GAINES STREET • TALLAHASSEE, FLORIDA 32399-0355

State of Florida vs. David Miller, Jr.
Case No. 97-6680-CFA

AFFIDAVIT OF WORK PERFORMED AND SERVICES RENDERED

9-29-03	.1	Phone calls to/from Co-Counsel
	.1	Work on Notice of Appearance
	.1	Open file
9-30-03	.2	Work on Notice of Appearance
10-1-03	.1	Phone call from Co-Counsel
10-7-03	.1	Review Notice of Designation of Co-Counsel
	.1	Review Motion
10-13-03	.1	Phone call to Co-Counsel
10-15-03	1.0	Hearing preparation
	.1	Phone call from Co-Counsel
10-16-03	.2	Phone call from Co-Counsel
	.3	Status Conference (by phone)
10-18-03	2.5	Hearing preparation
10-19-03	3.5	Hearing preparation
10-20-03	1.5	Hearing preparation
10-22-03	1.0	Hearing preparation
10-23-03	.6	Phone call to Co-Counsel
10-24-03	1.5	Hearing preparation
10-26-03	.1	Phone call regarding Travel Arrangements

10-27-03	.3	Phone call from Co-Counsel
	.1	Review Order
	1.5	Hearing preparation
10-28-03	1.1	Phone call to Co-Counsel
	1.5	Hearing preparation
10-29-03	.3	Phone calls to/from Co-Counsel
	2.0	Hearing preparation
10-30-03	.4	Status Conference
	.2	Phone calls from Co-Counsel
	.3	Review faxes from Co-Counsel
	1.5	Hearing preparation
10-31-03	2.0	Hearing preparation
11-1-03	2.5	Hearing preparation
11-2-03	5.5	Travel/Hearing preparation
11-3-03	9.5	Hearing preparation/ Witness preparation/ Met with Co-Counsel and Investigator
11-4-03	11.5	Hearing preparation/ Witness preparation/ Met with Co-Counsel and Investigator/Hearing preparation
11-5-03	8.5	Hearing/Hearing preparation/Travel
11-10-03	.5	Phone calls with Co-Counsel
11-11-03	.1	Work on Witness Costs
12-2-03	.1	Phone call to Co-Counsel
12-3-03	.1	Phone call to Co-Counsel
12-9-03	.2	Phone call to Co-Counsel

12-17-03	.1	Phone call to Co-Counsel
12-22-03	.2	Phone call to Co-Counsel
12-28-03	.1	Phone call from Co-Counsel
12-29-03	.1	Phone calls to/from Co-Counsel
12-30-03	.1	Phone call from Co-Counsel
1-12-04	.1	Phone call from Co-Counsel
1-26-04	.1	Review order
	.1	Phone call to Co-Counsel
2-4-04	.1	Phone call from Co-Counsel
2-6-04	.1	Phone calls to/from Co-Counsel
	1.0	Closing argument preparation
2-7-04	.1	Phone call to Co-Counsel
	1.5	Closing argument preparation
2-8-04	1.5	Travel
2-9-04	8.3	Closing argument/Closing argument preparation/Met with Co-Counsel/Travel
4-21-04	.1	Phone call from Co-Counsel
4-22-04	.1	Phone call to Co-Counsel
4-27-04	1.2	Review Order
4-30-04	.1	Phone call from Co-Counsel
	.1	Fax to Co-Counsel
5-3-04	.3	Phone call to Co-Counsel
	80.3	TOTAL HOURS.

Department of Financial Services has no objections to this billing.
By: [signature]
Date: 6/10/04
$1,330.00 Approved

ROBERT A. NORGARD
Attorney at Law

STATE OF FLORIDA
COUNTY OF POLK

Sworn to or affirmed and signed before me this 18th day of May, 2004, by Robert A. Norgard.

Dawn Jenkins
NOTARY PUBLIC

Dawn Jenkins
[Print, type, or stamp commissioned name of notary]

✓ Personally known
____ Produced identification
Type of identification produced:

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing, consisting of 8 pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 4 day of Oct A.D., 20 21

Clerk, Circuit and County Courts
Duval County, Florida

By _____
Deputy Clerk

A000203

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

FILED
DEC 01 2004
CLERK CIRCUIT COURT

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 97-6680-CFA

DAVID MILLER,

Defendant.
_____/

MOTION FOR DELIVERY SERVICE REIMBURSEMENT

The undersigned attorney moves for an entry of an Order awarding reimbursement fees for delivery service expenses in the above-styled cause, and as grounds therefore says:

1. Counsel was appointed by Order of this Court to represent the defendant in a capital postconviction case.

2. The following reimbursement services were rendered by Robert A. Norgard for delivery service of case files: See attached Invoice.

3. The Department of Financial Services, Bureau of Auditing has already approved the payment of $ 474.00 to Robert A. Norgard for reimbursement fees: See attached letter with enclosures from the Department of Financial Services.

WHEREFORE, the undersigned attorney requests that this Court enter an Order awarding Reimbursement Fees in the amount of $474.00 and further Order that the Department of Financial Services, Bureau of Auditing issue a warrant payable to Robert A. Norgard in the amount of $474.00 for Reimbursement Fees in the above-styled case.

THIS INSTRUMENT #NOT COMPUTER
D. KEEBLER

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Department of Financial Services, Bureau of Auditing, 200 East Gaines St., Tallahassee, FL 32399, this 29th day of November, 2004.

ROBERT A. NORGARD
Attorney at Law
P.O. Box 811
Bartow, FL 33830
(863)533-8556
Fla. Bar No. 322059

FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

November 16, 2004

Robert A. Norgard, Esquire
Post Office Box 811
Bartow, Florida 33831-0811

Re: State of Florida vs. David Miller
Case Number: 97-6680-CFA

Dear Mr. Norgard:

The Department of Financial Services received your request for payment on November 1, 2004, for miscellaneous expenses totaling $480. Enclosed is the partial approval for miscellaneous expenses in the amount of $474 pursuant to Section 27.711(6), Florida Statutes. Please forward to us the signed motion for payment of these expenses at your earliest convenience.

Your payment request included travel expenses of 600 miles times $.30 per mile, which amounted to $180. However, the travel rules delineated in Section 112.061(7)(d)(1), Florida Statutes, allow mileage at $.29 per mile. Therefore, only the 600 miles at $.29 per mile ($174) was approved and the additional 600 miles at $.01 ($6) was not approved.

Please include in the court order the approved amount of $474 for miscellaneous expenses. Also, state that the warrant be made payable to Robert A. Norgard, Esquire. Return the signed court order, certified copy or true copy of signed order to the following address:

Terry Catledge
Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

If you have any questions, please call me at (850) 410-9294 or e-mail at catledged@dfs.state.fl.us.

Sincerely,

Terry Catledge
Capital Collateral Contract Manager

Enclosure

TERRY CATLEDGE • CAPITAL COLLATERAL CONTRACT MANAGER
DIVISION OF ACCOUNTING AND AUDITING • BUREAU OF AUDITING
200 EAST GAINES STREET • TALLAHASSEE, FLORIDA 32399-0355 • TEL. 850-410-9294 • FAX 850-410-9337
EMAIL • CATLEDGED@DFS.STATE.FL.US
AFFIRMATIVE ACTION • EQUAL OPPORTUNITY EMPLOYER

INVOICE

DATE: 10/1/2004

TO: ROBERT NORGARD, ATTORNEY AT LAW
863-533-8556

FROM: DARRELL A. JACKSON, LEGAL ASSISTANT

RE: DAVID MILLER CASE FILES

JOB DESCRIPTION: PICK UP AND DELIVERY OF FILES FROM HEIDI BREWER, ATTORNEY AT LAW, TALLAHASSEE, FLORIDA TO ROBERT NORGARD, ATTORNEY AT LAW, BARTOW, FLORIDA

DATES OF SERVICE: 10/1/04 – 10/1/04

INVOICE CALCULATION AS FOLLOWS:

600 MILES X ~~$.30~~ .29 = 174.00
600 MILES X $.30 PER MILE = ~~$180.00~~
$30.00/HR @ 10 HRS = $300.00
TOTAL = ~~$480.00~~ $474.00

AMOUNT DUE UPON RECEIPT: ~~$480.00~~ $474.00

Department of Financial Servi
has no objections to this billin
By: Terry Cutler
Date: 11/16/04
Approved for $474.00

PLEASE SIGN BELOW ACKNOWLEDGING RECEIPT OF FILES AND ACCEPTANCE OF INVOICE.

Robert Norgard for
ROBERT NORGARD, ATTY AT LAW — DATE 10-1-04

DARRELL A. JACKSON, LEGAL ASST. — DATE 10-1-04

SHOULD THERE BE ANY PROBLEMS DURING TRANSMISSION OF THIS FAX, PLEASE CALL 850-264-5231

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing, consisting of 4 pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 1 day of OCT A.D., 2021.

Clerk, Circuit and County Courts
Duval County, Florida

By _____
Deputy Clerk

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

DAVID MILLER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

FILED
MAY 09 2005

APPEAL NO. SC04-892

Lower Ct. No. 97-6680-CFA

CR-C

MOTION FOR PAYMENT OF ATTORNEY FEES

The undersigned attorney moves for an entry of an Order awarding him a reasonable attorney's fee in the above-styled cause, and as grounds therefore says:

1. Counsel was appointed by Order of this Court to represent the Appellant in a capital appeal.

2. The following services were rendered in the representation of the Appellant: See attached Affidavit of Work Performed and Services Rendered.

3. Pursuant to Fla. Stat. § 27.711, undersigned counsel is entitled to the following attorney's fees.

   a. Attorney's fees through the filing of the Initial Brief on the appeal from the denial of the Motion for Postconviction Relief and the Petition for Writ of Habeas Corpus.

4. The Department of Financial Services, Bureau of Auditing has already approved the payment of $14,810.00 to undersigned counsel for attorney's fees pursuant to Fla. Stat. § 27.711(4)(d). See attached Letter with enclosures from the Department of Financial Services.

THIS INSTRUMENT IN COMPUTER
D. KEEBLER

WHEREFORE, the undersigned attorney requests that this Court enter an Order awarding a reasonable attorney's fee in the amount of $14,810.00, and further Order that the Department of Financial Services, Bureau of Auditing issue a warrant to be payable to Robert A. Norgard in the amount of $14,810.00 for attorney's fees in the above-styled case.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Department of Financial Services, Bureau of Auditing, 200 East Gaines St., Tallahassee, FL 32399, this 28th day of April, 2005.

ROBERT A. NORGARD
Attorney at Law
P.O. Box 811
Bartow, FL 33830
(863)533-8556
Fla. Bar No. 322059

FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

April 6, 2005

Robert A. Norgard, Esquire
Post Office Box 811
Bartow, Florida 33831-0811

Re: State of Florida vs. David Miller
Case Number: 97-6680-CFA

Dear Mr. Norgard:

The Department of Financial Services received your request for payment on March 24, 2005, for attorney fees totaling $14,810 in the above referenced case. Enclosed is the approval for attorney fees in the amount of $14,810 pursuant to Section 27.711(4)(d), Florida Statutes. Please forward to us the signed motion for payment of these fees at your earliest convenience.

Please include in the court order the approved amount of $14,810 for attorney fees, and also, state that the warrant be made payable to Robert A. Norgard, Esquire. Return the signed court order, certified copy or true copy of signed order to the following address:

Terry Catledge
Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

If you have any questions, please call me at (850) 410-9294 or e-mail at catledged@dfs.state.fl.us.

Sincerely,

Terry Catledge
Capital Collateral Contract Manager

Enclosure

TERRY CATLEDGE • CAPITAL COLLATERAL CONTRACT MANAGER
DIVISION OF ACCOUNTING AND AUDITING • BUREAU OF AUDITING
200 EAST GAINES STREET • TALLAHASSEE, FLORIDA 32399-0355 • TEL. 850-410-9294 • FAX 850-410-9337
EMAIL • CATLEDGED@DFS.STATE.FL.US
AFFIRMATIVE ACTION • EQUAL OPPORTUNITY EMPLOYER

2-16-05	3.0	Legal research/Habeas
2-17-05	3.2	Legal research
	1.0	Draft Brief
2-18-05	3.5	Work on Habeas Corpus Petition
2-22-05	3.0	Work on Habeas Corpus Petition
2-23-05	4.0	Work on Habeas Corpus Petition
2-28-05	.8	Proof/Edit Habeas Corpus Petition
	1.3	Proof/Edit Brief
3-1-05	4.2	Draft Brief
3-6-05	3.1	Draft Brief
3-13-05	2.0	Proof/Edit Brief
3-14-05	1.2	Proof/Edit Habeas Corpus Petition

148.1 TOTAL HOURS.

148.1 x $100 = $14,810

Department of Financial Services
has no objections to this billing.
By: [signature]
Date: 4/6/05

Approved for $14,810 in attorney fees

[signature]
ROBERT A. NORGARD
Attorney at Law

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing, consisting of 4 pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 4 day of OCT A.D., 2021.

Clerk, Circuit and County Courts
Duval County, Florida

By _____
Deputy Clerk

A000213

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

FILED
NOV 21 2005
CLERK CIRCUIT COURT

DAVID MILLER,

Appellant,

vs.

APPEAL NO. SC04-892

STATE OF FLORIDA,

Lower Ct. No. 97-6680-CFA

Appellee.
_____/

MOTION FOR PAYMENT OF ATTORNEY FEES

The undersigned attorney moves for an entry of an Order awarding him a reasonable attorney's fee in the above-styled cause, and as grounds therefore says:

1. Counsel was appointed by Order of this Court to represent the Appellant in a capital appeal.

2. The following services were rendered in the representation of the Appellant: See attached Affidavit of Work Performed and Services Rendered.

3. Pursuant to Fla. Stat. § 27.711, undersigned counsel is entitled to the following attorney's fees.

a. Attorney's fees through the filing of the Reply Brief.

4. The Department of Financial Services, Bureau of Auditing has already approved the payment of $5,190.00 to undersigned counsel for attorney's fees pursuant to Fla. Stat. § 27.711(4)(b). See attached Letter with enclosures from the Department of Financial Services.

THIS INSTRUMENT
IN COMPUTER

WHEREFORE, the undersigned attorney requests that this Court enter an Order awarding a reasonable attorney's fee in the amount of $5190.00, and further Order that the Department of Financial Services, Bureau of Auditing issue a warrant to be payable to Robert A. Norgard in the amount of $5190.00 for attorney's fees in the above-styled case.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Department of Financial Services, Bureau of Auditing, 200 East Gaines St., Tallahassee, FL 32399, this 16th day of November, 2005.

ROBERT A. NORGARD
Attorney at Law
P.O. Box 811
Bartow, FL 33830
(863)533-8556
Fla. Bar No. 322059

FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

November 15, 2005

Robert A. Norgard, Esquire
Post Office Box 811
Bartow, Florida 33831-0811

Re: State of Florida vs. David Miller
Case Number: 97-6680-CFA

Dear Mr. Norgard:

The Department of Financial Services received your request for payment on November 1, 2005, for attorney fees totaling $5,190 in the above referenced case. Enclosed is the approval for attorney fees in the amount of $5,190 pursuant to Section 27.711(4)(d), Florida Statutes. Please forward to us the signed motion for payment of these fees at your earliest convenience.

Please include in the court order the approved amount of $5,190 for attorney fees, and also, state that the warrant be made payable to Robert A. Norgard, Esquire. Return the signed court order, certified copy or true copy of signed order to the following address:

Terry Catledge
Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

If you have any questions, please call me at (850) 413-5745 or e-mail me at Terry.Catledge@fldfs.com.

Sincerely,

Terry Catledge
Capital Collateral Contract Manager

Enclosure

TERRY CATLEDGE • CAPITAL COLLATERAL CONTRACT MANAGER
DIVISION OF ACCOUNTING AND AUDITING • BUREAU OF AUDITING
200 EAST GAINES STREET • TALLAHASSEE, FLORIDA 32399-0355 • TEL. 850-413-5745 • FAX 850-413-5551
EMAIL • TERRY.CATLEDGE@FLDFS.COM
AFFIRMATIVE ACTION • EQUAL OPPORTUNITY EMPLOYER

David Miller, Appellant
vs.
State of Florida, Appellee.

Department of Financial Services has no objections to this billing.
By: Terry Cutler
Date: 11/15/05
Approved for 51.9 Hours at $100 per hour = $5,190.00.

LOG OF WORK PERFORMED AND SERVICES RENDERED

7-2-05	1.5	Receive and Review State's Answer Brief
7-15-05	4.0	Legal Research
7-22-05	1.8	Legal Research
	2.0	Review Record
7-23-05	2.3	Review Record and Review State's Response
7-26-05	3.7	Draft Reply Brief
7-29-05	2.2	Draft Reply Brief
8-4-05	2.4	Legal Research
8-9-05	3.1	Draft Reply Brief and Legal Research
9-6-05	3.0	Draft Extension for Time, Review State's Answer Brief
9-7-05	4.0	Review State's Reply Brief, Draft Motion to Toll Time
9-8-05	3.0	Draft Reply Brief and Legal Research
9-9-05	5.7	Legal Research and Draft Reply Brief
9-12-05	5.8	Draft Reply Brief
9-13-05	4.4	Draft Reply Brief and Legal Research
9-14-05	.5	Phone calls to Florida Supreme Court
	3.8	Draft and Edit Reply Brief
	53.2	TOTAL HOURS.

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing, consisting of 4 pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 4 day of OCT A.D., 2021.

Clerk, Circuit and County Courts
Duval County, Florida

By _____
Deputy Clerk

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

STATE OF FLORIDA,
Plaintiff,

vs.

DAVID MILLER,
Defendant.
_____/

FILED
MAR 26 2007
CLERK CIRCUIT COURT

CASE NO: 97-6680-CF

FILED
IN COMPUTER
N. W.

MOTION FOR PAYMENT OF INVESTIGATOR FEES AND COSTS

COMES NOW, undersigned counsel on behalf of Criminal Specialists Investigations, ROSALIE C. BOLIN, and moves this Honorable Court for an Order for Payment of Investigator Fees and as grounds in support of this motion alleges as follows:

1. This Court entered an Order Granting Defendant's Motion for Appointment of Investigator.

2. The investigator's total fees and costs are $793.72. See Invoice which is attached hereto and incorporated herein by reference.

WHEREFORE, the undersigned attorney requests that this Court enter an Order awarding a reasonable investigator fee in the amount of $793.72, and further Order that the Department of Financial Services,. Bureau of Auditing issue a warrant to be payable to Robert A. Norgard on behalf of Criminal Specialist Investigations, Rosalie Bolin, in the amount of $793.72 for investigator fees and costs in the above-styled case.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the State Attorney, 330 East Bay Street, Jacksonville, FL 32202, and the Department of Financial Services, Bureau of Auditing, 200 East Gaines St., Tallahassee, FL 32399, this 21st day of March, 2007.

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

FLORIDA DEPARTMENT OF FINANCIAL SERVICES

ALEX SINK
CHIEF FINANCIAL OFFICER OF FLORIDA

March 20, 2007

Robert A. Norgard, Esquire
Post Office Box 811
Bartow, Florida 33831-0811

Re: State of Florida vs. David Miller
Case Number: 97-6680-CFA

Dear Mr. Norgard:

The Department of Financial Services received your request for payment on March 12, 2007 in the amount of $897.26 for investigative fees of $600 and miscellaneous expenses of $297.26 in the above referenced case. Enclosed are the approvals for investigative fees in the amount of $600 pursuant to Section 27.711(5), Florida Statutes, and for miscellaneous expenses in the amount of $193.72 pursuant to Section 27.711(6), Florida Statutes. At your earliest convenience, please forward the signed motion for payment of these fees and expenses to us with a copy of the respective itemized billing as provided to the judge for his/her review, and a copy of this correspondence.

Please include in the court order the approved amount of $600 for investigative fees payable under Section 27.711(5), Florida Statutes, and $193.72 for miscellaneous expenses payable under Section 27.711(6), Florida Statutes, all amounting to a grand total of $793.72. Also, please state that the warrant be made payable to Robert A. Norgard, Esquire. Return the signed court order, certified copy or true copy of signed order to the following address:

Terry Catledge
Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

We reduced your original payment request for miscellaneous expenses from $297.26 to $193.72 because the mileage rate on the invoice was erroneously reflected as $.445 per mile rather than the actual $.29 per mile (668 miles times $.445 equals $297.26 but 668 miles times $.29 equals $193.72). The time of travel stated on the payment invoice (1/19/07 – 3/2/07) was prior to 7/1/07 when the mileage rate was increased from $.29 per mile to $.445 per mile.

Please be advised that pursuant to Section 27.711(13), Florida Statutes, the fact that the Chief Financial Officer's contract manager has not objected to any portion of a billing or to the sufficiency of the

TERRY CATLEDGE • CAPITAL COLLATERAL CONTRACT MANAGER
DIVISION OF ACCOUNTING AND AUDITING • BUREAU OF AUDITING
200 EAST GAINES STREET • TALLAHASSEE, FLORIDA 32399-0355 • TEL. 850-413-5745 • FAX 850-413-5551
EMAIL • TERRY.CATLEDGE@FLDFS.COM

AFFIRMATIVE ACTION • EQUAL OPPORTUNITY EMPLOYER

documentation is not binding on the court, which retains primary authority and responsibility for determining the reasonableness of all billings for fees, costs, and related expenses, subject to statutory limitations.

The Chief Financial Officer's approval or denial is based solely on the amount requested and the sufficiency of the supporting documentation as prescribed by statute and the terms of your contract. Approval or denial does not constitute an opinion of the Chief Financial Officer regarding the reasonableness of any amount requested.

If you have any questions, please call me at (850) 413-5745 or e-mail me at Terry.Catledge@fldfs.com.

Sincerely,

Terry Catledge

Terry Catledge
Capital Collateral Contract Manager

Enclosures



Criminal Specialist Investigations, Inc.

INVOICE

P.O.Box 75038
Tampa, Fl 33675
(813) 241-9158 (813) 241-9159 fax

Date
3/7/07
Invoice #
Miller1

Bill To : Robert A. Norgard, Atty.
P.O. Box 811
Bartow, Florida 33831

	State vs. David Miller
	Registry/Post Conviction

Date	Description Of Services	Hours	Fee
1/19/07	Travel to and From UCI (Raiford, Fla.)	6.0	240.00
1/19/07	Client Contact	1.0	40.00
1/22/07	Fax, memo to Attorney	.50	20.00
1/31/07	Letter to Client, sent off for Military Records Request	.50	20.00
3/2/07	Travel to and from UCI (Raiford, Fla.)	6.0	240.00
3/2/07	Client Contact, delivered military records	1.0	40.00
	Total Time	**15.0**	**600.00** ✓
	Expenses: 3/13 $193.7 ✓ 3/13 $.29 ✗ .45 Mileage total miles 668 miles @		297.26

Department of Financial Services has no objections to this billing
By: [signature]
Date: 3/20/07

approved for $600 for investigative fees
also for only $193.72 in Miscellaneous expenses

Investigator / Mitigation Specialist		
Rosalie Bolin	Total Due	$897.26

3/13 $193.7

Investigator Mileage Log

Case Number State vs. David Miller

Date	From	To	Purpose	Miles*
1/19/07	Tampa	Raiford	Client Contact UCI	167
1/19/07	Raiford	Tampa	Return	167
3/2/07	Tampa	Raiford	Client Contact Ucl	167
3/2/07	Raiford	Tampa	Return	167

Total Miles	668
Per Mile	$0.445
Total Reimbursable Amount	297.26

.445 per day rate did not begin 7/1

5/3 29

5/3 $193.72

*Please check mileage using the mileage calculator @ http://www3.dot.state.fl.us/mileage/default.asp

IMPORTANT: This form should be used for mileage reimbursement as allowed by the Indigent Services Committee in the circuit in which you were appointed.

NOTE: Travel that includes expenses other than mileage should be submitted on the State of Florida Travel Reimbursement Packet.

B.1.c.3.

A000224

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing, consisting of 10 pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 7 day of OCT A.D., 20 21

Clerk, Circuit and County Courts
Duval County, Florida
By _____
Deputy Clerk

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

FILED
IN COMPUTER
N. W.

STATE OF FLORIDA,
Plaintiff,

vs.
DAVID MILLER,
Defendant.
_____/

CASE NO. 97-6680-CFA

FILED
DEC 21 2007
CLERK CIRCUIT COURT

MOTION FOR REIMBURSEMENT

The undersigned attorney moves for an entry of an Order awarding reimbursement fees for storage expenses in the above-styled cause, and as grounds therefore says:

1. Counsel was appointed by Order of this Court to represent the defendant in a capital postconviction case.

2. The following reimbursement services were rendered by Robert A. Norgard for storage: See attached Invoice.

3. The Department of Financial Services, Bureau of Auditing has already approved the payment of $496.70 to Robert A. Norgard for reimbursement fees: See attached letter with enclosures from the Department of Financial Services.

WHEREFORE, the undersigned attorney requests that this Court enter an Order awarding Reimbursement Fees in the amount of $496.70 and further Order that the Department of Financial Services, Bureau of Auditing issue a warrant to be payable to Robert A. Norgard in the amount of $ 496.70 for Reimbursement Fees in the above-styled case.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Department of Financial Services, Bureau of Auditing, 200 East Gaines St., Tallahassee, FL 32399, this 13th day of December, 2007.

ROBERT A. NORGARD
Attorney at Law
P.O. Box 811
Bartow, FL 33830
(863)533-8556
Fla. Bar No. 322059

REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

December 12, 2007

Robert A. Norgard, Esquire
P.O. Box 811
Bartow, Florida 33831-0811

Re: State of Florida vs. David Miller
Case Number: 97-6680-CFA

Dear Mr. Norgard:

The Department of Financial Services received your payment request on November 29, 2007 for miscellaneous expenses of $496.70 payable under Section 27.711(6), Florida Statutes in the above referenced case. Enclosed is the approval of your request for miscellaneous expenses in the amount of $496.70 pursuant to Section 27.711(6), Florida Statutes. At your earliest convenience, please forward the signed motion for payment of these expenses to us with a copy of the respective itemized billing as provided to the judge for his/her review, and a copy of this correspondence.

Please include in the court order the total approved amount of $496.70 for miscellaneous expenses, payable under Section 27.711(6), Florida Statutes. Also, please state that the warrant be made payable to Robert A. Norgard, Esquire. The court order should include the court's finding that the approved expenses are reasonable. Return the signed court order, certified copy or true copy of signed order to the following address:

Terry Catledge
Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

Finally, please be advised that pursuant to Section 27.711(13), Florida Statutes, the fact that the Chief Financial Officer's contract manager has not objected to any portion of a billing or to the sufficiency of the documentation is not binding on the court, which retains primary authority and responsibility for determining the reasonableness of all billings for fees, costs, and related expenses, subject to statutory limitations.

FLORIDA DEPARTMENT OF FINANCIAL SERVICES
Terry Catledge • Capital Collateral Contract Manager
Division of Accounting & Auditing • Bureau of Auditing
200 E. Gaines St. • Tallahassee, FL 32399-0355 • Tel. 850-413-5745 • Fax 850-413-5551
Email • Terry.Catledge@fldfs.com
Affirmative Action • Equal Opportunity Employer

The Chief Financial Officer's approval or denial is based solely on the amount requested and the sufficiency of the supporting documentation as prescribed by statute and the terms of your contract. Approval or denial does not constitute an opinion of the Chief Financial Officer regarding the reasonableness of any amount requested.

Please call me if you have any questions at (850) 413-5745 or e-mail me at Terry.Catledge@fldfs.com.

Sincerely,

Terry Catledge
Capital Collateral Contract Manager

Enclosures

ROBERT A. NORGARD
ATTORNEY AT LAW

Post Office Box 811
341 W. Davidson St., Ste.302
Bartow, FL. 33831-1084

(863)533-8556
(863)533-1334 Fax

Fax Transmittal Form

To: Terry Catledge
From: Dawn w/Robert A. Norgard
Date Sent: November 28, 2007
Number of Pages: 1
Fax: 850-413-5551

Re: Storage Reimbursement

per month unit: $85.60

RECEIVED
DEC 10 2007
BUREAU OF AUDITING

February 2006	$ 103.60	(rent began)
Mar. – Dec. 2006	$ 856.00	
Jan. – Dec. 2007	$ 1,027.20	
TOTAL:	$ 1,986.80	

Divided by 4 = $ 496.70

Department of Financial Services has no objections to this billing.
By: Terry Catledge
Date: 12/12/07
Approved for $496.70 on the David Noller case.

Thank you.

PRIVELEGED AND CONFIDENTIAL – All information transmitted hereby is intended only for the use of the addressee(s) named above. If the reader of this message is not the intended recipient(s) or the employee or agent responsible for delivering the message to the intended recipient(s), please note that any distribution or copying of this communication is strictly prohibited. Anyone who receives this communication in error should notify us immediately by telephone and return the original message to us at the address above via U.S. mail.

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing consisting of 5 pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 4 day of OCT A.D. 2021

Clerk, Circuit and County Courts
Duval County, Florida

By _____
Deputy Clerk

A000231

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

FILED
JUN 26 2013
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

DAVID MILLER,
Appellant,

vs.

APPEAL NO. SC04-[illegible]

STATE OF FLORIDA,
Appellee.
_____/

Lower Ct. No. 97-6680-CFA

ORDER FOR PAYMENT OF ATTORNEY FEES

THIS CAUSE coming on to be heard upon the Motion for Payment of Attorney Fees, the undersigned having been appointed to represent the Defendant by Order of the Court, and the Court being fully advised in the premises, it is:

ORDERED AND ADJUDGED:

1. Attorney fees are approved in the amount of $4,000.00.

2. The Department of Financial Services shall issue a warrant in the amount of $4,000.00 payable to Robert A. Norgard as attorney fees for representation of the Defendant in the above-styled case.

DONE AND ORDERED in Chambers in Jacksonville, Duval County, Florida this 25 day of June, 2013.

L. HALDANE TAYLOR
for Circuit Judge

cc: Robert A. Norgard
Department of Financial Services

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

DAVID MILLER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.
_____/

FILED
JUN 28 2023
CLERK CIRCUIT COURT

APPEAL NO. SC04-892

Lower Ct. No. 97-6680-CFA

MOTION FOR PAYMENT OF ATTORNEY FEES

The undersigned attorney moves for an entry of an Order awarding a reasonable attorney's fee in the above-styled cause, and as grounds therefore says:

1. Counsel was appointed by Order of this Court to represent the Defendant in a capital case.

2. The case is concluded through the Oral Argument in the Florida Supreme Court.

3. The services rendered in the representation of the Defendant are documented in the attached Log of Work Performed and Services Rendered.

4. Pursuant to Fla. Stat. § 27.711, undersigned counsel is entitled up to $4,000.00 in attorney fees "after timely filing in the Supreme Court the capital defendant's brief or briefs that address the trial court's final order... denying the capital defendant's motion for postconvicton relief..." per Fla. Stat. § 27.711(4)(f) .

5. The Department of Financial Services, Bureau of Auditing has already approved the payment of $4,000.00 to undersigned counsel for attorney's fees pursuant to Fla. Stat. § 27.711(4)(f). See attached Letter with enclosures from the Department of Financial Services.

FILED
IN COMPUTER
DARLENE

WHEREFORE, the undersigned attorney requests that this Court enter an Order awarding a reasonable attorney's fee in the amount of $4,000.00, and further Order that the Department of Financial Services, Bureau of Auditing issue a warrant to be payable to Robert A. Norgard in the amount of $4,000.00 for attorney's fees in the above-styled case.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Department of Financial Services, Bureau of Auditing, 200 East Gaines St., Tallahassee, FL 32399, this 24th day of June, 2013.

ROBERT A. NORGARD
Attorney at Law for the firm
NORGARD & NORGARD
P.O. Box 811
Bartow, FL 33830
(863)533-8556
Fla. Bar No. 322059

REPRESENTING
CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

June 24, 2013

Robert A. Norgard, Esquire
P.O. Box 811
Bartow, Florida 33831-0811

Re: State of Florida vs. David Miller
Case Number: 97-6680-CFA

Dear Mr. Norgard:

The Department of Financial Services received your payment request on June 24, 2013 for attorney fees in the amount of $4,000 payable under Section 27.711(4)(f), Florida Statutes, in the above referenced case. The attached payment request and supporting documentation have been reviewed for statutory and contractual compliance. Enclosed is the approval of your request for attorney fees in the amount of $4,000 pursuant to Section 27.711(4)(f), Florida Statutes. At your earliest convenience, please forward the signed motion for payment of these fees to us with a copy of the respective itemized billing as provided to the judge for his/her review, and a copy of this correspondence.

Please include in the court order the total approved amount of $4,000 for attorney fees, payable under Section 27.711(4)(f), Florida Statutes. Also, please state that the warrant be made payable to Robert A. Norgard, Esquire. The court order should include the court's finding that the approved fees are reasonable. Return the signed court order, certified copy or true copy of signed order to the following address:

Kathryn Jones
Capital Collateral Contract Manager
Department of Financial Services
Bureau of Auditing
200 East Gaines Street
Tallahassee, Florida 32399-0355

Please be advised that pursuant to Section 27.711(13), Florida Statutes, the fact that the Chief Financial Officer's contract manager has not objected to any portion of a billing or to the sufficiency of the documentation is not binding on the court, which retains primary authority and responsibility for determining the reasonableness of all billings for fees, costs, and related expenses, subject to statutory limitations.

FLORIDA DEPARTMENT OF FINANCIAL SERVICES
Kathryn Jones • Capital Collateral Contract Manager
Division of Accounting & Auditing • Bureau of Auditing
200 East Gaines Street • Tallahassee, Florida 32399-0355 • Tel. 850-413-5745 • Fax 850-413-2193
Email • Kathryn.Jones@MyFloridaCFO.com
AFFIRMATIVE ACTION • EQUAL OPPORTUNITY EMPLOYER

The Chief Financial Officer's approval or denial is based solely on the amount requested and the sufficiency of the supporting documentation as prescribed by statute and the terms of your contract. Approval or denial does not constitute an opinion of the Chief Financial Officer regarding the reasonableness of any amount requested.

If you have any questions, please e-mail me at Kathryn.Jones@myfloridacfo.com or call me at (850) 413-5745.

Sincerely,

Kathryn Jones
Capital Collateral Contract Manager

Enclosures

LOG OF WORK PERFORMED-ORAL ARGUMENT

DAVID MILLER 97-6680-CFA

11/23/05	Review transcripts/file	5.5
	Review case law/legal research	4.0
11/24/05	Review briefs	2.5
	Review transcripts	5.3
11/27/05	Review Briefs	2.5
	Update/review case law	2.0
11/30/05	Travel from Lakeland to Tallahassee	5.0
	Review briefs/outline for argument	4.5
	Review Sent. Order	1.5
12/1/05	Appearance at Fla. S. Ct.	3.0
	Travel from Tallahassee to Lakeland	4.5
	Total Hrs.	40.3
	Billing for	40.0

RECEIVED
JUN 24 2013
BUREAU OF AUDITING

Department of Financial Services has no objections to this billing.
By: K. Jones
Date: 6/24/13
approved for $40,000 in atty fees

NORGARD & NORGARD
Attorneys at Law
P.O. Box 811
Bartow, FL 33831-0811

UNITED STATES POSTAGE
PITNEY BOWES
$000.66⁰
02 1P
0000930195 JUN 25 2013
MAILED FROM ZIP CODE 33830

FILED
JUN 2 8 2013
CLERK

Clerk of the Circuit Court
330 East Bay St.
Room 103
Jacksonville, FL 32202

32202329 C002

A000238

DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing, consisting of 1 pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 4 day of DEC A.D., 20 21.

Clerk, Circuit and County Courts
Duval County, Florida

By _____
Deputy Clerk

A000239

APPENDIX A-6

August 15, 2017, CHU-N Motion to Appoint Counsel

FILED

2017 AUG 15 PM 12:57

CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DISTRICT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v. Case No. 3:17-cv-932-J-34 JBT

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT
OF CORRECTIONS,

Respondents.
_____/

UNOPPOSED MOTION TO FIND PETITIONER INDIGENT AND APPOINT THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE NORTHERN DISTRICT OF FLORIDA AS COUNSEL FOR PETITIONER

The Capital Habeas Unit ("CHU") of the Office of the Federal Public Defender for the Northern District of Florida ("FDO") moves to be appointed as counsel for Petitioner, David Miller, Jr., so that the CHU may ascertain the status of Petitioner's federal habeas rights and pursue federal remedies that might be available to Petitioner. Petitioner is indigent and incarcerated on death row at the Union Correctional Institution in Union County, Florida.

This appointment is at no direct cost to this District Court, as the CHU has its own funding from the Administrative Office of the United States Courts ("AO").

The Defender Services Office ("DSO") has approved and authorized the CHU for this appointment.

Pursuant to the DSO protocol, notice of this appointment has also been provided to the Chief Judge of the United States Court of Appeals for the Eleventh Circuit.

Counsel for Respondent, Assistant Attorney General Jennifer Donohue, was contacted about this appointment and authorized the undersigned to represent that the Attorney General of Florida does not object.[1]

State-court counsel, Christopher J. Anderson, has conferred with undersigned CHU counsel and joins in this request.

I. Approval

The Northern District CHU has obtained approval for this out-of-district appointment from the Administrative Office of the United States Courts ("AO") and Defender Services Offices ("DSO"). Pursuant to the out-of-district appointment protocol, notice was provided to the Honorable Ed Carnes, Chief Judge of the United States Court of Appeals for the Eleventh Circuit.[2] Federal Public Defenders Donna

---

[1] While the CHU's position is that Respondent's counsel does not have standing on the question of an 18 U.S.C. § 3599 appointment, the CHU requests Respondent's counsel's position as a courtesy.

[2] Under the DSO out-of-district appointment protocol, the DSO must approve a Federal Defender's out-of-district appointment request prior to an appointment, and DSO approval requires prior notification to the Circuit Chief Judge. Pursuant to the protocol, notification was provided to Chief Judge Ed Carnes.

Elm of the Middle District and Randolph Murrell of the Northern District agree that the CHU should be appointed herein.

II. Petitioner

Petitioner himself has conferred with the undersigned, Billy H. Nolas, Chief of the Northern District CHU, and other members of the CHU staff. Petitioner wishes to have the Northern District CHU appointed as his federal habeas corpus counsel.

III. Background

Petitioner was convicted of first-degree murder in Duval County, Florida in 1998. The jury recommended—by a 7-to-5 vote—a death sentence for the murder. The state court imposed the death sentence. The Florida Supreme Court affirmed. *Miller v. State*, 770 So. 2d 1144 (Fla. 2000).

On September 27, 2001, Petitioner filed a state court motion to vacate his convictions pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure in Florida's Fourth Judicial Circuit. *Miller v. State*, 926 So. 2d 1243, 1248 & n.3 (Fla. 2006). Petitioner filed an amended motion on March 11, 2002. The court denied relief on all claims on April 22, 2004. On March 23, 2006, the Florida Supreme Court affirmed the state trial court's denial of post-conviction relief. *Id.* at 1261.

Petitioner's previous counsel missed Petitioner's statute of limitations deadline under the Antiterrorism and Effective Death Penalty Act ("AEDPA") and

never filed a federal habeas corpus petition on his behalf. Petitioner wishes to have the CHU assist him in an effort to have his federal habeas corpus rights reinstated. *Cf. Holland v. Florida*, 560 U.S. 631 (2010) (describing procedures by which a petitioner may seek to reinstate federal rights). Petitioner may raise, among other issues, a *Hall v. Florida*, 134 S. Ct. 1986 (2014), claim that requires research and investigation. Petitioner does not currently have federal counsel to assist him.

The CHU has been appointed by District Court in other cases in order to research and ascertain whether federal habeas rights can be reinstated, *see Rodgers v. Jones*, No. 3:15-cv-507-RH, ECF No. 3 (N.D. Fla. Nov. 11, 2015), (Hinkle, J.), *Hutchinson v. Jones*, No. 3:13-cv-128-MW (N.D. Fla. Dec. 11, 2014) (Walker, J.), and in other cases involving issues concerning equitable tolling of the statute of limitations. *See Martin v. Jones*, No. 3:16-cv-339-MMH-PDB, ECF No. 12 (M.D. Fla. Aug. 24, 2016) (Barksdale, J.); *Brown v. Jones*, No. No. 3:16-cv-99-RH, ECF No. 8 (N.D. Fla. Apr. 16, 2016) (Hinkle, J.).

IV. Petitioner is indigent and should be appointed counsel

Title 18 U.S.C. § 3599 provides that state prisoners who are or become "financially unable to obtain adequate representation" and are seeking to vacate or set aside a death sentence, are entitled to counsel in federal habeas corpus proceedings.

Petitioner has previously been found indigent by state courts. *See State v. Miller*, No. 1997-CF-6680 (Duval Cty. May 28, 1997). Petitioner is also currently indigent, unable to retain new counsel of his own, and has insufficient funds to pay for costs associated with legal representation. *See Indigency Affidavit* and other supporting materials attached to this motion.

V. The CHU should be appointed to represent Petitioner

As noted, the CHU has obtained all necessary approvals and Petitioner wishes to have the CHU serve as federal counsel and ascertain whether his habeas rights can be reinstated. Further, this appointment would be at no direct cost to this District Court, as the CHU already has its own budget. Under DSO guidelines, the CHU should seek appointment before entering an appearance. Should this Court grant this motion, the undersigned will enter his appearance.

The CHU has represented other Middle District habeas petitioners. *See, e.g.*, *Alston v. Dep't of Corrs.*, No. 3:04-cv-257-TJC, ECF No. 118 (M.D. Fla. Jan. 30, 2017) (Corrigan, J.); *Stephens v. Sec'y Dep't of Corrs.*, No. 3:08-cv-260-TJC-JRK, ECF No. 28 (M.D. Fla. Dec. 28, 2016) (Corrigan, J.); *Durousseau v. Jones*, 3:16-cv-1275-MMH-JRK, ECF No. 4 (M.D. Fla. Oct. 18, 2016) (Klindt, J.); *McMillian v. Sec'y Dep't of Corrs.*, No. 3:16-cv-923-TJC-PDB, ECF No. 6 (M.D. Fla. Aug. 9, 2016) (Barksdale, J.); *Rigterink v. Sec'y Dep't of Corrs*, No. 8:16-cv-1680-VMC-AEP, ECF No. 4 (M.D. Fla. Jun. 28, 2016) (Hernandez Covington, J.); *Carter v.*

Sec'y Fla. Dep't of Corr., 3:15-cv-1198-TJC-PDB, ECF No. 11 (M.D. Fla. Jun. 7, 2016) (Barksdale, J.).

The CHU was established with the concurrence of the Chief Judge of the Eleventh Circuit (the Honorable Ed Carnes), the Chief Judge of the United States District Court of the Northern District of Florida (the Honorable M. Casey Rogers), and the AO. The CHU was created because of significant problems relating to the provision of meaningful defense services in a number of capital cases in Florida, a pattern that raised concern for the bench and bar. *See, e.g.*, *Lugo v. Sec'y*, 750 F.3d 1198, 1215 (11th Cir. 2014); *see also Banks v. Sec'y*, 592 F. App'x 771, 775 (11th Cir. 2014) (Martin, J., concurring); *id.* at 774 (Ed Carnes, C.J.,) ("Fortunately, since [Lugo] a capital habeas unit has been approved and is currently being established in the Northern District of Florida…"); *id.* at 775 ("We were of the view that the best way [to avoid inadequate assistance] probably would be to establish a capital habeas unit in Florida, the only state in our circuit that did not have one at the time."). Missed federal filings, as in this case, was an area of concern leading to creation of the CHU

VI. Conclusion

Petitioner is indigent and without funds to hire counsel. The CHU has obtained approval for this out-of-district appointment from the Administrative Office of the United States Courts and the Office of Defender Services. Notice was

provided by those offices to Circuit Chief Judge Ed Carnes. Accordingly, Petitioner and the CHU respectfully request that the Capital Habeas Unit of the Federal Defender for the Northern District of Florida be appointed as Petitioner's federal habeas corpus counsel.

Respectfully submitted,

Billy H. Nolas
Fla. Bar No. 806821
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
billy_nolas@fd.org

CERTIFICATE OF COMPLIANCE WITH ATTORNEY CONFERENCE REQUIREMENT

I hereby certify that as the moving party that I complied with the attorney-conference requirement set forth in Local Rule 3.01(g). In response to an inquiry from the undersigned, counsel for Respondent indicated that Respondent does not object to appointing the CHU as Petitioner's counsel.[3]

Billy H. Nolas

[3] While academic in this case, undersigned counsel's position is that Respondent does not have standing on matters related to the appointment of § 3599 counsel.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August 2017, I served the foregoing motion by electronic transmission to Assistant Attorney General, Jennifer Donohue at jennifer.donohue@myfloridalegal.com and capapp@myfloridalegal.com, and Christopher J. Anderson at chrisaab1@gmail.com.

Billy H. Nolas

3:17-cv-932-J-34JBT

JS 44 (Rev. 11/15)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
David Miller, Jr.

DEFENDANTS
Julie Jones, Secretary, Florida Department of Corrections

(b) County of Residence of First Listed Plaintiff Union County
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Billy H. Nolas, Chief, Capital Habeas Unit, Federal Public Defender
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301 (850)942-8818

Attorneys *(If Known)*
Office of the Florida Attorney General

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☒ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. 2254
Brief description of cause:
Capital habeas case

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND $**

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE
08/14/2017

SIGNATURE OF ATTORNEY OF RECORD
Billy H. Nolas

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP ✓ JUDGE _____ MAG. JUDGE _____

A000249

APPENDIX A-7

August 24, 2017, District Court Order Appointing CHU-N

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v. Case No. 3:17-cv-932-J-39JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

The Court **grants** the unopposed motion to appoint the Office of the Capital Habeas Unit for the Federal Public Defender for the Northern District of Florida as counsel, Doc. 1, and the petitioner's request to proceed as a pauper, Doc. 1. The Court finds that the petitioner qualifies under 18 U.S.C. § 3599(a)(2) for the appointment of counsel. See Doc. 1 at 5; Doc. 2. Considering the representations made in the motion (Doc. 1), the Court further finds the Office of the Capital Habeas Unit is well qualified to represent the petitioner, and alternatively, the Court finds good cause to appoint this office to represent the petitioner. See 18 U.S.C. § 3599. Therefore, the Court appoints the Capital Habeas Unit for the Federal Public Defender for the Northern District of Florida to represent the petitioner in ascertaining the status of petitioner's federal habeas rights and pursuing federal remedies that might be available to petitioner. See Doc. 1 at 1.

The attorneys from the Capital Habeas Unit who are assigned to this case must

each file a notice of appearance by August 31, 2017. Also, the petitioner's counsel must notify the Court of how the petitioner intends to proceed by September 14, 2017.

DONE AND ORDERED at Jacksonville, Florida, this 24th day of August, 2017.

BRIAN J. DAVIS
United States District Judge

lc22
c: Counsel of record

APPENDIX A-8

January 30, 2019, Initial Petition for Writ of Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. 2254

Prisoner's name: DAVID MILLER, JR.
Prisoner's number: DOC No. J08118
Place of Confinement: UNION CORRECTIONAL INSTITUTION
Raiford, Florida

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v. **CASE NO. 3:17-cv-932-BJD-JBT**

MARK S. INCH,
Secretary, Florida
Department of Corrections,

Respondent,

and

ASHLEY MOODY,
Attorney General,

Additional Respondent.
_____/

PETITION

1. **Name and location of court which entered the judgment of conviction under attack and state court case number(s):**

Duval County Circuit Court of the Fourth Judicial Circuit, Case No. 97-6680.

2. **Date of judgments and convictions:**

Miller was found guilty on June 26, 1998. The jury, by a vote of 7-5, recommended a death sentence on July 7, 1998. Thereafter, on July 24, 1998, the trial judge sentenced Miller to death.

3. **Length of sentence:**

Sentence of death.

4. Sentencing judge:

Honorable L. Haldane

5. Nature of offense or offenses for which you were convicted:

First-degree murder, aggravated battery.

6. What was your plea?

Not guilty plea.

7. Type of trial:

Jury trial.

8. Did you testify at trial?

Yes.

9. Did you appeal from the judgment of the conviction?

Yes.

10. If you did appeal, answer the following:

A) Name of court: Florida Supreme Court.

B) Result: Miller's convictions and sentences were affirmed on direct appeal. *Miller v. State*, 770 So. 2d 1144 (Fla. 2000).

C) Date of result: August 31, 2000, rehearing denied October 24, 2000.

If you filed a second appeal or filed a petition for certiorari in the Florida Supreme Court or the United Supreme Court, give details:

No second appeal or petition for certiorari was filed.

11. Did you file any post-conviction motions under either Florida Rule of Criminal Procedure 3.800 or 3.850 with the state trial court or any other post-conviction motions or

petitions for writ of habeas corpus with the state trial court or state appellate court to this judgment and conviction?

Yes.

12. **If you did file any matters within the realm of question 11, answer the following as to each motion or petition.**

A) The type of motion/ petition filed; B) Date motion/petition filed; C) Name of court; D) Result; E) Date of Result

A) Rule 3.851 Motion.

B) September 27, 2001. The State moved for summary denial on October 26, 2001, on the basis that the motion was insufficiently pled. On January, 23, 2002, the trial court granted the State's motion for summary denial and granted Miller additional time for the filing of an amended motion. The parties stipulated to an order holding that the amended motion would relate back to October 2, 2001.

C) Duval County Circuit Court of the Fourth Judicial Circuit.

D) Denied.

E) April 22, 2004.

13. **If your motion or petition described in paragraph 12 was denied, did you file an appeal of that denial with the appropriate state appellate court?**

Appeal of 3.851 denial taken appropriately to the Florida Supreme Court.

As to each motion or petition indicate:

A) Name of court where appeal filed; B) Date appeal filed; C) Result; D) Date of Result

A) 3.851 denial appealed to the Florida Supreme Court.

B) Notice of appeal for the 3.851 denial filed on or about May 24, 2004, initial brief filed March 17, 2005.

C) The Florida Supreme Court affirmed the denial of relief.

D) March 23, 2006. *Miller v. State*, 926 So. 2d 1243 (Fla. 2006), mandate issued April 13, 2006.

If you filed a second appeal or filed a petition for certiorari in the Florida Supreme Court or the United Supreme Court, give details:

No petition for certiorari was filed in the United States Supreme Court.

14. If you did file any other matters within the realm of question 11, answer the following as to each motion or petition.

A)The type of motion/petition filed; B) Date motion/petition filed; C) Name of court; D) Result; E) Date of Result.

A petition for writ of habeas corpus was filed on March 17, 2005, in the Florida Supreme Court. The petition was denied on March 23, 2006. *Miller v. State*, 926 So. 2d 1243 (Fla. 2006).

A second petition for writ of habeas corpus was filed on June 28, 2017, in the Florida Supreme Court. The petition was denied on January 31, 2018. *Miller v. State*, 237 So. 3d 921 (Fla. 2018), rehearing stricken on February 26, 2018, certiorari denied on October 29, 2018.

PRELIMINARY MATTERS

I. Introduction

David Miller, through counsel, petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Miller is a death-sentenced Florida prisoner incarcerated at the Union Correctional Institution. Respondent Mark S. Inch is the Secretary of the Florida Department of Corrections and, in that capacity, is responsible for Miller's custody and for carrying out an execution warrant.

Miller has been on Florida's death row for 20 years, but his case has never been before a federal court. This Court's August 24, 2017, appointment of the Capital Habeas Unit ("CHU") of the Office of the Federal Public Defender for the Northern District of Florida, is the first time that Miller has ever had federal legal representation.

Based on the claims below, and for the reasons that will be addressed in Miller's forthcoming memorandum of law, Miller's custody on Florida's death row is unconstitutional, and relief should be granted under § 2254.

II. Request for Leave to File a Memorandum of Law

Miller requests leave to file a memorandum of law addressing the merits of his § 2254 claims and related procedural issues

including timeliness and exhaustion. This petition, like all § 2254 petitions, is a fact pleading governed by the Federal Rules of Civil Procedure. *See Mayle v. Felix*, 545 U.S. 644, 670 (2005); *Hittson v. GDCP Warden*, 759 F.3d 1210, 1265 (11th Cir. 2014). As such, the petition sets forth Miller's claims for relief and facts supporting those claims, but does not contain Miller's complete legal arguments, which are more appropriately presented in a separate memorandum.

Allowing Miller to file a substantive memorandum of law is consistent with Rule 2(c) of the Rules Governing Section 2254 Cases, which requires habeas petitions to "specify all the available to the petitioner" and to "state the facts supporting each ground," but does not require legal arguments supporting the claims to be included within the pleading itself. As the Eleventh Circuit has recognized, Rule 2(c) simply requires "fact pleading . . . as authorized under Federal Rule of Civil Procedure 8(a)." *Hittson*, 759 F.3d at 1265; *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007) (explaining that federal civil pleadings need only contain "enough facts to state a claim to relief that is plausible on its face").

Courts routinely allow § 2254 petitioners to file separate memoranda of law in support of their pleadings, including in the Middle District of Florida. *See, e.g., Cooper v. Secretary, Dep't*

of Corrs., No. 8:08-cv-5-T-27MAP, 2011 WL 795812, at *1 (M.D. Fla. 2011) (considering § 2254 petition and separate memorandum of law). In a capital case in the Northern District, Judge Hinkle explicitly rejected the suggestion that a § 2254 petitioner should have included all of his legal arguments within his petition. *Hernandez v. Jones*, No. 3:15-cv-428, ECF No. 10 (N.D. Fla. 2015) (Hinkle, J.) ("The respondent asserts that any legal argument should have been included in, or submitted simultaneously with, the petition itself . . . . It makes sense, though, to allow a petitioner to file a memorandum of law and to give the petitioner a reasonable period in which to do so."). Indeed, allowing separate legal memoranda is particularly important in capital cases, where legal arguments can be particularly complex, and often must address voluminous factual records developed during lengthy trial and state post-conviction proceedings.

Consistent with this precedent, this Court should grant leave for Miller to file a memorandum of law in support of the claims in this petition.

III. Timeliness

Although Miller's petition is being filed beyond the Antiterrorism and Effective Death Penalty Act (AEDPA)'s one-year statute of limitations, the petition should be deemed timely and reviewed on the merits. Miller's convictions and sentence of death

were affirmed by the Florida Supreme Court on August 31, 2000. *Miller v. State*, 770 So. 2d 1144 (Fla. 2000). Rehearing was denied on October 24, 2000. Miller did not file a petition for writ of certiorari in the United States Supreme Court. His death sentence became final on January 22, 2001, when the time for seeking certiorari expired.

Under the AEDPA, Miller's federal habeas petition was initially due one year later, on January 22, 2002. *See* 28 U.S.C. § 2244 (d)(1). On September 27, 2001, Miller's state collateral counsel filed a motion for post-conviction relief in the circuit court. The State moved for summary denial on October 26, 2001, on the basis that Miller's motion was insufficiently pled (PCR. 93-99). On January, 23, 2002, the trial court granted the State's motion for summary denial and granted Miller additional time for the filing of an amended motion (PCR. 156-57). The parties stipulated to an order holding that the amended motion would relate back to October 2, 2001 (PCR. 157). At this juncture, Miller's AEDPA clock was tolled with 112 days remaining on it. *See* 28 U.S.C. § 2244(d)(2).

Subsequent to an evidentiary hearing, the trial court entered an order denying relief on April 23, 2004 (PCR. 841-1177). The Florida Supreme Court affirmed on March 23, 2006. *Miller v. State*,

926 So. 2d 1243 (Fla. 2006). The court's mandate issued on April 13, 2006.

The remaining time on Miller's clock expired on August 3, 2006, without any federal habeas petition being filed on his behalf. This petition is being filed twelve years later, on January 30, 2019.[1]

Despite the aforementioned circumstances, and for reasons that Miller will discuss in more detail in his memorandum of law, Miller submits that his petition should not be dismissed as time-barred. Although the statutory limitations period for an initial § 2254 proceeding expired prior to Miller's claims being filed in the instant petition, that limitations period is not jurisdictional, and Miller submits that a recognized exception, equitable tolling, is pertinent here. *See Holland v. Florida*, 560 U.S. 631 (2010) (holding that one-year statute of limitations for federal habeas claims may be tolled in appropriate circumstances for non-statutory, equitable reasons).

Equitable tolling is flexible and decided on a "case-by-case" basis. *Id.* at 649-50. In deciding whether to apply equitable tolling, this Court is required to "exercise judgment in light of

---

[1] The only other substantive pleading filed on Miller's behalf in any court during this time frame was a 2017 state habeas petition addressing *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 20 (Fla. 2016).

prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* at 654.

The CHU's investigation of Miller's case so far indicates that equitable tolling is appropriate. One indication that equitable tolling is warranted stems from the fact that Miller has significant mental health issues which impact his ability to communicate with counsel. Miller has been diagnosed with a number of disorders throughout his life, including a mixed personality disorder with features of schizoid personality, schizophrenia, and brain damage. A recent mental health examination confirms that Miller has paranoid schizophrenia, with a history of pervasive hallucinations and delusions dating back to at least the early 1980s. As is typical in schizophrenia and schizotypal disorders, Miller suffers from a language disorder. He, like many individuals with schizophrenia, often does not want to communicate. When forced to do so, Miller does not communicate well. It is likely that Miller would have acquiesced to what his attorneys wanted him to do, simply to end the interaction and return to his solitude. This tendency would be particularly pronounced under stress. At Miller's best, he is low-functioning, and in many ways presents with symptoms appearing similar to a severe form of autism. He is paranoid and withdrawn. The rest of the time, he presents with

active schizophrenia and psychosis in the form of delusions and hallucinations. These symptoms would have made effective communication virtually impossible between Miller and his defense counsel.

As Miller will explain in more detail in his memorandum of law, courts have widely recognized the availability of equitable tolling due to extraordinary circumstances where the defendant suffered some form of mental incapacity. *See, e.g.*, *Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001); *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999); *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2013); *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009).

Additionally, in light of the number of years by which Miller's petition has been filed beyond the AEDPA's one-year deadline, the CHU submits that there are equitable tolling arguments based on serious deficiencies in the state post-conviction representation. Both abandonment and attorney misconduct qualify as a basis for equitable tolling. *Brown v. Secretary*, No. 17-10027, 2018 WL 4932715 (11th Cir. Oct. 11, 2018).

Based on this evidence, and other evidence that may be uncovered during a complete investigation by counsel, the CHU submits that it can demonstrate that § 2244(d)'s limitations period

should be equitably tolled and that Miller's § 2254 claims should be reviewed on the merits.

Miller has valid arguments to present in response to any specific affirmative procedural defenses Respondent may raise regarding claims in this petition, including timeliness. Miller will present these arguments at the proper time–namely, after Respondent has raised any affirmative defenses with particularity. It would be premature for Miller to attempt to respond to specific affirmative procedural defenses that Respondent has not yet asserted. Such a process would unfairly shift the burden of raising affirmative defenses to Miller and would result in an inefficient use of judicial resources, as Respondent would likely still raise some arguments that Miller did not anticipate, and Miller would need to respond to such.

IV. Evidentiary Hearing

As will be described further in Miller's memorandum of law, a federal evidentiary hearing on his § 2254 claims is permissible and appropriate. *See* 28 U.S.C. § 2254(e)(1)-(2). To the extent that a factual basis for one or more of Miller's claims was not developed in state court, a federal evidentiary hearing is not prohibited. With respect to claims that were not fully addressed and adjudicated by the state courts on the merits, a federal hearing is permissible. *See Cullen v. Pinholster*, 131 S.Ct. 1388,

1398 (2011) (explaining that a federal evidentiary hearing is permissible when the state court did not adjudicate the claim on the merits); *see also Williams v. Alabama*, 791 F.3d 1267, 1273, 1276-77 (11th Cir. 2015) (remanding for evidentiary hearing on § 2254 claim after determining that state court did not adjudicate the claim on the merits). In addition, to the extent that the record for a non-merits-adjudicated claim was not fully developed in state court, Miller was not at fault because he made reasonable attempts, in light of the information available at the time, to investigate and pursue his claims in state court. An evidentiary hearing will enable Miller to prove this petition's factual allegations, which will entitle Miller to federal habeas relief. *See Williams v. Taylor*, 529 U.S. 420, 432 (2000).

To the extent that any claims were fully addressed and adjudicated by the state courts on the merits, a federal hearing is nonetheless permissible because, among other reasons, (1) the state courts' rejection of the claim assumed the truth of Miller's facts, (2) the state courts' rejection of the claim rested on an antecedent unreasonable application of federal law, and/or (3) the lack of factual record is the fault of the state court. *See Pinholster*, 131 S. Ct. at 1412 (Breyer, J., concurring) ("If the federal habeas court finds that the state-court decision fails [Section 2254(d)]'s test (or if [Section 2254(d)] does not apply),

then an [evidentiary] hearing may be needed."); *see also Madison v. Comm'r*, 761 F.3d 1240, 1249-50 (11th Cir. 2014) ("Nothing in *Pinholster*, or any other principle of habeas corpus, bars a District Court from conducting an evidentiary hearing where . . . (1) the federal claim was adjudicated on the merits in state court; (2) there is a determination based only on the state court record that the petitioner has cleared the § 2254(d) hurdle; and (3) the habeas petitioner tried, but was not given the opportunity to develop the factual bases of the claim in state court within the meaning of 28 U.S.C. § 2254(e)(2).").

V. Basis for Relief Under § 2254

Miller's state custody and death sentence violate the United States Constitution. Under § 2254, Miller is entitled to federal habeas corpus relief from his state custody and death sentence. *See* 28 U.S.C. § 2254(a).

To the extent that the Florida courts adjudicated Miller's federal constitutional claims on the merits, those decisions were: (1) contrary to and/or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; and/or (2) based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1)-(2).

To the extent that the Florida courts rendered non-merits decisions on Miller's claims, those decisions were erroneous as a

matter of federal law, involved improper procedural bars, or can be overcome by Miller's showing of cause and prejudice and/or a miscarriage of justice, as Miller will describe in reply to any affirmative defenses Respondent may assert. Finally, as Miller will explain in reply to any timeliness, waiver, or procedural bar defenses that Respondent might raise, he has valid arguments of ineffective assistance of state post-conviction counsel to overcome such defenses. See *Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Trevino v. Thaler*, 133 S.Ct. 1911 (2013); *Christeson v. Roper*, 135 S.Ct. 891 (2015); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992).

All facts, allegations, and claims set forth in this petition and the other submissions made in this litigation are incorporated into each of the individual claims and allegations pleaded below.

STATEMENT OF THE FACTS[2]

A. TRIAL

On March 5, 1997, Albert Floyd lived on the street with his girlfriend, Linda Fullwood (T. 268-71). They slept on a concrete floor under a covered doorway behind an Episcopal Church bookstore

[2] Citations in this petition are as follows: References to the trial record are designated as "T.____". References to the direct appeal record are designated as "R.____". References to the post-conviction evidentiary hearing record are designated as "PCT.____". References to the post-conviction record on appeal are designated as "PCR.____". All other references are self-explanatory or otherwise explained herewith.

building in Jacksonville (T. 270, 273). As was routine, Floyd awoke at 6:00 a.m. to catch a bus to his job in telemarketing sales (T. 270). He returned from work around 7:00 p.m. (T. 270). Upon his return, Floyd and Fullwood talked and had something to eat (T. 271). They shared three 16-ounce cans of beer (T. 291-92). Fullwood said they pooled their funds and purchased a $10 rock of crack cocaine which they smoked (T. 271-72, 291-93). Fullwood and Floyd went behind the church building to sleep at around 11:00 to 11:30 p.m. (T. 272). They had blankets and quilts to use (T. 273). Floyd always positioned himself toward the outside, and Fullwood slept closer to the building (T. 273). During the night, Fullwood awoke to find a man beating Floyd with a pipe or stick (T. 274). Floyd was still asleep, and he never moved from that position (T. 297). Fullwood screamed and verbally confronted the man, asking him why he was hitting Floyd (T. 274). The man turned and began hitting her in the head, arm, and side (T. 274-75). Fullwood could not identify the man, but described him as a black man wearing light colored clothes (T. 275-76).

Jimmy Hall was walking along Duval Street about 3:00 a.m. when he heard someone yelling, “Stop! Stop! Why are you doing this?” (T. 305-06). Hall ran behind the church building where he saw a man beating two people with a pipe (T. 305-06, 308-09). The two people had been sleeping and were still under covers (T. 306-07).

Hall walked to within 10 or 15 feet and saw the man swing the pipe three times, striking the woman twice and the man once (T. 308-09, 326-27). Hall could see blood sling off of the pipe onto the ceiling and walls of the covered doorway area (T. 318-19). The pipe was four or five feet long with a bent end (T. 315). The man used both hands to swing the pipe, and he was hitting with the bent end (T. 315). Hall yelled at the man to stop (T. 308). The man turned and started walking toward Hall, but he then ran away around the building (T. 309). Although the man took the pipe with him, he discarded it, and Hall heard the pipe hit a hard surface (T. 319-20).

Hall went to aid Fullwood, who was standing up (T. 309). The man was still laying down, covered in blood, and he did not move (T. 310). Fullwood asked Hall to go to the Y.M.C.A. across the street and ask someone to call the police (T. 309). Fullwood walked to the street to wait for the police (T. 276). Officer John Merritt arrived within a few minutes (T. 276, 310, 332). Fullwood suffered a concussion, a broken arm, two broken fingers and several fractured ribs (T. 278-79). Floyd died from his injuries which consisted of three blows to the head (T. 339-50).

Dr. Bonifacio Floro performed the autopsy on Floyd (T. 33943). Dr. Floro found three lacerations to the head which produced a wound fracturing the skull and penetrating into the brain (T. 348-

51). The wounds were consistent with blows from a pipe (T. 351). According to Dr. Floro, any one of the blows would have produced unconsciousness (T. 351). These injuries caused Floyd's death (T. 352).

Detective Reddish found the pipe on the roof of the church building during his investigation (T. 365-70). He had a crime scene technician, Raymond Godbee, retrieve the pipe and carry it to the crime lab (T. 375-78). Frank Depreso, a forensic serologist, found the presence of human blood on the bent end of the pipe (T. 385-86). There was no way to determine the age of the blood stain (T. 386). Carol Herring, a latent fingerprint analyst, was unable to develop any usable prints on the pipe (T. 393-99).

Two and one half months after the homicide, David Miller approached a police officer in Baton Rouge, Louisiana, and told him he had killed someone in Jacksonville and wanted to confess (T. 417). Detective Willie Vick spoke to Miller at the police Department (T. 417-18). After Vick advised Miller of his rights, Miller told the detective that he had beaten a black man to death and had also beaten a woman while trying to rob the man (T. 418-20). The man and woman were sleeping (T. 420-21). Miller said he intended to knock the man unconscious with a five to six foot long pipe which was curved at the end (T. 420-21). The woman who was also under the blanket woke up and started screaming (T.

420-21). Miller said he struck her with the pipe (T. 420-21). After another man came up and interrupted Miller; he stopped striking the woman and fled (T. 420-21).

Detective Vick telephoned Detective Reddish in Jacksonville, who proceeded to question Miller by phone (T. 425, 511-22). Miller again related the circumstances of the homicide, stating that he was high on drugs and alcohol that night, and he wanted money to buy more drugs or alcohol to maintain his high (T. 513).

Detective Reddish asked Detective Vick to obtain a statement from Miller (T. 523). Vick conducted a full videotaped interview of Miller about the homicide (T. 425-91). Miller related that he contacted the police because he believed that the victim had a large network of friends and wealthy family who were looking for Miller and tracking him down so that they could kill him (T. 438-39). His conscience was bothering him (T. 439). He "felt like, if I stayed free, people were going to kill me." (T. 439). He realized that what he had done was wrong and he wanted to apologize to the victim's family (T. 482-83). Additionally, he felt as if the victim had family looking for him and he felt death was near (T. 481-83).

In his interview, Miller stated that he "did not intend to cause a killing"–he was just scared (T. 441). On the night of the homicide he had been drinking and smoking crack cocaine (T.

450-51). He told the detectives he drank three or four quarts and smoked a dime rock of cocaine (T. 450-51). Miller said he was inebriated (T. 445, 450). He began looking for more money or alcohol (T. 441, 445). In a park, Miller picked up a pipe which was about six feet long and had a dent in it (T. 441). He walked behind a building which was near the Sulzbacher homeless center where he saw a man sleeping under a blanket on a covered concrete porch area (T. 442-45). In order to avoid resistance to the robbery, Miller decided to strike the man to see if he was going to struggle and then go through the man's pockets (T. 446). Miller wanted to disable the man before taking money or alcohol from him -- he did not intend to kill the man (T. 439, 440-41). Miller "was looking for a struggle. I said, 'Here is my struggle. I will touch him with this and knock him out. I don't remember the struggling too much alone." (T. 484). Miller was not certain that the victim was human, only that he was homeless (T. 439-40).

When Miller struck the man on the head, a woman, who was also sleeping under the blanket, awoke screaming (T. 446-47). Miller thought the man was alone (T. 445). Miller struck the woman, trying to knock her out (T. 447). He thought he may have struck the man again as well (T. 448). As Miller struck the woman, another man approached and verbally confronted him (T. 440,

451-53). Miller walked away with the pipe which he dropped in a nearby open area (T. 453).

Miller further stated that he retrieved his bag and immediately changed clothes, since he thought the witness might remember what his clothes looked like (T. 454-57). He then went to an overpass where the homeless often slept (T. 454). For the first day he stayed there, without leaving except at night (T. 457). The second day, Miller worked for a labor pool (T. 457-58). Later, he was drinking beer with some other homeless men, and they talked about the man who had been killed (T. 458). Until that time, Miller had hoped that he had merely knocked the man unconscious (T. 458). On the third day after the homicide, Miller "said, 'Oh, my God.' And just took [his] money and left" Jacksonville (T. 480-81). He left because he believed there were "power people that would be willing to do anything it takes" to harm him and he "could sense death coming upon me, and that's why I turned myself in." (T. 481-82). He began seeing faces and cars, and was convinced they were following him (T. 482). He knew that he would be killed (T. 484).

Miller was transported back to Jacksonville, where Detective Reddish conducted another interview and had Miller show him the scene of the crime (T. 523-45). Miller again related the circumstances of the homicide and walked the detectives through the events at the scene (T 523-45). Miller explained that he decided

to strike the man to avoid any resistance to the robbery (T. 544). He knew that some homeless people sleep with knives or guns, and he chose to strike first to prevent giving the man the opportunity to hurt him during the robbery (T. 544).

During the defense case, Miller testified, making several bizarre statements which Prosecutor Bateh characterized as "rambling dialogue" and fixating on getting his notepad to help him remember (T. 578-80).[3] The defense introduced his statement to Detective Reddish that he had never been treated for mental illness (T. 586-87).

During Miller's testimony, the defense played an audiotaped statement Miller gave to Detective Reddish about the offense which again detailed the circumstances of the homicide (T. 585-648). Miller stated that on March 5, 1997, he worked at the labor pool and then used his money to buy beer, liquor and crack cocaine (T. 575). After drinking all the alcohol, 40 ounces of malt liquor, and smoking the cocaine, Miller started walking (T. 576-77,

---

[3] Miller testified that "the time slot that they have scheduled on the [confession tapes] are a little different from what I actually have conceived in my mind" (T. 576); "the reason why I'm on the stand is–two points...There is one point I wanted to argue–there is a couple points I want to argue" (T. 577); "I perceived that–not the police but some organization possibly related to the victim was following me trying to take my life" (T. 583); "I was trying to explain to him that it was–that you had to have been there, that the situation is not, 'Do this. Do that'" (T. 653).

648-51). He picked up the pipe to carry for protection (T. 576-77). The alcohol and cocaine had affected his judgment and he would do things he would not normally do when under the influence of drugs and alcohol (T. 579-82). Miller said he never intended to kill anyone (T. 582). He said the thought about taking money from the man did not come into his head until he was standing over him with the pipe (T. 582).

On cross-examination, Miller said he probably hit the man to rob him (T. 655). However, Miller said he was operating "on a mechanical mode" at the time of the crime due to his impaired mental capacities (T. 652). He started beating Linda Fullwood out of instinct when she startled and confronted him (T. 655-58). When Jimmy Hall walked up, this caused Miller to realize what he was doing, and he walked away (T. 655-58).

Miller explained that he turned himself in to the police because he thought someone related to the victim was following him (T. 583). He also knew what he had done was wrong and his conscience bothered him (T. 583-84). When Miller was excused from the witness stand, he was distressed that he was not able to make the points he had wished to make (T. 577, 656).

B. PENALTY PHASE

The State introduced judgments of conviction for two prior violent felonies in aggravation (T. 824-26). One was for the

aggravated battery committed contemporaneously with the homicide in this case (T. 824-26). The second was a North Carolina judgment convicting Miller of second degree murder in 1986 (T. 824-26).

Additionally, Albert Floyd's wife, Gwendolyn Floyd, testified as the sole State witness to victim impact information (T. 826-29). She met Floyd and he assumed responsibility for raising her two small children and the son they later had together (T. 827). She described Floyd as a kind, generous man who loved his children and worked hard to support them (T. 827-28).

Defense counsel presented the testimony of his mother, sister and brother in mitigation (T. 830, 862, 923). They testified to Miller's family background and his difficulties with drugs and alcohol addiction (T. 830, 862, 923). Further, Dr. Harry Krop testified about his psychological assessment of Miller (T. 893).

Yvonne Jordan, David Miller's mother, testified about David's childhood and his later difficulties with alcohol (T. 831-62). David was the second of four children (T. 831, 845). His older sister, Valnice[4], suffered from schizophrenia and committed suicide with a firearm (T. 831-32, 845). David had a close relationship with Valnice ("ain't nothing they wouldn't do for each other") and her death affected him (T. 834, 845). Sharon and Leonard, two

[4] Valnice's name is incorrectly spelled "Valnese" in the trial transcript.

other siblings, were two and four years younger than David (T. 850-51). David was also very close to a cousin and neighbor, Boyd Howe, whose death also greatly affected him (T. 835-36, 925-26). The children's father, David Miller, Sr., was an alcoholic and was physically abusive to his wife and children (T. 839-41). He would work all week, but on the weekend, he would drink heavily and fight (T. 839-41). Jordan described one instance when he hit her with a soda bottle causing an injury requiring stitches (T. 840). Miller would severely discipline the children (sometimes "for no reason") by beating them with a belt (T. 841). Jordan divorced the children's father when David was about 13 years old, and she moved the four children to her parents' home on a farm (T. 841-42). She described the move as a positive one for her and the children (T. 853-56).

After David graduated from high school, he joined the Navy (T. 846-47). When he returned from the Navy, he was a different person (T. 847). David was drinking heavily (T. 847-49). He behaved differently when drinking (T. 847-48). His mother did not allow alcohol in her home, and she asked him to leave because of his drinking and behavior (T. 848-49, 861-62). Rather than stop drinking, David began living in boarding houses or on the street (T. 848-49).

Sharon Barringer, David's sister, testified that she and David had a normal, loving brother-sister relationship growing up (T. 863). David was bright with mathematics and helped her with her homework (T. 863). She said their mother was the basic role model, and she did the best she could as a single mother of four (T. 863-64, 871-72). Their father was abusive to their mother and the children (T. 864-67). The children did not have a relationship with their father because he was an alcoholic and emotionally uninvolved with them (T. 864-65). He was not a role model (T. 864).

During one incident of their father's abuse, he grabbed their mother and choked her (T. 865). She managed to get away from him, but he chased after her (T. 865). Their mother had obtained a firearm; she shot it to keep him away from her, and she left in the car (T. 865). Sharon said her father was very angry, and made retaliatory threats against their mother (T. 865-66). The children called their mother and told her not to come home (T. 866). Their father then became angry at the children and beat them all with an electrical cord (T. 866). Sharon also described an incident when their father hit their mother with a soda bottle causing an injury requiring stitches and leaving a large scar (T. 865).

According to Sharon, drug and alcohol use changed David's personality and made him a different person (T. 872-73). He did

not have a drinking problem in high school (T. 869). After David graduated, he joined the Navy (T. 871-72). Sharon noticed when David returned home that he had changed (T. 871-72). David developed a more aggressive personality and attitude (T. 873). He had started drinking alcohol, and Sharon also suspected drug use as well (T. 873). Sharon said at different times she talked to David about his alcohol and drug use (T. 878-79). David is truthful to a degree that harms him. When David would ask her for money and she asked why he needed it, he would tell her he was going to buy alcohol with it (T. 870-71). Sharon lamented that she had not made the extra effort to counsel him more on this problem (T. 878-79).

Leonard Miller, David's brother, also testified about their family background (T. 923). Leonard was very close to his brother growing up (T. 925-26). David was family-oriented and on one occasion risked his life trying to put out a house fire (T. 928-29). Their father was an alcoholic and abusive to all the children, as well as Yvonne (T. 926-27). Leonard related one incident when their father strapped their oldest sister, Valnice, to a door and whipped her with an electrical cord (T. 927). Sometime later when Leonard was in college, he was in the house when Valnice committed suicide (T. 927).

Leonard further testified that after David joined the Navy, he began drinking and his life changed (T. 930). Prior to David's

military service, David had "a lot of heart" and was a source of encouragement for Leonard (T. 929). He became more aggressive, resembling "a totally different person" (T. 930). His mother did not tolerate any drinking in her house, and David eventually left because of this conflict (T. 930-31).

Dr. Harry Krop, a clinical psychologist, testified about his examination and testing of David Miller (T. 893-98). Dr. Krop reviewed records from the time Miller first obtained psychiatric treatment due to hospitalization in 1983 after a suicide attempt (T. 895-98). Dr. Krop also reviewed the depositions and other information, including Miller's confession, about the homicide (T. 896). Finally, Dr. Krop performed various psychological tests which included a neuro-psychological test (T. 896-97).

Based on Miller's prior psychiatric history, involving three or four in-patient hospitalizations, and his own examination, Dr. Krop found Miller's primary diagnosis to be alcohol abuse and depression (T. 898-99). A second diagnosis was mixed personality disorder which had features of schizoid personality, which is like schizophrenia but not to the extent that the person loses contact with reality, and paranoia (T. 900-01). Miller's most consistent personality traits are avoidant, schizoid, and paranoid (T. 900). According to Dr. Krop, these people tend to be aloof, distant and to not fit in with others in society (T. 900-01). Miller was

cooperative but suspicious and hesitant (T. 919-20). Dr. Krop did not find Miller to suffer from anti-social personality disorder, since persons with this diagnosis do not have empathy or concern about others. Miller does not fit that description (T. 902-03).

Additionally, neuropsychological testing showed that Miller has impaired frontal lobe functioning (T. 905-06). The frontal lobe of the brain is the last part to develop, and it usually is formed when a person is five or six years-old (T. 906). This part of the brain controls inhibition and allows a person to stop and start certain behaviors (T. 906-07). Although the frontal lobe does not control a person's decision-making regarding certain behaviors, it does affect the person's ability to stop behaviors once they are started (T. 907). The person's impulse control is impaired (T. 907).

Miller's alcohol abuse was treated during his times of institutionalization, but when released into the community, Miller is again homeless and relapses. Miller's transience exacerbates his pre-existing schizoid traits, resulting in an isolated environment without treatment for his disorders or substance abuse (T. 908). Dr. Krop concluded that Miller's diagnosis of alcohol and drug abuse, frontal lobe defects and schizoid personality traits combined to create a seriously mentally disturbed individual

(T. 908-09). Alcohol abuse combined with a personality disorder made it difficult for Miller to control his behavior (T. 908-09).

Because of Miller's mental condition, he functions better when he is in prison than on the streets. He works well when there is structure, and does not function well in its absence, as can be seen in his past history of homelessness and alcohol abuse (T. 911-12).

In the hours before the murders, Miller consumed approximately four quarts of beer and smoked a dime's worth of crack cocaine (T. 914-15). This is consistent with Miller's lifestyle of heavy drinking (T. 915). It is not unusual for people who drink heavily to not see themselves as drunk (T. 916). Not only is the influence of alcohol significant, but also the chemical effects of the need to keep drinking–of dependency on alcohol and drugs (T. 916-18). The effects of dependency, withdrawal, and feeding one's addiction has "as much of an influence as the actual chemical effects of the alcohol" (T. 917-18).

David Miller testified in his own behalf (T. 935). He stated that his family was a loving and respectable family (T. 936). However, he said one thing that greatly affected him was that his mother and father never told him they loved him (T. 936). Later, he realized that his mother and father loved him (T. 936). She

worked hard to raise four children (T. 936). Miller said he did not want to use his childhood as an excuse (T. 936).

Miller expressed his religious beliefs and that as a result of the Bible, he was ready to take responsibility for his actions (T. 936-37). He stated "I can accept anything any time anywhere today. Nothing really worries me" (T. 937). He apologized to Linda Fullwood and the family of Albert Floyd, and he asked for forgiveness (T. 937-38).

Pursuant to Florida's prior capital sentencing scheme, an advisory jury voted whether to recommend the death penalty to the judge, but did not make any of the findings of fact required to impose a death sentence under state law. *See Hurst v. Florida*, 136 S. Ct. 616 (2016) (describing Florida's prior scheme). The advisory jury voted to recommend death by a bare majority vote of 7 to 5. The judge then made the statutory findings of fact required for a death sentence. The judge found the following aggravators: 1) prior violent felony conviction; 2) the homicide was committed during an attempt to commit a robbery; 3) the homicide was committed for pecuniary gain (R. 365-66). The judge merged the second and third aggravators into one aggravating circumstance. The judge found no statutory mitigators, because "the attorneys concurred that the evidence submitted during trial did not give rise to any statutory mitigating factors" (R. 367).

The judge found the following nonstatutory mitigators: 1) the victim was rendered unconscious immediately and did not suffer; 2) Miller turned himself in to the police; 3) an alternative sentence for murder is life without possible release; 4) Miller exhibited remorse and apologized to the victim's family; 5) Miller cooperated with the police investigation; 6) Miller did not resist arrest; 7) Miller suffered emotional distress over the death of his sister and close cousin; 8) Miller has a frontal lobe deficit which affects inhibition and impulse control; 9) Miller would likely adapt well to long-term incarceration; 10) Miller was loved by his family and had performed good deeds; 11) Miller adjusted well while incarcerated. (R. 367-74).

C. Post-conviction PROCEEDINGS

During a post-conviction evidentiary hearing, Miller presented evidence in support of his claim that trial counsel rendered ineffective assistance. Attorney Refik Eler testified at the hearing that he represented Miller at his trial (PCT. 1482). Eler stated that his ultimate goal in this case was to get a life recommendation from the jury (PCT. 1559). He did not feel there was much of a guilt phase case (PCT. 1559).

Eler began to practice law in 1986 with the State Attorney's Office (PCT. 1483). He stayed in county court for six to nine

months, then moved into the Special Prosecution Division specializing in economic crime (PCT. 1484). Eler did not prosecute any first-degree murder cases to trial. He served as second chair on one first-degree murder case, basically completing work assigned to him by the lead attorney (PCT. 1483). That case also did not go to trial (PCT. 1484).

Eler left the State Attorney's Office in 1989 to enter private practice. Eler has tried or co-tried six or seven cases where the death penalty was sought (PCT. 1485). He served as lead counsel for the penalty phase in roughly half of those cases (PCT. 1487).

Eler believed that a defense lawyer was responsible for investigating mitigation and molding it into a fashion that jurors could understand (PCT. 1489-90). Collecting records and talking to family members were the investigative means Eler generally used to gather mitigation information (PCT. 1490).

In Miller's case the Public Defender had done "a substantial amount" of the mitigation investigation, so Eler was "pretty fortunate" (PCT. 1490). Eler said he "came into the case pretty much almost ready to try the case in terms of guilt and/or penalty" (PCT. 1490-91). Eler "received the benefit" of prior counsel doing "a lot of the records searching and conducting" but knew he and is investigator were responsible for "the rest of the accumulation of it and the follow-up of that information" (PCT at 1491).

When investigating mental health issues, Eler testified that he seeks a confidential expert to determine competency, but "I'll pretty much defer to the mental health expert" for any follow-up (PCT. 1491). Dr. Harry Krop was already working on this case when Eler took over because he had been retained by the Public Defender (PCT. 1491). Eler believed that Dr. Krop was a leading expert in the areas of psychology and neuropsychology (PCT. 1492). Eler admitted that issues regarding competency "were really addressed with Mr. Chipperfield" and that Eler did not follow up regarding competency (PCT. 1493). Miller did not actively participate in his defense, and believed he needed to be punished. (PCT 1548).

Eler acknowledged that the decision about what evidence to present to a jury or the court is a decision that the attorney must make (PCT. 1499). However, Eler does not usually make recommendations to mental health experts. Eler presented the testimony of Dr. Krop during the penalty phase with regard to two areas: (1) to establish a nonstatutory mitigating factor of frontal lobe deficit and (2) to establish Miller's ability to adjust to long-term incarceration (PCT. 1493). Some evidence of drug and alcohol usage was testified to by Dr. Krop as well (PCT. 1493).

Eler acknowledged that using a mental health professional to develop mitigation is extremely important (PCT. 1497). A mental health professional can offer testimony as to the psychological

impact that dysfunctional familial acts have upon an individual (PCT. 1497). This opinion would be outside the scope of what the family members would be able to testify to (PCT. 1495).

Only three family members, Dr. Krop, and Miller testified at penalty phase (PCT. 1495). The family members testified briefly during the penalty phase about the dysfunctional family situation, with very limited testimony of childhood abuse and parental alcoholism (PCT. 1495). Dr. Krop did not testify about any psychological impact these events had on Miller. Eler believed that Dr. Krop interviewed Miller's family members (PCT. 1496). Dr. Krop had asked permission from the public defender to do this (PCT. 1496). Eler believed that Dr. Krop had the benefit of background materials on Miller and had talked with the family and Miller, but recalls no discussions with Dr. Krop about the effect of Miller's dysfunctional family (PCT. 1498-99). Eler felt that Dr. Krop would have been able to offer an expert opinion as to the psychological impact that the abusive childhood and dysfunctional family had on Miller (PCT. 1499).[5] Eler admitted that he, as the attorney, was the one responsible for deciding what mitigation evidence and expert testimony to present in court (PCT. 1499-1500).

[5] Dr. Krop did not testify as to the psychological impact the events of childhood had on Miller.

Eler acknowledged that the sentencing order of the trial court referenced the death of one of Miller's siblings and the death of his cousin. However, the order stated that an absence of testimony in either the guilt or penalty phase as to the emotional trauma suffered by Miller as a result of the deaths led to a determination that this mitigation evidence was entitled to little weight by the trial judge (PCT. 1502). Likewise, very little evidence of childhood abuse and a dysfunctional family was presented as mitigation (PCT. 1503). Eler agreed that he failed to present evidence relating to the psychological trauma suffered by Miller as a result of these abuses, though such evidence could have been developed through a mental health professional (PCT. 1503). Eler acknowledged that this evidence would have been important for the jury and trial judge to hear (PCT. 1504). Eler's reason for not presenting this testimony was because he did not think that Dr. Krop told him that this was a feature he needed to bring out (PCT. 1504).

Some evidence was presented through Miller's mother, Yvonne Jordan, a sister, and a brother of Miller's history of drug and alcohol abuse (PCT. 1504). Eler recalled that their testimony had been that Miller began using alcohol at age 18 or 19 while he was in the Navy, and that it made him more talkative (PCT. 1505). Once again, Eler did not ask Dr. Krop to testify about the various

psychological and emotional ramifications of a substance abuse disorder and the long term effect it would have had on Miller and how such long-term addictions would have affected Miller's judgment on the night of the homicide (PCT. 1506). Eler only focused on Miller's drug/alcohol usage on the night of the incident. Eler did not try to present any evidence which would have established Miller's attempts at treatment and the systemic failures of those treatment programs (PCT. 1509).

No medical records relating to Miller's mental health were presented to the jury (PCT. 1509). Eler thought that some information in the records was detrimental to Miller and he did not want to admit that evidence to the jury (PCT. 1510). Eler agreed that the records contained much relevant mitigation evidence, and could not articulate what specific harm would have come from introducing the records (PCT. 1510-11).

Eler admitted to being familiar with the concept of motions in limine (PCT. 1568). He will usually file a motion in limine if he anticipates a problem with evidence (PCT. 1568). He does not usually anticipate potential areas of improper argument by the State that would necessitate a motion in limine (PCT. 1569). Eler did not seek a pretrial ruling from the court to determine what the court would have permitted the State to introduce as rebuttal evidence to the information contained in the medical records (PCT.

1513). Eler could not remember what was in the records that he thought was so bad that it justified excluding all the records; he could recall only one item in the records that referred to one instance of aggressive behavior by Miller during treatment. This consisted of a statement that Miller had pushed another patient (PCT. 1513).

Eler believed that showing a defendant has had previous involuntary hospitalizations due to mental health issues was detrimental (PCT. 1514). Eler thought evidence of mental illness which required hospitalization would undercut an argument that Miller was a good candidate for rehabilitation in prison (PCT. 1514). In Eler's opinion the fact that a defendant had been previously committed to a mental institution was something he would never want a jury to hear (PCT. 1515). When asked why a diagnosis of alcohol dependence with psychological dependence, cocaine dependence with psychological dependence, cannabis abuse, and schizoid personality disorder three or four months before the murder occurred was not relevant mitigation and how that evidence would open the door to testimony that Miller pushed someone in the mental hospital, Eler only responded that Dr. Krop considered these things (PCT. 1516). Eler acknowledged that he did not have Dr. Krop testify about Miller's many contacts with mental health agencies and his involuntary hospitalization for attempting to harm

himself and his brother three or four months prior to the homicide (PCT. 1517, 1519). Eler did not have Dr. Krop testify about the life-long adult addiction to drugs and alcohol suffered by Miller and the psychological and emotional impact those addictions had on him (PCT. 1518). Eler presented no evidence of the treatment that Miller had sought during his life (PCT. 1518).

Eler first claimed that he did not present all the above-referenced testimony because it would have been detrimental to Miller (PCT. 1521). Eler could not offer a single negative point that Dr. Krop could have been cross-examined on if he had testified about what the alcohol and drug problems meant to Miller (PCT. 1521). Eler finally acknowledged that "I'm not sure that would have been a bad thing" to have had Dr. Krop testify in this area (PCT. 1521).

Eler did not know if Dr. Krop evaluated Miller to determine the level and effect of the trauma he suffered as a result of the death of his sibling and cousin (PCT. 1516). Eler did not present any testimony by Dr. Krop as to this issue; he only presented the fact that a sister and neighbor had died (PCT. 1516). Eler could not point to any bad things that would have come out had Dr. Krop testified in this area (PCT. 1522). Eler then claimed he did not present this testimony because he deferred to Dr. Krop (PCT. 1522). Eler admitted that the lawyer asks the questions in court, not the

doctor (PCT. 1522).

Eler also did not have Dr. Krop testify as to the psychological impact childhood abuse and a dysfunctional family had on Miller (PCT. 1518). Eler chose not to follow up on any of the psychological testimony, despite having it available to him (PCT. 1519-20). While believing such evidence was detrimental, he did choose to present some very limited factual testimony about alcohol usage and childhood abuse only from family members.

Eler agreed that a defense attorney has the duty to exclude or minimize the aggravating circumstances the State relies upon (PCT. 1522). In this case, Miller had a previous conviction for second-degree murder in North Carolina (PCT. 1522). Eler recalled that Miller had pled guilty to that offense (PCT. 1522). Eler could not recall presenting any evidence or making any argument to the jury to mitigate this prior conviction other than the fact of the guilty plea (PCT. 1522-23).

Eler was familiar with the circumstances surrounding the prior second-degree murder conviction. He knew that Miller had been evaluated by two mental health professionals because of mental health issues in that previous case and the North Carolina judge made specific findings that mental problems significantly reduced Miller's culpability for that offense. (PCT. 1523, 1572). He did not present any evidence of the judicial findings made in North

Carolina which mitigated the prior conviction to the jury or trial court in this case (T. 1523, 1572).

Eler did not think that it was important to present evidence of the circumstances surrounding a prior conviction to the judge or jury (PCT. 1524). He acknowledged judicial opinions which talked about the need to mitigate prior felonies by showing the circumstances of what happened and make them not as serious as they might seem (PCT. 1524). Eler did not do it because he does not like to dwell on the negative and did not want to show that Miller already had "one bite at the apple." (PCT. 1524). Instead he chose to "gloss over" the circumstances (PCT. 1526). Eler agreed that everybody already knew that Miller had "one bite at the apple" because both the jury and trial court were going to be told of the conviction irrespective of whether or not evidence of the facts surrounding it were presented. Eler admitted that giving the jury and trial judge information about the circumstances surrounding the prior conviction would not have allowed otherwise inadmissible evidence to come before the jury (PCT. 1573). Eler further admitted that an unexplained prior conviction for second-degree murder was a significant aggravating circumstance (PCT. 1525). Eler also acknowledged that he knew the State was not planning to put on testimony about the underlying facts of that conviction because he had seen their witness list (PCT. 1526). Eler presented

nothing to mitigate the prior judgment for second-degree murder (PCT. 1527).

Eler also did not present evidence of mental mitigation at the time of the instant homicide (PCT. 1524). Eler did not look at the psychological reports because he believed that Dr. Krop had, so he did not present that evidence to the jury (PCT. 1525).

Eler was also questioned about why he did not object to numerous arguments made by the State (PCT. 1527). Eler had no independent recollection of the particular arguments and had not reviewed the motion for post-conviction relief prior to testifying (PCT. 1527). Eler did not quarrel with what the transcripts reflected was argued by the State (PCT. 1528). He agreed that an attorney in any case has the responsibility to preserve the errors in the proceedings for appellate review (PCT. 1529). Eler agreed that if an issue is not objected to at the trial level, it is waived for appeal unless it rises to the level of fundamental error (PCT. 1529). Eler acknowledged that appellate courts rarely find fundamental error, even though he had not done much research into fundamental error (PCT. 1563-64). He further agreed that it is important to object to improper argument by the State in certain instances (PCT. 1529-30). He does not object to argument over small issues because he does not want the jury to dislike him. But Eler did state that “If there’s fundamental error, I’m going to

object whether the jury likes me or doesn't like me." (PCT. 1557). Eler does not object to argument at times because he did not want to lose his "bond" with the jury over small issues (PCT. 1533, 1558, 1567). He acknowledged that there is a jury instruction that deals with jurors not holding the objections of counsel against the defendant (PCT. 1567). Eler did not know if he ever asked for it in this case (PCT. 1567).

Additionally, Eler testified that he does not believe in objecting to things which he considers to be in the "gray" area such as where a prosecutor's argument crosses the line of acceptable argument, but is not fundamental error (PCT. 1563). Eler acknowledged that many objectionable events happen during trials that are reversible error if objected to, but will not rise to the level of fundamental error (PCT. 1563-64). When asked what the attorney has to do in order to preserve reversible error, Eler first stated he did not understand the question, but agreed that an objection and motion for mistrial would be one way to preserve a record (PCT. 1656).

In the instant case, Eler did not object to numerous arguments by the State that Miller would have killed Fullwood but for the intervention of Jimmy Hall because he did not feel the argument was affecting the jury (PCT. 1530). Eler did agree that having the State argue that this would have been a double homicide but for the

actions of a third party was pretty bad (PCT. 1537). He termed it "a very zealous prosecution argument." (PCT. 1538).[6] Upon reviewing the argument, Eler thought that maybe he should have objected (PCT. 1530, 1533). Even Eler was willing to admit that this argument did not help his case (PCT. 1533). Eler also acknowledged that cumulative error can be a factor and six times was quite a bit (PCT. 1568).

Eler admitted that prosecutorial vouching for the credibility of his witness is something that should be objected to (PCT. 1533). When confronted with the prosecutor vouching for the credibility of Jimmy Hall, Eler indicated confusion and was not sure if the argument was improper (PCT. 1534). Eler did not think that arguing to the jury that a witness had told the truth was vouching for his credibility (PCT. 1534). Eler also admitted to being familiar with case law which prohibited an attorney from stating to the jury whether a witness is lying or telling the truth (PCT. 1535).

Eler agreed that it was not appropriate for the State to argue the lack of sympathy for the victim as a means of attacking mitigation (PCT. 1535). When confronted with the State's closing argument on this point, Eler admitted it was objectionable argument for penalty phase (PCT. 1535, 1536). He should have objected, but

---

[6] The prosecutor actually made this argument on six different occasions (PCT. 1538).

at the time he did not think it was significant (PCT. 1535, 1536). Eler sometimes does not object to these types of arguments because he "takes them and turns them around in his closing." (PCT. 1536). He hoped he did that in this case, but he did not remember actually doing so (PCT. 1536).

Debra Lee is a substance abuse counselor and social worker in Charlotte, North Carolina (PCT. 1586). She works for the Salisbury VA Medical Center (PCT. 1587). In 1994, she worked as an outreach counselor for homeless and chronically mentally ill veterans with the goal of helping them to gain access to needed health-care services (PCT. 1587). The VA provided funding for outreach activities to homeless shelters, camps, bridges, wherever homeless people congregate for the purpose of interviewing people in order to conduct an assessment that will lead to finding programs to assist them with health-care needs. This includes treatment for medical needs, substance abuse, and psychiatric treatment (PCT. 1588).

Lee testified that she worked with Miller for an 18-month period, beginning in 1994, in North Carolina (PCT. 1580). She met Miller in a day shelter and helped him secure treatment for substance abuse and alcoholism (PCT. 1589). During her contact with Miller they spoke at length about his family history, including his father's alcoholism, physical and sexual abuse, his

witnessing the rape of both of his sisters, and the eventual suicide of his sister and cousin (PCT. 1589). Miller would become very upset when talking of these things, "as if he was reliving those events" (PCT. 1589). It took almost a year before Miller agreed to treatment, which is not unusual among the chronically homeless (PCT. 1590). He was skeptical of Lee at first, and spent a year watching her work with other people before allowing her to try to help him (PCT 1593).

Miller eventually agreed to be evaluated by a psychiatrist and medical doctors (PCT. 1590). Initially, outpatient treatment was agreed upon for Miller due to some concerns about his level of commitment to treatment (PCT. 1590). During this treatment Miller had difficulty maintaining sobriety (PCT. 1591). After Miller demonstrated a commitment to treatment, the decision was made to switch to inpatient treatment (PCT. 1597). In the fall of 1996, Miller entered a 30-day inpatient treatment program (PCT. 1591, 1596).

Miller entered into a substance abuse unit (PCT. 1591). Initially, he was treated with anti-anxiety medication (PCT. 1598). During treatment Lee characterized Miller as quiet, with a tendency to isolate himself (PCT. 1592). He did not like to talk about things that bothered him (PCT 1592). Miller was depressed, paranoid about others' welfare, and very paranoid about what would

happen to him in the VA hospital (PCT. 1592). He was particularly "skeptical of systems" and believed institutions were hostile (PCT. 1592). He tried to isolate himself, such as hiding in dark rooms (PCT. 1596). Miller had a previous suicide attempt, so his self-isolation was cause for concern (PCT. 1596). He had some problems with groups in the beginning due to the pressure to open up in these settings, which led to increased depression and paranoid thoughts (PCT. 1600). In response to his increased depression, a program of more intensive one-on-one therapy was begun in part due to a concern that Miller could hurt himself (PCT. 1597). At one point there was some concern that Miller needed to be in an acute psychiatric unit, but the decision was eventually made to keep him at the substance abuse unit (PCT. 1597).

Miller displayed symptoms of post-traumatic stress disorder, and was diagnosed with schizoid personality disorder on November 22, 1996, as a result of his abusive childhood, his witnessing of the rapes of his sisters, his own sexual abuse, and the suicide of his sister (PCT. 1598-99).[7] Psychiatric staff believed stress was pushing him into a state of active schizophrenia (PCT. 1600). Dr.

[7] The instant offenses occurred on March 17, 1997, four months later (PCT. 1601).

Satterfield was responsible for the diagnoses.[8] During her entire contact with Miller, Lee did not see him act out (PCT. 1592). Miller shared his previous legal problems with Lee (PCT. 1593). Miller told her that he had been in an argument with someone at a rooming house and that he had shot the person (PCT. 1612). He served seven years in prison and was released not too long before he sought help from Lee (PCT. 1612, 1621).

Lee found Miller to be very remorseful and extremely saddened by his actions (PCT. 1593). She believed he was plagued by what had happened and he often expressed that he should be punished for it (PCT. 1612). Miller's skepticism of systems and exposure to violence on the streets made him less able to recognize and accept offers of help (PCT 1606, 1609).

Miller had a history of abusing many substances, including hallucinogens such as Valium and Quaaludes, cocaine, marijuana, crack cocaine, and significant amounts of alcohol (PCT. 1593).

Lee was aware that Miller had a family history of mental illness, including schizophrenia, which Miller's treating providers suspected he suffered from (PCT. 1595).

Miller was discharged on his 30th day, November 27, 1996, with a referral to return to the mission he had been staying at prior to

---

[8] Dr. Satterfield was not presented as a witness.

the inpatient program and to continue out-patient psychological counseling (PCT. 1601). Miller wanted to go to a half-way house, but that did not happen because there was no availability (PCT. 1602). Miller returned to the same environment he had been in prior to treatment (PCT. 1602). A short time later he left town (PCT. 1602).

Lee stated that a person with a discharge plan such as that given to Miller, coupled with his history, has less than a three percent chance of success (PCT. 1602). It is now well-recognized that persons who return to the same environment do not fair well (PCT. 1603). Today, Miller would have been placed in an aftercare program with housing available for up to two years and other support (PCT. 1603). Miller's only stable housing as an adult occurred during the military or when he was incarcerated (PCT. 1603). The services provided to homeless persons, especially those such as Miller, have evolved greatly since 1994-1996 (PCT. 1607). Now, there are supportive services in the community that just did not exist in 1996 (PCT. 1608). It would not be realistic to have expected Miller to succeed once he was discharged in 1996 (PCT. 1622).

Lee was contacted by public defender Alan Chipperfield in this case (PCT. 1604). It was her understanding that he represented Miller (PCT. 1604). She spoke with him and his investigator (PCT.

1605). She was not contacted by anyone else until a week before the present November 2003 hearing, when she was asked to testify (PCT. 1605). She had never heard the name Refik Eler (PCT. 1605).

Dr. Joseph Chong Sang Wu is a physician at the University of California, Irvine College of Medicine (PCT. 1624). He is the clinical director of the Brain Imaging Center and associate professor in the Department of Psychiatry (PCT. 1624). The primary focus of the Brain Imaging Center is the administration and interpretation of PET scans and PET scan studies of neuropsychiatric disorders such as schizophrenia, Alzheimer's dementia, Parkinson's disease, and traumatic brain injury (PCT. 1624). Only 20-30 centers nationwide utilize PET scans for neuropsychiatric purposes (PCT. 1625). Dr. Wu is a preeminent researcher in studies of PET scans involving cocaine addiction, depression, and schizophrenia (PCT. 1626). He conducts pharmaceutical studies to test the effectiveness of antipsychotic medications for treatment as well as treatments for cocaine additions and depression (PCT. 1627).

According to Dr. Wu, an MRI scan looks at the brain structure and determines if the shape of the brain structure is altered in any way (PCT. 1630). A PET scan looks at the function of the brain. You can have a portion of the brain that is structurally intact but does not function (PCT. 1630). An MRI scan of a cadaver

would show a perfectly normal brain shape, an intact brain, but a PET scan would show no function (PCT. 1631). The PET scan shows the level of brain function as measured by sugar metabolism (PCT. 1632). The more active a particular area of the brain is, the more sugar that part of the brain consumes (PCT. 1633). These areas of activity, or sugar metabolization, are color-coded on the PET scan films - high activity areas are colored with hot colors such as red; moderate areas of metabolism with yellow or green, and low metabolism areas with blue (PCT. 1633). The mechanics of how PET scans are obtained has been in use over 20 years and is a science that is generally accepted in the scientific community (PCT. 1633-36).

PET scans help to corroborate neuropsychological test data (PCT. 1637). Dr. Wu was provided with the results of psychological tests that Dr. Krop performed on Miller (PCT. 1638). Dr. Krop diagnosed frontal lobe problems (PCT. 1638). Dr. Wu's actual evaluations of Miller corroborate that conclusion (PCT. 1638). The PET scan of Miller showed a pattern of abnormal decrease in frontal lobe activity, especially in the orbital frontal lobe area and in the relative pattern of activity of the frontal lobe relative to the occipital lobe (PCT. 1639). Miller's scan looked more like that of a schizophrenic, also in line with Dr. Krop's diagnosis of schizophrenic spectrum disorder (PCT. 1640). Dr. Wu's findings

were that Miller showed a significant decrease in the functioning of the frontal cortex of the brain, especially the orbital frontal cortex, a pattern of metabolic hyperfrontality with a decrease in the frontal occipital gradient, and metabolic decreases in the subcortical area (PCT. 1642). This was an abnormal brain with frontal lobe deficit (PCT. 1642). This determination is consistent with a schizophrenia spectrum disorder as identified by Dr. Krop and documented in the records of Miller (PCT. 1643).

Schizophrenic spectrum disorder is characterized by someone who has symptoms that are schizophrenia-like, but who may not necessarily meet the full-blown diagnosis under the DSM-IV-R for schizophrenia (PCT. 1644). This diagnosis would include behaviors such as being withdrawn, odd behaviors, paranoia, and poor social functioning (PCT. 1644-45). Miller's family history is also highly indicative of schizophrenia (PCT. 1645). Miller reported some auditory hallucinations, just not persistent enough for a full-blown diagnosis of schizophrenia (PCT. 1645).

Dr. Wu further testified that there is a correlation between childhood abuse and neurobiological vulnerability (PCT. 1646). If someone who has some sort of frontal lobe abnormality is subject to childhood abuse, the likelihood of aggression increases (PCT. 1646). Miller is an example of someone with a neurobiological vulnerability (PCT. 1647). There is an increased likelihood of

aggressive impulses, loss of judgment, and an inhibition of improper impulses in someone with frontal lobe lesions, such as Miller (PCT. 1647). The PET scan was done in 2002 (PCT. 1649). The homicide occurred in 1997 (PCT. 1649). Dr. Wu did not believe there was any change in Miller's brain between 1997 and 2002 (PCT. 1649).

Dr. Harry Krop, a psychologist and the director of Community Behavioral Services, focuses his practice on forensic psychiatry (PCT. 1691). Dr. Krop testified that he was retained as a mental health expert in this case by public defender Alan Chipperfield in 1997 (PCT. 1693). Chipperfield requested that Dr. Krop review competency and sanity as related to Miller and to do an analysis of his drug/alcohol intoxication and mental health problems on the day of the homicide (PCT. 1694). Chipperfield also suggested in a letter to Dr. Krop possible mitigating factors that he felt needed to be explored in the area of remorse, family situation, and prison record (PCT. 1695). Dr. Krop was sent some information by Chipperfield after the public defender investigator had interviewed certain family members (PCT. 1695). Chipperfield also provided Dr. Krop with a list of records he felt were important, which included school records, military records, prison classification records, VA records, and psychiatric records (PCT. 1695). Chipperfield provided a copy of Miller's confession, as well as other

information relating to the homicide (PCT. 1695). Dr. Krop did not have the benefit of a PET scan in 1997 (PCT. 1696).

Dr. Krop had since received a copy of Dr. Wu's report and a report from a Dr. Holder (PCT. 1697). He was familiar with Dr. Wu's findings, which were consistent with the abnormalities that Dr. Krop had detected in his neuropsychological testing of Miller in 1997 (PCT. 1696-97). Dr. Krop's 1997 diagnosis was also consistent with earlier diagnoses (PCT. 1697).

Dr. Krop had reviewed his records regarding the time he spent consulting with Eler (PCT. 1698). His records reflected one half-hour consultation on July 6, 1998, during Miller's trial (PCT. 1698). Dr. Krop testified in Miller's trial on July 7, 1998 (PCT. 1698). He might have spoken to Eler for a few additional minutes before he testified, but remembered no other contact with Eler (PCT. 1698).

Dr. Krop did not recall speaking to Eler about possible mitigation (PCT. 1698). He believed he provided a report of his findings, which included concerns about the dysfunctional family, cognitive defects in the frontal lobe, and the results of psychological testing to either Chipperfield or Eler (PCT. 1700). Dr. Krop did not recall having any discussion with Eler wherein he advised him to refrain from presenting certain areas of mitigation (PCT. 1700). He did not create a situation where Eler would have

deferred to his opinion about what should or should not be presented (PCT. 1700-01).

Dr. Krop stated that in 1997 he had clearly identified a long-standing history of drug and alcohol abuse by Miller (PCT. 1701). Miller's substance abuse contributed to his psychiatric problems, led to depression, and ultimately led to hospitalization (PCT. 1702). Dr. Krop believed these facts would support a mitigating factor that has been utilized in other cases he has been involved with (PCT. 1702). Dr. Krop felt that he had enough information in 1997 that he could have testified as to the psychological effects the addictions had on Miller (PCT. 1702-03). Dr. Krop could have testified as to how the severe personality disorder Miller suffered interacted with his addictions and cognitive defects. He could have testified as to how these factors impacted on Miller's judgment making ability, impulse control, and so forth had he been been asked the appropriate questions by Eler (PCT. 1703).

Dr. Krop could have also testified about adjustment disorders that Miller had faced which led to a life of homelessness (PCT. 1704). The combination of mental health issues Miller faced would not be conducive to voluntarily seeking treatment (PCT. 1704). It would not be likely that Miller, given his diagnosis, would seek out-patient treatment on his own following his discharge from the

30 day treatment program unless he had significant support and efforts expended by others to ensure he continued treatment (PCT. 1714).

It was Dr. Krop's opinion that the 30-day treatment program Miller entered into shortly before the instant offense was not sufficient to address his problems (PCT. 1713). Individuals who suffer from the long-standing mental health issues that Miller suffers from usually require long and extensive out-patient treatment, which would necessarily include medication and psychotherapy on an on-going basis (PCT. 1713).

Dr. Krop testified at the evidentiary hearing that Miller reported to him significant emotional deprivation in his childhood and significant physical abuse by an alcoholic father (PCT. 1705). Miller believed his father was capable of killing him and his mother (PCT. 1705). Her victimization caused her to be a very negative person who verbally and mentally abused Miller (PCT. 1706). Miller was constantly told he was not wanted and would never amount to anything (PCT. 1706). Dr. Krop interviewed three family members, including Mrs. Miller, for the purpose of developing additional information about the circumstances of Miller's youth (PCT. 1706). Dr. Krop was surprised that he was not asked by Eler to address his findings in these areas in his testimony, especially after he had brought this area of mitigation

to the attention of Chipperfield in his initial letter to defense counsel (PCT. 1707).

Dr. Krop testified that Miller also spoke with him about the suicide of his schizophrenic sister and cousin (PCT. 1707). The death of his sister was especially traumatic because Miller was closest to her (PCT. 1708).

Additionally, Miller talked with Dr. Krop about experiencing sexual abuse and witnessing the rape of his sisters by two male cousins (PCT. 1708). When Miller told his father what he had witnessed, he was accused of lying and was beaten (PCT. 1708). As a result of his father's actions, Miller became increasingly suspicious (PCT. 1708).

According to Dr. Krop, medical records reflect that Miller received little out-patient mental health treatment (PCT. 1709). Miller did receive an extensive evaluation at the Dorothea Dix Hospital when he was in acute crisis in 1983 and there were medical records from 1986, the time of the North Carolina second-degree murder (PCT. 1709). All medical records Dr. Krop reviewed substantiated a long-standing history of mental health problems (PCT. 1709).

Miller was court-ordered into the Dorothea Dix Hospital in 1983 (PCT. 1710). The psychiatric reports diagnosed Miller with adjustment disorder, alcohol abuse, and mixed personality disorder

with avoidance, schizoid, and borderline features (PCT. 1711). The evaluator in 1983 directed the North Carolina trial court to potentially mitigating factors present in that episode, which include the history of alcohol abuse, Miller's intoxication at the time of that offense, and a history of emotional problems associated with an underlying personality disorder (PCT. 1712). These findings were consistent with Dr. Krop's current findings (PCT. 1712). The findings indicated that Miller's alcohol intoxication and emotional/personality disorder, taken together, "most probably impaired this patient's ability to appreciate the criminality of his conduct at the time of the alleged offenses and to conform his behavior to the requirements of law" (PCT. 1712).

Dr. Krop felt that Miller's admission to a VA hospital in 1996 several months before the instant homicide was significant in confirming the continuing mental health difficulties that Miller had suffered from for years (PCT. 1710).

Dr. Krop testified at the penalty phase of Miller's trial (PCT. 1725). He was able to provide only a cursory explanation for the basis of his opinion under the questions proposed to him by Eler (PCT. 1725). Dr. Krop opined that a cursory reference to a particular record is significantly different from being asked to describe the details of the record that is pertinent to the diagnosis or testimony (PCT. 1726). It is important to get into

the substance of the material contained in the records and to develop significant facts which support his opinion and give the jury the proper insight into the defendant (PCT. 1726). Dr. Krop's testimony at the evidentiary hearing was significantly different from that at trial (PCT. 1726). For example, at trial Dr. Krop was not asked any questions about Miller's psychiatric records, anything which related to the 1983 offense, or Miller's perceptions of the dysfunctional family environment and its effect on him (PCT. 1726).

While Dr. Krop did not find that Miller suffered from a "major mental illness", he explained that this is a term of art (PCT. 1727). Dr. Krop firmly believed that Miller has serious psychological problems and serious emotional problems and that Miller was operating under those problems at the time of the instant homicide in 1997 (PCT. 1727).

The prosecution presented the testimony of Dr. Lawrence E. Holder, a clinican at Shands Hospital and a supervisor in the administration of PET scans (PCT. 1730). During the period of time that Dr. Holder was training and at the time he became board certified in nuclear medicine, he received no training relating to PET scans (PCT. 1751). He had been a clinical professor of radiology for two years at Shands (PCT. 1733). His areas of research focused on radio nuclide bone imaging in orthopedic sports

medicine and trauma, RSD, and tumor imaging (PCT. 1751, 1752-53). He is not published in the area of PET scans and has not published any materials related to the brain (PCT. 1754). Dr. Holder has no specialized training in the area of psychiatry (PCT. 1755). He focuses on the diagnosis of medical conditions as a determinate of treatment (PCT. 1738). Dr. Holder has only done PET scan reviews for five or fewer years since PET scans have only been around clinically for three or so years (PCT. 1756). He primarily does examinations ordered by medical doctors as opposed to psychiatric testing (PCT. 1739). Dr. Holder has testified before in civil cases, but never in a criminal case (PCT. 1738).

The use of a PET scan is a subset of nuclear medicine (PCT. 1735). Dr. Holder reviewed the PET scans of Miller and the report of Dr. Wu (PCT. 1741). He also very briefly reviewed some trial testimony (PCT. 1742). In Dr. Holder's opinion, Miller's PET scans were of adequate technical quality (PCT. 1743). Dr. Holder found no focal cortical abnormalities and no non-cortical abnormalities (PCT. 1744). He opined that the PET scan was normal (PCT. 1744). Dr. Holder admitted that there is debate in the medical community as to what constitutes "normal" v. "abnormal" (PCT. 1748). Dr. Holder did not find any abnormality in the frontal lobe area (PCT. 1745). He admitted that the images in Defense Exhibit 6 (those of Miller and a control image) were different (PCT. 1760).

Dr. Holder did not disagree with the results of the neuropsychological tests performed by Dr. Krop (PCT. 1757-58).

Dr. Holder has never utilized a visual vigilance test, as was used by Dr. Wu in this case (PCT. 1746). He believed the increased glucose activity observed in Miller's scan was consistent with a visual stimuli taking place (PCT. 1746).

Dr. Wu was recalled by the defense (PCT. 1764). Dr. Wu believed that the differing opinion reached by Dr. Holder was due to his unfamiliarity with the visual vigilance test coupled with his lack of experience in reviewing scans of both normal and schizophrenic patients during the performance of those tasks (PCT. 1764). Dr. Wu noted that the use of the visual vigilance test and his conclusions regarding the results of that test in the instant case were supported by peer reviewed literature (which included 50 articles that he personally authored) specifically addressing schizophrenia as compared with normal responses (PCT. 1765). Dr. Wu felt that experience with this application of the PET scan is important when analyzing the test that should be used and the type of pathology being assessed (PCT. 1765). While Dr. Holder has many interests, he does not have a special interest or any experience in the area of PET scans of the brain involving neuropsychiatric illness (PCT. 1766).

GROUNDS FOR RELIEF

GROUND I

MILLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS.

Miller's trial counsel failed to present significant, available evidence of mitigating circumstances to the jury during the penalty phase of his trial. Counsel's objectively unreasonable inaction, whether by reason of ignorance or neglect, prejudiced his client. Counsel's ineffectiveness violated Miller's federal constitutional rights. *See Strickland v. Washington*, 466 U.S. 668 (1984). To the extent that the Florida Supreme Court adjudicated this claim on the merits, its decision was contrary to or at a minimum involved an unreasonable application of clearly established federal law, as Miller will discuss further in his memorandum of law. As will also be discussed further in the memorandum of law, state post-conviction counsel's ineffectiveness should not curtail this Court's review of trial counsel's ineffectiveness.

All other facts and allegations in this petition are incorporated into the below facts relating to ineffectiveness.

I. Exhausted Ineffective Assistance of Counsel Issues

A. DEFICIENT PERFORMANCE

Miller's trial attorney, Refik Eler, testified at the post-conviction evidentiary to his opinion that he was "pretty fortunate" that the public defender's office, which had originally represented Miller, had done a substantial amount of the mitigation investigation (PCT. 1490).

The public defender's office did in fact retain Dr. Krop (PCT. 1491). Indeed, the public defender had outlined for Dr. Krop some areas of potential investigation and procured numerous records of Miller for him (PCT. 1695). Dr. Krop had written a letter back to the public defender requesting additional interviews with family members and offering a very preliminary opinion on certain mitigation. PC Exhibit 1/A at Vol. II, Section 8.[9] Dr. Krop did speak with some lay witnesses in the family, and an initial contact had been made with Debra Lee, a counselor who treated Miller in 1994, by the public defender (PCT. 1604-05). Unfortunately, that was all the investigation that ever took place in this case.

Eler failed to complete the investigation, speak with lay

[9] In his letter to Chipperfield, Dr. Krop stated, "Should the State continue to seek the death penalty in this case, I would need to see Mr. Miller again and review additional materials when they are available. I would also like to interview family members and would appreciate your assistance in coordinating these interviews." PC Exhibit 1/A at Vol. II, Section 8.

witnesses, or confer with his mental health expert prior to trial. Dr. Krop's records reflected only a one-half hour consultation on July 6, 1998, during Miller's trial (PCT. 1698).[10] Dr. Krop may have spoken to Eler for a few additional minutes before he testified (PCT. 1698). Dr. Krop did not recall speaking to Eler about possible mitigation (PCT. 1698).

Had Eler conducted a reasonable investigation of his own by effectively completing the preparation of the penalty phase, he would have discovered vital mitigating evidence. Instead, because of his deficient performance, Eler failed to present evidence relating to the psychological trauma suffered by Miller as a result of the abuses he suffered, though such evidence could have been developed through a mental health professional (PCT. 1503). Eler acknowledged that this evidence would have been important for the jury and trial judge to hear (PCT. 1504). Eler's reason for not presenting this testimony was not strategic–it was because he did not think that Dr. Krop told him that this was a feature he needed to bring out (PCT. 1504).

Eler also did not ask Dr. Krop to testify about the various psychological and emotional ramifications of a substance abuse disorder and the long term effect it would have had on Miller and

---

[10] Dr. Krop testified in Miller's trial on July 7, 1998 (PCT. 1698).

how such long-term addictions would have affected Miller's judgment on the night of the homicide (PCT. 1506). Eler only focused on Miller's drug/alcohol usage on the night of the incident. Eler did not try to present any evidence which would have established Miller's attempts at treatment and the systemic failures of those treatment programs (PCT. 1509).

Eler first claimed that he did not present the aforementioned testimony because it would have been detrimental to Miller (PCT. 1521). Yet, Eler could not offer a single negative point that Dr. Krop could have been cross-examined on if he had testified about what the alcohol and drug problems meant to Miller (PCT. 1521). Eler finally acknowledged that, "I'm not sure that would have been a bad thing" to have had Dr. Krop testify in this area (PCT. 1521).

Moreover, no medical records relating to Miller's mental health were presented to the jury (PCT. 1509). Eler agreed that the records contained much relevant mitigation evidence (PCT. 1511). However, Eler unreasonably believed that showing a defendant has had previous involuntary hospitalizations due to mental health issues was detrimental (PCT. 1514). Eler thought evidence of mental illness which required hospitalization would undercut an argument that Miller was a good candidate for rehabilitation in prison (PCT. 1514). In Eler's opinion, the fact that a defendant had been previously committed to a mental

institution was something he would never want a jury to hear (PCT. 1515). When asked why a diagnosis of alcohol dependence with psychological dependence, cocaine dependence with psychological dependence, cannabis abuse, and schizoid personality disorder three or four months before the murder occurred was not relevant mitigation and how that evidence would open the door to testimony that Miller pushed someone in a mental hospital, Eler only responded that Dr. Krop considered these things (PCT. 1516).

Eler further acknowledged that he did not know if Dr. Krop evaluated Miller to determine the level and effect of the trauma he suffered as a result of the death of his sibling and cousin (PCT. 1516). Eler did not present any testimony by Dr. Krop as to this issue; he only presented the fact that a sister and neighbor had died (PCT. 1516). Eler could not point to any bad things that would have come out had Dr. Krop testified in this area (PCT. 1522). Eler then claimed he did not present this testimony because he deferred to Dr. Krop (PCT. 1522). Eler admitted that the lawyer asks the questions in court, not the doctor (PCT. 1522).

Eler also did not have Dr. Krop testify as to the psychological impact childhood abuse and a dysfunctional family had on Miller (PCT. 1518). Eler chose not to follow up on any of the psychological testimony, despite having it available to him (PCT. 1519-20). While believing such evidence was detrimental, Eler did

choose to present some very limited factual testimony about alcohol usage and childhood abuse only from family members.

Finally, Eler testified that he did not present evidence of mental mitigation at the time of the instant homicide (PCT. 1524). Eler did not look at the psychological reports because he believed that Dr. Krop had, so he did not present this evidence to the jury (PCT. 1525).

B. PREJUDICE

Miller was prejudiced by trial counsel's unreasonably deficient performance during the penalty phase, as evidenced by the existence of significant mitigation that could have and should have been uncovered. This evidence reflects that, but for trial counsel's deficiencies at the penalty phase, there is a reasonable probability of a different result in Miller's case.

During his post-conviction evidentiary hearing and since, significant mitigation evidence has been uncovered that would have been presented by any reasonable trial counsel. For instance, Debra Lee is a substance abuse counselor and social worker in Charlotte, North Carolina (PCT. 1586). She works for the Salisbury VA Medical Center (PCT. 1587). In 1994, she worked as an outreach counselor for homeless and chronically mentally ill veterans with the goal of helping them to gain access to needed health-care services (PCT. 1587). The VA provided funding for outreach

activities to homeless shelters, camps, bridges, wherever homeless people congregate for the purpose of interviewing people in order to conduct an assessment that will lead to finding programs to assist them with health-care needs. This includes treatment for medical needs, substance abuse, and psychiatric treatment (PCT. 1588).

Lee testified that she worked with Miller for an 18 month period, beginning in 1994, in North Carolina (PCT. 1580). She met Miller in a day shelter and helped him secure treatment for substance abuse and alcoholism (PCT. 1589). During her contact with Miller they spoke at length about his family history, including his father's alcoholism, physical and sexual abuse, his witnessing the rape of both of his sisters, and the eventual suicide of his sister and cousin (PCT. 1589). Miller would become very upset when talking of these things (PCT. 1589). It took almost a year before Miller agreed to treatment, which is not unusual among the chronically homeless (PCT. 1590).

Miller eventually agreed to be evaluated by a psychiatrist and medical doctors (PCT. 1590). Initially, outpatient treatment was agreed upon for Miller due to some concerns about his level of commitment to treatment (PCT. 1590). During this treatment Miller had difficulty maintaining sobriety (PCT. 1591). After Miller demonstrated a commitment to treatment, the decision was made to

switch to inpatient treatment (PCT. 1597). In the fall of 1996, Miller entered a 30 day inpatient treatment program (PCT. 1591, 1596)

Miller entered into a substance abuse unit (PCT. 1591). During treatment Lee characterized Miller as quiet, with a tendency to isolate himself (PCT. 1592). Miller was depressed and very paranoid about what would happen to him in the VA hospital (PCT. 1592). Miller had a previous suicide attempt, so his self-isolation was cause for concern (PCT. 1596). He had some problems with groups in the beginning due to the pressure to open up in these settings, which led to increased depression (PCT. 1600). In response to his increased depression, a program of more intensive one-on-one therapy was begun in part for a concern that Miller could hurt himself (PCT. 1597). At one point there was some concern that Miller needed to be in an acute psychiatric unit, but the decision was eventually made to keep him at the substance abuse unit (PCT. 1597).

Miller was diagnosed with schizoid personality disorder on November 22, 1996, as a result of his abusive childhood, his witnessing of the rapes of his sisters, his own sexual abuse, and the suicide of his sister (PCT. 1599).[11] During her entire contact

[11] The instant offenses occurred on March 17, 1997, four (continued...)

with Miller, Lee did not see him act out (PCT. 1592). Miller shared his previous legal problems with Lee (PCT. 1593). Miller told her that he had been in an argument with someone at a rooming house and that he had shot the person (PCT. 1612). He served seven years in prison and was released not too long before he sought help from Lee (PCT. 1612, 1621).

Lee found Miller to be very remorseful and extremely saddened by his actions (PCT. 1593). She believed he was plagued by what had happened and he often expressed that he should be punished for it (PCT. 1612).

Miller had a history of abusing many substances, including hallucinogens such as Valium and Quaaludes, cocaine, marijuana, crack cocaine, and significant amounts of alcohol (PCT. 1593).

Lee was aware that Miller had a family history of mental illness, including schizophrenia (PCT. 1595). There was a question of concern as to whether Miller also suffered from this (PCT. 1595).

Miller was discharged on his 30th day, November 27, 1996, with a referral to return to the mission he had been staying at prior to the inpatient program and to continue out-patient psychological counseling (PCT. 1601). Miller wanted to go to a half-way house,

---

[11](...continued)
months later (PCT. 1601).

but that did not happen because there were not any beds available (PCT. 1602). Miller returned to the same environment he had been in prior to treatment (PCT. 1602). A short time later he left town (PCT. 1602).

Lee stated that a person with a discharge plan such as that given to Miller, coupled with his history, has less than a three percent chance of success (PCT. 1602). It is now well-recognized that persons who return to the same environment do not fare well (PCT. 1603). Today, Miller would have been placed in an aftercare program with housing available for up to two years and other support (PCT. 1603). Miller's only stable housing as an adult occurred during the military or when he was incarcerated (PCT. 1603). The services provided to homeless persons, especially those such as Miller, have evolved greatly since 1994-1996 (PCT. 1607). Now, there are supportive services in the community that just did not exist in 1996 (PCT. 1608). It would not be realistic to have expected Miller to succeed once he was discharged in 1996 (PCT. 1622).

Lee was contacted by public defender Alan Chipperfield in this case (PCT. 1604). It was her understanding that he represented Miller (PCT. 1604). She spoke with him and his investigator (PCT. 1605). She was not contacted by anyone else until a week before this hearing, when she was asked to testify (PCT. 1605). She had

never heard the name Refik Eler (PCT. 1605).

Dr. Joseph Chong Sang Wu is a physician at the University of California, Irvin College of Medicine (PCT. 1624). He is the clinical director of the Brain Imaging Center and associate professor in the Department of Psychiatry (PCT. 1624). The primary focus of the Brain Imaging Center is the administration and interpretation of PET scans and PET scan studies of neuropsychiatric disorders such as schizophrenia, Alzheimer's dementia, Parkinson's disease, and traumatic brain injury (PCT. 1624). Only 20-30 centers nationwide utilize PET scans for neuropsychiatric purposes (PCT. 1625). Dr. Wu is a preeminent researcher in studies of PET scans involving cocaine addiction, depression, and schizophrenia (PCT. 1626). He conducts pharmaceutical studies to test the effectiveness of antipsychotic medications for treatment as well as treatments for cocaine additions and depression (PCT. 1627).

According to Dr. Wu, an MRI scan looks at the brain structure and determines if the shape of the brain structure is altered in any way (PCT. 1630). A PET scan looks at the function of the brain. You can have a portion of the brain that is structurally intact but does not function (PCT. 1630). An MRI scan of a cadaver would show a perfectly normal brain shape, an intact brain, but a PET scan would show no function (PCT. 1631). The PET scan shows the

level of brain function as measured by sugar metabolism (PCT. 1632). The more active a particular area of the brain is the more sugar that part of the brain consumes (PCT. 1633). These areas of activity, or sugar metabolization, are color-coded on the PET scan films - high activity areas are colored with hot colors such as red; moderate areas of metabolism with yellow or green, and low metabolism areas with blue (PCT. 1633). The mechanics of how PET scans are obtained has been in use over 20 years and is a science that is generally accepted in the scientific community (PCT. 1633-36).

PET scans help to corroborate neuropsychological test data (PCT. 1637). Dr. Wu was provided with the results of psychological tests that Dr. Krop performed on Miller (PCT. 1638). Dr. Krop diagnosed frontal lobe problems (PCT. 1638). Dr. Wu's actual evaluations of Miller corroborate that conclusion (PCT. 1638). The PET scan of Miller showed a pattern of abnormal decrease in frontal lobe activity, especially in the orbital frontal lobe area and in the relative pattern of activity of the frontal lobe relative to the occipital lobe (PCT. 1639). Miller's scan looked more like that of a schizophrenic, also in line with Dr. Krop's diagnosis of schizophrenic spectrum disorder (PCT. 1640). Dr. Wu's findings were that Miller showed a significant decrease in the functioning of the frontal cortex of the brain, especially the orbital frontal

cortex, a pattern of metabolic hyperfrontality with a decrease in the frontal occipital gradient, and metabolic decreases in the subcortical area (PCT. 1642). This was an abnormal brain with frontal lobe deficit (PCT. 1642). This determination is consistent with a schizophrenia spectrum disorder as identified by Dr. Krop and documented in the records of Miller (PCT. 1643).

Schizophrenic spectrum disorder is characterized by someone who has symptoms that are schizophrenia-like, but who does not necessarily meet the full-blown diagnosis under the DSM-IV-R for schizophrenia (PCT. 1644). This diagnosis would include behaviors such as being withdrawn, odd behaviors, paranoia, and poor social functioning (PCT. 1644-45). Miller's family history is also highly indicative of schizophrenia (PCT. 1645). Miller reported some auditory hallucinations, just not persistent enough for a full-blown diagnosis of schizophrenia (PCT. 1645).

Dr. Wu further testified that there is a correlation between childhood abuse and neurobiological vulnerability (PCT. 1646). If someone who has some sort of frontal lobe abnormality is subject to childhood abuse, the likelihood of aggression increases (PCT. 1646). Miller is an example of someone with a neurobiological vulnerability (PCT. 1647). There is an increased likelihood of aggressive impulses, loss of judgment, and an inhibition of improper impulses in someone with frontal lobe lesions, such as

Miller (PCT. 1647). The instant PET scan was done in 2002 (PCT. 1649). The homicide occurred in 1997 (PCT. 1649). Dr. Wu did not believe there was any change in Miller's brain between 1997 and 2002 (PCT. 1649).

Dr. Harry Krop, a psychologist and the director of Community Behavioral Services, focuses his practice on forensic psychiatry (PCT. 1691). Dr. Krop testified that he was retained as a mental health expert in this case by public defender Alan Chipperfield in 1997 (PCT. 1693). Chipperfield requested that Dr. Krop review competency and sanity as related to Miller and to do an analysis of his drug/alcohol intoxication and mental health problems on the day of the homicide (PCT. 1694). Chipperfield also suggested in a letter to Dr. Krop possible mitigating factors that he felt needed to be explored in the area of remorse, family situation, and prison record (PCT. 1695). Dr. Krop was sent some information by Chipperfield after the public defender investigator had interviewed some family members (PCT. 1695). Chipperfield also provided Dr. Krop with a list of records he felt were important, which included school records, military records, prison classification records, VA records, and psychiatric records (PCT. 1695). Chipperfield provided a copy of Miller's confession, as well as other information relating to the homicide (PCT. 1695). Dr. Krop did not have the benefit of a PET scan in 1997 (PCT. 1696).

Dr. Krop had since received a copy of Dr. Wu's report and a report from a Dr. Holder (PCT. 1697). He was familiar with Dr. Wu's findings, which were consistent with the abnormalities that Dr. Krop had detected in his neuropsychological testing of Miller in 1997 (PCT. 1696-97). Dr. Krop's 1997 diagnosis was also consistent with earlier diagnoses (PCT. 1697).

Dr. Krop believed he provided a report of his findings, which included concerns about the dysfunctional family, cognitive defects in the frontal lobe, and the results of psychological testing to either Chipperfield or Eler (PCT. 1700). Dr. Krop did not recall having any discussion with Eler wherein he advised him to refrain from presenting certain areas of mitigation (PCT. 1700). He did not create a situation where Eler would have deferred to his opinion about what should or should not be presented (PCT. 1700-01).

Dr. Krop stated that in 1997 he had clearly identified a long-standing history of drug and alcohol abuse by Miller (PCT. 1701). Miller's substance abuse contributed to his psychiatric problems, led to depression, and ultimately led to hospitalization (PCT. 1702). Dr. Krop believed that these facts would support a mitigating factor that has been utilized in other cases he has been involved in (PCT. 1702). Dr. Krop felt that he had enough information in 1997 that he could have testified as to the

psychological effects the addictions had on Miller (PCT. 1702-03). Dr. Krop could have testified as to how the severe personality disorder Miller suffered interacted with his addictions and cognitive defects. He could have testified as to how these factors impacted on Miller's judgment making ability, impulse control, and so forth had he been been asked the appropriate questions by Eler (PCT. 1703).

Dr. Krop could have also testified about adjustment disorders that Miller had faced which led to a life of homelessness (PCT. 1704). The combination of mental health issues Miller faced would not usually be conducive to the seeking of voluntary treatment (PCT. 1704). It would not be likely that Miller, given his diagnosis, would seek out-patient treatment on his own following his discharge from the 30 day treatment program unless he had significant support and efforts expended by others to ensure he continued treatment (PCT. 1714).

It was Dr. Krop's opinion that the 30-day treatment program that Miller entered into shortly before the instant offense was not sufficient to address his problems (PCT. 1713). Individuals who suffer from the long-standing mental health issues that Miller suffers from usually require long and extensive out-patient treatment, which would necessarily include medication and psychotherapy on an on-going basis (PCT. 1713).

Dr. Krop testified at the evidentiary hearing that Miller reported to him significant emotional deprivation in his childhood and significant physical abuse by an alcoholic father (PCT. 1705). Miller believed his father was capable of killing his mother (PCT. 1705). Her victimization caused her to be a very negative person who verbally and mentally abused Miller (PCT. 1706). Dr. Krop interviewed three family members, including Mrs. Miller, for the purpose of developing additional information about the circumstances of Miller's youth (PCT. 1706). Dr. Krop was surprised that he was not asked by Eler to address his findings in these areas in his testimony, especially after he had brought this area of mitigation to the attention of Chipperfield in his initial letter to defense counsel (PCT. 1707).

Dr. Krop testified that Miller also spoke with him about the suicide of his sister and cousin (PCT. 1707). The death of his sister was especially traumatic because Miller was closest to her (PCT. 1708).

Additionally, Miller talked with Dr. Krop about witnessing the rape of his sisters by two male cousins (PCT. 1708). When Miller told his father what he had witnessed, he was accused of lying and was beaten (PCT. 1708).

According to Dr. Krop, medical records reflected that Miller received little out-patient mental health treatment (PCT. 1709).

Miller did receive an extensive evaluation at the Dorothea Dix Hospital when he was in acute crisis in 1983 and there were medical records from 1986, the time of the North Carolina second-degree murder (PCT. 1709). All medical records Dr. Krop reviewed substantiated a long-standing history of mental health problems (PCT. 1709).

Miller was court-ordered into the Dorothea Dix Hospital in 1983 (PCT. 1710). The psychiatric reports diagnosed Miller with adjustment disorder, alcohol abuse, and mixed personality disorder with avoidance, schizoid, and borderline features (PCT. 1711). The evaluator in 1983 directed the North Carolina trial court to potentially mitigating factors present in that episode, which include the history of alcohol abuse, Miller's intoxication at the time of that offense, and a history of emotional problems associated with an underlying personality disorder (PCT. 1712). These findings were consistent with Dr. Krop's current findings (PCT. 1712).

Dr. Krop felt that Miller's admission to a VA hospital in 1996 several months before the instant homicide was significant in confirming the continuing mental health difficulties that Miller had suffered from for years (PCT. 1710).

Dr. Krop testified at the penalty phase of Miller's trial (PCT. 1725). He was able to provide only a cursory explanation for

the basis of his opinion under the questions proposed to him by Eler (PCT. 1725). Dr. Krop opined that a cursory reference to a particular record is significantly different from being asked to describe the details of the record that is pertinent to the diagnosis or testimony (PCT. 1726). It is important to get into the substance of the material contained in the records and to develop significant facts which support his opinion and give the jury the proper insight into the defendant (PCT. 1726). Dr. Krop's testimony at the evidentiary hearing was significantly different from that at trial (PCT. 1726). For example, at trial Dr. Krop was not asked any questions about Miller's psychiatric records, anything which related to the 1983 offense, or Miller's perceptions of the dysfunctional family environment and its effect on him (PCT. 1726).

While Dr. Krop did not find that Miller suffered from a "major mental illness", he explained that this is a term of art (PCT. 1727). Dr. Krop firmly believed that Miller has serious psychological problems and serious emotional problems and those were operating at the time of the instant homicide in 1997 (PCT. 1727).

C. CONCLUSION

Miller was prejudiced as a result of his trial counsel's failure to adequately investigate and prepare. Miller's jury heard

only a fraction of the available mitigating evidence regarding Miller's upbringing, mental illness, and brain damage. Even so, his jury rendered a death verdict by the barest of margins: 7 to 5. Had Miller's jury been presented with the poignant, powerful mitigation available at trial, there is a reasonable probability that the outcome of Miller's sentencing proceedings would have been different, and at least one juror would have been compelled to recommend life imprisonment over death.

The Florida Supreme Court's decision rejecting Miller's ineffectiveness claim on state post-conviction review was contrary to or at a minimum involved an unreasonable application of clearly established federal law, as well as an unreasonable determination of the facts. *See* 28 U.S.C. 2254(d). The Florida Supreme Court's justification for denying Miller's claim in state court–that "counsel was aware of Miller's childhood, his substance abuse problems, and his mental health issues"–fundamentally misapplies the holdings of the cases it cites. *See, e.g., Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). Trial counsel being put on notice of red flags in a defendant's history is not an excuse for counsel's failure to follow up on those red flags–quite the opposite. Similarly, it is counsel's duty to bring investigative leads to their mental health expert–not the other way around. Finally, counsel is not permitted to ignore a wealth of

mitigating evidence simply because they fear encountering information that could be seen as a "double-edged sword." *See, e.g., Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362.

II. Analysis of Unexhausted Ineffective Assistance of Counsel Issues Pursuant to *Martinez v. Ryan*

As will be explored further in Miller's memorandum of law, state prisoner may obtain federal habeas corpus review of a procedurally defaulted trial counsel ineffectiveness claim by showing cause for the default and prejudice from a violation of federal law. Cause for the default may be established by demonstrating that post-conviction counsel was ineffective under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Martinez v. Ryan*, 566 U.S. 1 (2012).

Particularly in a capital case, post-conviction counsel's ineffectiveness in failing to develop a sufficient record in state court should not curtail federal review. Miller has valid arguments to make that counsel's ineffective failure to develop the record should not preclude a federal evidentiary hearing or expansion of the record. *See Martinez*, 566 U.S. 1; *Trevino*, 569 U.S. 413; *Christeson*, 135 S. Ct. 891; *Tamayo-Reyes*, 504 U.S. 1.

Here, Miller's ineffective assistance of trial counsel claim is not procedurally defaulted because it was presented to the state

courts and decided by the Florida Supreme Court on the merits. To the extent that Miller's initial collateral review counsel failed to adequately develop the record in support of this claim, that ineffectiveness should not confine this Court's review to the state-court record that resulted from collateral counsel's ineffectiveness. Instead, the court should consider the additional evidence below in analyzing Miller's ineffective assistance of trial counsel claim. To the extent Respondent may raise procedural defenses to specific aspects of Miller's ineffectiveness claim, Miller will respond to such defenses when they are raised with specificity by Respondent.

A. FAMILY HISTORY

Trial counsel ineffectively failed to present, and post-conviction counsel ineffectively failed to develop the record regarding, Miller's family history.

One of the greatest predictors of an individual's likelihood to develop schizophrenia is a family history of the disease. Miller's sister, Valnice, suffered from paranoid schizophrenia, possible schizotypal personality disorder, and her condition manifested with marked similarities to Miller's.

Valnice had auditory and visual hallucinations, showed looseness of associations, disorganized and concrete thinking, sleep problems, fearfulness, and delusions. She avoided eye

contact. She had a history of psychotic episodes and hospitalizations. She suffered from religious preoccupations and delusions. She believed people toward whom she had misbehaved in the distant past were going to kill or assault her.

Valnice could only perform menial jobs, but was unable to hold down any job for long. Although she lived with her mother, Valnice considered incarceration preferable to living with her mother, so she attempted to steal from her mother, stating "I wanted to go to jail to get some rest for my nerves."

Additionally, Valnice's medical records indicate that her maternal aunt and great-aunt also had psychiatric conditions. Her medical records from 1982 indicate a dysfunctional family history, and state that her brother David is described by the family as "crazy" and "different." Other medical records indicate that Yvonne Miller is "a very hostile woman" who is "very superficial" and "berates" her children.

B. DR. GOLDEN

Collateral counsel also failed to present the testimony of Dr. Charles Golden, Ph.D., at the post-conviction evidentiary hearing. Dr. Golden interviewed Miller on January 23, 2002, reviewed prior records, and prepared a report of his findings on March 20, 2003. Miller's post-conviction attorneys listed Dr. Golden as a witness for Miller's evidentiary hearing. Yet, inexplicably, he was never

called to testify; nor was his report ever introduced as evidence.

Had Miller's counsel called Dr. Golden or introduced his report, the court would have learned that Miller "sees the world as a hostile and dangerous place which he has no idea how to handle." Golden Report at 4. He is anxious, constricted, defensive, and displays "an excessive amount of affective detachment." *Id.* He has "tunnel vision" and does not take in relevant information from his environment. He avoids the complexities of stimuli around him. Individuals with this condition "often have high levels of fear and anxiety and will turn to drugs and alcohol as self-treatment." *Id.* (internal quotations omitted).

Dr. Golden's results are consistent with schizoid and schizophrenic disorders, and suggest that Miller is "unable to deal with emotional stimuli and may be easily overwhelmed." *Id.* He removes himself from group situations because they are unrewarding and may misinterpret the social environment. Miller cannot understand how or why other people behave the way they do. He "therefore has a detachment from the real world and tends to engage in a world of fantasy." *Id.*

Miller suffers from significant impairment in his ability to perceive and think, particularly with regard to analytic skills moderated by the anterior areas of the brain. *Id.* at 5. These impairments are particularly pronounced in situations where stress

and emotional stimuli are involved. He has poor reality ties and he "is unable to perceive the world as other people do, leading to multiple misunderstandings with others." *Id.* He has significant distortion in his way of responding to situations. *Id.* He obsesses over processing information and focuses on small or irrelevant details "rather than seeing the whole picture, leading him to inappropriate conclusions." *Id.*

Miller's impaired perception of reality extends to his self-image. His perception of himself is, like his other perceptions, "based as much on imaginary as real experiences." *Id.* This leads to negative feelings of self-worth, immaturity, and limited self-awareness, and it serves negatively in decision-making and problem-solving activity. *Id.* It is difficult for Miller to deal with everyday requirements, and he feels overwhelmed by interpersonal demands. Consistent with these findings, Miller shows substantial indications of depression. *Id.*

Dr. Golden's review of prior mental health evaluations indicated that Miller has a "poor self-concept, lability, and dysphoria." *Id.* at 6. He worries excessively, is introspective, withdrawn, and hypersensitive. He struggles to control his anger and has a lack of adequate defenses for normal interpersonal interactions. *Id.* All of this is consistent with a diagnosis of schizophrenia and schizoid disorder. *Id.* at 6-7. There is

evidence that Miller was dissociating at the time he committed the prior murder. *Id.* at 7.

Prior records indicate that Miller suffers from significant brain damage, both organic and exacerbated. His brain dysfunction is likely lifelong. *Id.* at 7. His organic brain damage caused emotional disorders in conjunction with his childhood upbringing. *Id.* Miller's adult life centered around drug and alcohol abuse. His test results indicate a frontal lobe brain injury. He cannot process information from his environment in an accurate or conventional manner. *Id.* Miller's idiosyncratic perceptions of the environment result in odd and eccentric behavior, and this is exacerbated by his addictions to drugs and alcohol. *Id.*

Miller is substantially impaired in both cognitive and social skills. His "deficits have caused difficulties in vast areas of his life such as in vocational, social, and interpersonal settings." These findings were validated by the results of a PET scan. *Id.*

C. DR. HERKOV

Clinical psychologist Dr. Herkov was retained by CCRC-N on February 1, 2002, and he conducted an interview with Miller as far as record review and attorney consultation throughout 2002. Nevertheless, he was never presented as a witness at Miller's post-conviction evidentiary hearing, and no report regarding his

findings was ever introduced. Undersigned counsel consulted with Dr. Herkov, as well as Miller's post-conviction legal defense team. Neither Dr. Herkov nor Miller's post-conviction defense team can think of a reason why Dr. Herkov was not called as a witness at Miller's evidentiary hearing.

D. DR. SATTERFIELD

Undersigned counsel have spoken with Dr. Arthur Satterfield, M.D., who acted as Miller's psychiatrist during his 1996 inpatient treatment. Dr. Satterfield had never been contacted by any of Miller's prior counsel. Dr. Satterfield stated that at the time of Miller's inpatient treatment, he was not aware of Miller's family history of schizophrenia or history of auditory hallucinations and delusions. Dr. Satterfield stated that, had he been aware of these details, he would likely have diagnosed Miller with full-blown schizophrenia.

E. DR. REGNIER

Undersigned counsel's own retained clinical psychologist, Dr. Eddy Regnier, M.S.W., M.A., Ph.D., has conducted an evaluation of Miller and independent record review, and his findings are consistent with other evidence in Miller's case demonstrating that Miller suffers from schizophrenia. All testing methods and conclusions formulated by Dr. Regnier were available prior to Miller's trial and post-conviction proceedings. There is no

evidence of malingering.

Miller has a family history of schizophrenia, including his sister, Valnice, who was diagnosed with the disease prior to taking her own life. Anecdotes from Miller's family members suggest Miller's father was also schizophrenic, suffering from religious delusions and institutionalized after disappearing, nude, into a local forest with only a bible. Another of Miller's relatives was institutionalized for decades after drowning his children in a well as a result of hearing the voice of God tell him to do so. Yet another of Miller's family members is currently incarcerated, and was found incompetent during his appeals process due to severe delusions. Family history of schizophrenia is considered the strongest predictor that an individual will himself develop the disease.

Additionally, Miller suffered from numerous adverse childhood experiences ("ACEs"), which are highly correlated with the development of psychiatric illness, including schizoid and schizophrenic diseases. Miller's ACEs include his parents' severe mental health problems, substance abuse issues, and extreme violence toward their children. Miller's history, both anecdotal and record-based, indicates physical and emotional abuse from both parents, alternated with neglect. Love was not expressed, nor holidays celebrated. Miller witnessed the rape of his sister, and

may have been sexually abused himself. Beatings were common, occurring at least weekly, and the children were forced to strip naked prior to beatings. The children were beaten all over their bodies, including on their genitals. Sometimes, the children were tied down for beatings, or the beatings were coupled with death threats. Miller's parents threatened them with axes and pointed guns at him. Miller's safe place became the woods — he would hide there for hours, alone. Miller's father doled out beatings with sticks, electrical cords, and even a crowbar.

Consistent with Miller's family history is his troubled academic and employment history. As a child, Miller was shuffled among approximately five schools. He was dismissed from one elementary school due to his low academic performance. Another time, he was forced to change schools due to racial bussing. Still another time, he was transferred from one school to another due to his race. And, another time, he was sent to an all-white school where he failed to thrive. After school, Miller joined the Navy, but received an administrative discharge for being a burden to the command. After his discharge, he was only able to find menial jobs such as dishwashing or putting rebar into concrete. He could not financially support himself, and became transient.

Miller is socially withdrawn and unable to make sustained eye contact. He is aloof, behaviorally introversive, and shy. He

speaks softly, and reports voluntarily isolating himself in his cell for extended periods of time. He displayed an odd demeanor with grandiose delusions of God taking up residence in his head. He reported auditory hallucinations beginning when he was very young, and was religiously preoccupied. He appeared depressed, but denied it. His affect was flat and his judgment seemed poor. He is easily emotionally fatigued, including by normal environmental stimuli. He suffers from cognitive and perceptual distortions.

Miller reported committing the murder in a blackout state (fugue) after drinking and using multiple drugs including crack cocaine. He has a long substance abuse history including crack cocaine, alcohol, Quaaludes, Valium, and Thorazine. Miller's substance abuse appears to be a form of self-medication – drugs and alcohol act as antianxiety agents. He gravitated toward anything sedating, which is consistent with individuals suffering from post-traumatic stress disorder (PTSD). It is also common among individuals with schizophrenia, whose senses are often overstimulated by everyday experiences, such as the feeling of textures, temperature, light, sound, and smells.

Miller suffers from religious delusions and hallucinations, which began long prior to the crime. Miller reported hearing voices as a child, and gave detailed examples from as far back as the early 1980s.

Daily life for Miller is uneventful, with long periods of passivity and solitude. He struggles with feelings of meaninglessness. He appears indifferent to social surroundings and avoids introspection, but this does not mean he does not have deep feelings – only that he is unable to manage his emotions and is disengaged from the subtleties of emotional life. His thought processes are unfocused, especially in relation to the more intimate aspects of social and personal relations. He is guarded and tries to prevent negative thoughts. He is self-conscious and struggles to express warmth. He constantly, but quietly, worries.

Miller functions best in institutional settings. He prefers simple, repetitive, and dependent life patterns in which he can avoid self-assertion, abdicate autonomous responsibilities, and ignore normal social relationships and conventional aspirations. He is disengaged from social life and uninterested in the rewards of an active social life. Miller is caught in a vicious cycle where, by significantly restricting his social and emotional involvements, he has perpetuated preexisting feelings of depression and isolation.

Miller exhibits odd and eccentric behaviors, including with food. Typically a model inmate, Miller has occasionally been written up for episodes in which he becomes paranoid and believes something to be wrong with his food. Miller simply describes these

times as not acting like himself. His self-esteem is low. He is self-belittling and believes himself to be weak and ineffectual. At the same time, he resents what he believes are unreasonable expectations others have placed upon him. This is consistent with schizophrenia – he cannot function in everyday situations and social interactions, and is baffled by the concept that this comes naturally for most people.

The psychological evaluation indicates that Miller may have been insane at the time of his crime, and was likely incompetent during the period leading up to his trial and throughout his appeals process.[12] Miller experiences periods of altered mental status characterized by delusions, religious preoccupations, and auditory hallucinations that impact his capacity to understand the consequences of his actions. He appears, by reason of mental

[12] Dr. Krop evaluated Miller in October and November of 1997, and made a cursory competency finding without full record review. Despite the numerous and continuous red flags detailed above that Miller was not competent to stand trial, no further inquiry was conducted regarding his competency. If trial counsel had adequately investigated, he would have seen that Miller was not competent to stand trial or questioned his competency enough to require an evaluation. Miller had voluminous medical records diagnosing him with multiple psychiatric and neuropsychiatric disorders (most if which not all predate his crime and trial). Additionally, Miller's family history was rife with biological risk factors for schizophrenia and psychosis. Further, counsel was on notice that Miller had a longstanding drug and alcohol history, and that drugs impact brain chemistry long after physical withdrawal is complete.

infirmity, disease, or defect, unable to understand the nature and quality of his acts and their consequences. His failure to meaningfully participate in his own defense is a response to delusional ideas and the result of auditory hallucinations.

As is typical in schizophrenia and schizotypal disorders, Miller suffers from a language disorder. He, like many individuals with schizophrenia, often does not want to communicate. When forced to do so, Miller does not communicate well. It is likely that Miller would have acquiesced to what his attorneys wanted him to do, simply to end the interaction and return to his solitude. This tendency would be particularly pronounced under stress. At Miller's best, he is low-functioning, and in many ways present with symptoms appearing similar to a severe form of autism. He is paranoid and withdrawn. The rest of the time, he presents with active schizophrenia and psychosis in the form of delusions and hallucinations.

F. CONCLUSION

Collateral counsel raising an ineffective assistance of counsel claim in an initial-review collateral proceeding is obligated under *Martinez* to provide effective representation within the meaning of *Strickland* in investigating, presenting, and litigating the ineffectiveness of trial counsel. Miller's state post-conviction counsel did not fulfill that obligation, to

Miller's prejudice.

This Court should consider the full record presented in support of this petition in deciding whether Miller's federal constitutional rights were violated by reason of ineffective assistance of counsel. To the extent Respondent raises any procedural defense with respect to specific aspects of Miller's ineffectiveness claim, Miller will respond to such affirmative defenses if and when they are raised.

Exhaustion of Ground I in state courts:

1) **Did you raise Ground I in the Florida Supreme Court on a direct appeal of your conviction?** No.

2) **After your conviction, did you raise Ground I in the state circuit court that sentenced you by filing a motion under Florida Rule of Criminal Procedure 3.850?** Section I of Ground I was raised and presented to the state courts. Collateral counsel failed to present Section II to the state courts.

   a) **If your answer is "yes", then state:**

      i. **Date motion filed:** September 17, 2001, stricken on January 8, 2002. A new 3.851 motion was filed on March 11, 2002, and both parties stipulated that the March 11, 2002 motion related back to October 2, 2001.

      ii. **Whether you received an evidentiary hearing:** Yes.

      iii. **Result:** Denied.

      iv. **Date of Result:** April 22, 2004.

   b) **If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida?** Yes

i. **If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why:** N/A.

ii. **Date appeal filed, result of appeal, date of result:** Notice of appeal filed on or about May 24, 2004. The Florida Supreme Court affirmed the denial of relief. *Miller v. State*, 926 So. 2d 1243 (Fla. 2006), mandate issued April 13, 2006.

3) **Have you raised Ground I in any other petition, application, or motion filed in the state courts of Florida?** No.

GROUND II

MILLER'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN TRIAL COUNSEL WAS INEFFECTIVE UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984) BY FAILING TO OFFER EVIDENCE TO MINIMIZE THE AGGRAVATING FACTOR OF PRIOR VIOLENT FELONY ARISING FROM MILLER'S PRIOR CONVICTION FOR SECOND DEGREE MURDER.

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

In sentencing Miller to death, the trial court paid particular attention to this conviction:

> The defendant's prior conviction for murder is most appalling and has been given great weight. The court cannot imagine a greater aggravating factor unless it pertains to the method of the prior murder or the nature

> of the victim. This second murder by the defendant occurred approximately four years from the date of the defendant's early release from prison after serving a mere seven years of his twenty-five year sentence. The Supreme Court of Florida has previously held that the death sentence is appropriate, not mandatory, but appropriate, in cases wherein one of the aggravating factors proven is the defendant's prior conviction for murder.

(PCR. 374-75) (citations omitted).[13]

Despite having readily available evidence, trial counsel failed to present evidence that would have mitigated or neutralized the weight of the prior violent felony conviction. Records from Dorothea Dix Hospital, where Miller was admitted pursuant to court order for evaluation prior to trial, would have shed light on Miller's mental state as well as the circumstances of the crime (PC Ex. 1/A, Vol. II, Section 4). According to the records, "This is the first Dorothea Dix Hospital admission for this 26 year old, black, single, male patient admitted on court order from Forsyth County for evaluation of his capacity to proceed on current charges of murder. This patient has a history of outpatient treatment at the Reynolds Mental Health Center and a history of one previous hospitalization to that program in 1983."

As to the facts of the crime, the mental health records state:

---

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

> Contacts with the patient's attorney describe this patient's current charges to be related to an incident that occurred at a rooming house where this patient lived. The victim is another resident of the house. Reportedly, the victim and the patient had a brief discussion. He went upstairs to sleep, saw the gun, and reportedly went downstairs and shot the victim. No apparent history of conflict with the victim had been obtained. The patient has previous history of psychiatric treatment with marks across his arms for previous suicide attempts. This patient reportedly called the police from a public phone and walked along the street, stopping a policeman, and saying "I think you're looking for me." The patient was reported to have stated at the time of his arrest that he hoped God would forgive him for shooting him.

(PC Ex. 1/A, Vol. II, Section 4)

While finding Miller competent to proceed to trial despite then-trial counsel's belief that Miller was , the forensic psychiatrist, Dr. Patricio Lara, diagnosed Miller with the following mental illnesses: Axis I - Adjustment disorder with mixed disturbance of emotions and conduct, alcohol abuse by history; Axis II - Personality disorder, mixed, with avoidant schizoid paranoid and borderline features (PC Ex. 1/A, Vol. II, Section 4). As to mitigating factors, Dr. Lara stated:

> If this case proceeds to the second phase for capital sentencing, the mitigating factors are (1) This patient presents history of alcohol intoxication at the time of the commission of his alleged offense and history of emotional problems associated with an underlying personality disorder. These two conditions combined **most probably impaired this patient's ability to appreciate the criminality of his conduct at the time of his alleged offenses and to conform his behavior to the requirements of the law.**

(PC Ex. 1/A, Vol. II, Section 4)(emphasis added). Dr Lara also recommended further treatment:

> Mr. Miller presents evidence of depressive symptoms with anxiety, irritability, and withdrawn features. Hi condition may further effect his abilities to cope with current stressful life situations. We recommend this patient to be considered for psychiatric treatment prior and during the period of his trial in order to assist him in the handling of this particularly difficult situation. We recommend contacts with the local mental health center for this purpose.

(PC Ex. 1/A, Vol. II, Section 4).

While at Dorothea Dix Hospital, Miller was referred by Dr. Lara to the psychology department for psychological testing (PC Ex. 1/A, Vol. II, Section 4). Amongst the findings made by the psychologist were the following:

> Mr. Miller was cooperative with the MMPI and his validity scales suggest that he feels badly, and is admitting to personal and emotional difficulties. Persons with this validity configuration are described as having a poor self-concept, labile, and dysphonic. His clinical scales suggest someone who is an excessive worrier, introspective, withdrawn and hypersensitive. Persons with similar profiles are characterized as ruminative and overideational. Such persons harbor chronic feelings of insecurity, inadequacy and inferiority. Passivity and passive-dependent traits are usually present. Problems are often encountered in situations that demand strength, anger, or originality. These persons exhibit a lack of defense patterns which leaves them nervous around others and causes difficulty in forming interpersonal relationships. This difficulty usually leads to withdrawal, isolation, and introversion. Persons with this profile are also said to have rich fantasy lives, especially about sexual matters. Diagnoses of schizoid personality and schizophrenia are the most common for this profile type. Mr. Miller's MMPI

> also suggest impulsivity, restlessness, and irritability. His projective data is supportive of the MMPI findings, suggesting poor reality ties, introversion, and a desire to minimize environmental contact. Also suggested were evasiveness, defensiveness, and psychological deterioration. Negativism also appears to be present as well as poor impulse controls and hostile acting-out tendencies. Finally, he may tend to withdraw from reality using fantasy to satisfy need which his environment does not meet.

(PC Ex. 1/A, Vol. II, Section 4).

While initially charged with first degree murder, Miller ultimately pled guilty to second degree murder (R. 365). In its sentencing order, the court found as a mitigating circumstance that Mr. Miller was suffering from a mental condition that, while insufficient to constitute a defense, significantly reduced his culpability for the offense (moved into evidence at T. 818-25). Further, the court found as a mitigating circumstance that an early stage of the criminal process, Miller voluntarily acknowledged wrong doing in connection with the offense to a law enforcement officer (moved into evidence at T. 818-25).

Due to trial counsel Eler's failure to explain and mitigate the prior conviction, Miller was significantly prejudiced at trial. Eler acknowledged that he believed the single most important factor in the jury recommendation was the prior North Carolina conviction. This factor was certainly the most important sentencing consideration to the trial judge as reflected in the sentencing

memorandum. If the jury had knowledge of the underlying facts of the conviction and Miller's mental state and conditions, especially the findings of the North Carolina judge that Miller acted with diminished capacity due to his mental illness, it is probable that the sentencing recommendation would have been different. Given that death was recommended by a vote of 7-5, the slimmest of margins, it is more than probable that the same jury would have rendered a life recommendation.

The Florida Supreme Court's decision rejecting Miller's ineffectiveness claim on state post-conviction review was contrary to or at a minimum involved an unreasonable application of clearly established federal law, as well as an unreasonable determination of the facts. *See* 28 U.S.C. 2254(d). The Florida Supreme Court's holding that trial counsel was reasonable in their failure to present evidence challenging the prior violent felony (second degree murder) aggravator because trial counsel wanted to "gloss over" the conviction flies in the face of well-established United States Supreme Court case law. *See, e.g., Rompilla v. Beard*, 545 U.S. 374 (2005). Additionally, it was an unreasonable determination of facts as reflected in the state court record. It was far more harmful for a jury to only hear that Miller had a previous murder conviction, than to hear that Miller, as a product of his mental illness, appeared unable to conform his conduct to

law or appreciate the criminality of his actions at the time. Instead of hearing evidence that would have reinforced the current defense theory that Miller was extremely mentally ill and therefore less culpable, the jury was left with the inaccurate impression that Miller was inherently violent.

All other facts and allegations in this petition are incorporated into Ground II.

Exhaustion of Ground II in state courts:

1) **Did you raise Ground II in the Florida Supreme Court on a direct appeal of your conviction?** No.

2) **After your conviction, did you raise Ground II in the state circuit court that sentenced you by filing a motion under Florida Rule of Criminal Procedure 3.850?** Yes.

   a) **If your answer is "yes", then state:**

      i. **Date motion filed**: September 17, 2001, stricken on January 8, 2002. A new 3.851 motion was filed on March 11, 2002, and both parties stipulated that the March 11, 2002 motion related back to October 2, 2001.

      ii. **Whether you received an evidentiary hearing**: Yes.

      iii. **Result**: Denied.
      iv. **Date of Result**: April 22, 2004.

   b) **If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida?** Yes.

      i. **If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why**: N/A.

      ii. **Date appeal filed, result of appeal, date of**

> **result**: Notice of appeal filed on or about May 24, 2004. The Florida Supreme Court affirmed the denial of relief. *Miller v. State*, 926 So. 2d 1243 (Fla. 2006), mandate issued April 13, 2006.

3) **Have you raised Ground II in any other petition, application, or motion filed in the state courts of Florida?** No.

GROUND III

TRIAL COUNSEL WAS INEFFECTIVE UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984) IN FAILING TO OBJECT TO CLEARLY ERRONEOUS, IMPROPER AND PREJUDICIAL CLOSING ARGUMENT BY THE STATE. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON APPEAL. THIS VIOLATED MILLER'S FEDERAL CONSTITUTIONAL RIGHTS.

During closing arguments at the guilt phase, the prosecutor improperly argued to the jury that this case would have been a double-homicide because Miller would have killed Fullwood but for the actions of a third-party:

> He starts trying to kill Linda Fullwood, and he would have continued to try to kill Linda Fullwood except for Jimmy Hall arriving at the scene.
>
> * * *
>
> I would submit to you that, if Jimmy Hall had not come up when he did come up responding to the cries of Linda Fullwood, from the evidence that you've heard, what do you suppose the defendant would have done?
>
> * * *
>
> From the evidence that you heard, if Jimmy Hall had not come up, what do you suppose the defendant would have done?

> He would have completed that robbery. He would have beaten Linda Fullwood until she had stopped crying out – may very well have killed her in an attempt to silence her – and would have taken that property. He would have completed his robbery.
>
> But I submit to you that, if Jimmy Hall had not responded – frankly it was the courage of Jimmy Hall to respond to the cries for help to go back behind that building to save Linda Fullwood's life.
>
> * * *
>
> Linda Fullwood woke up. He didn't stop at that. He was going to kill her – I submit to you – until Jimmy Hall came up. Then, when Jimmy Hall came up, the defendant fled.
>
> * * *
>
> He had the courage to go back there, and he was the one who saw the defendant and stopped that defendant from his robbery attempt and stopped him from possibly committing a second murder on Linda Fullwood in his attempt to commit his robbery.

(T. 698, 703, 704, 710, 716-17).

The prosecutor also improperly vouched for the credibility of his witness, Jimmy Hall:

> You heard from Jimmy Hall. Now, I'm not here to tell you that Jimmy Hall is the kind of guy that you want to move in next door to you or that you want to date your daughter.
>
> He's a convicted felon, and he admitted that to you. But he's come here, and he's told you the truth.

(T. 716). Whether Hall was telling the truth or not was an ultimate issue solely within the jury's purview and such an argument made by the State was improper.

Finally, during the penalty phase closing, the prosecutor urged the jury to reject as a mitigating factor the positive family relationships that Miller had:

> The defendant didn't care that Albert Floyd had a wife. He didn't care that Albert Floyd had children. He didn't care that Albert Floyd had grandchildren. He didn't care that he had family and friends who loved and cared for him. He didn't care. Now he wants you to care for him. He wants you to recommend a life sentence for him.
>
> * * *
>
> The defendant wants you to only hear that there are people who love and care for the defendant. He wants you to hear and focus on his life, his family, his problems, doesn't really want you to hear about Albert Floyd, that he had a wife, children, grandchildren. Wants you to forget that he was a hard working man who worked to support his family. Doesn't want you to think about the people who loved and cared for Albert Floyd.

(T. 946, 966). Not only was this argument improper as detracting the jurors from their proper function as fact finders relating to aggravating and mitigating circumstances, but also the argument was an improper appeal to the sympathies of the jurors for the victim.

Miller submits that trial counsel's performance fell below an objective standard of reasonableness under *Strickland v. Washington*, 466 U.S. 668 (1984), when he failed to ensure by proper objection that either a mistrial was granted or appellate review would be possible for these repeated instances of prosecutorial misconduct. Moreover, each of the objectionable and prejudicial arguments made by the prosecutor in this case constituted

fundamental error. There is no strategy which would justify the omission of this argument on direct appeal by Miller's appellate counsel. Habeas relief is warranted.

The Florida Supreme Court's decision rejecting Miller's ineffectiveness claim on state post-conviction review was contrary to or at a minimum involved an unreasonable application of clearly established federal law, as well as an unreasonable determination of the facts, particularly when viewed in conjunction with the facts as laid out in Ground II. *See* 28 U.S.C. 2254(d).

All other facts and allegations in this petition are incorporated into Ground III.

Exhaustion of Ground III in state courts:

1) **Did you raise Ground III in the Florida Supreme Court on a direct appeal of your conviction?** No.

2) **After your conviction, did you raise Ground IV in the state circuit court that sentenced you by filing a motion under Florida Rule of Criminal Procedure 3.850?** Yes.

   a) If your answer is "yes", then state:

   i. Date motion filed: September 17, 2001, stricken on January 8, 2002. A new 3.851 motion was filed on March 11, 2002, and both parties stipulated that the March 11, 2002 motion related back to October 2, 2001.

   ii. Whether you received an evidentiary hearing: No.

   iii. Result: Denied.
   iv. Date of Result: April 22, 2004.

b) If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida? Yes.

i. If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why: N/A.

ii. Date appeal filed, result of appeal, date of result: Notice of appeal filed on or about May 24, 2004. The Florida Supreme Court affirmed the denial of relief. *Miller v. State*, 926 So. 2d 1243 (Fla. 2006), mandate issued April 13, 2006.

3) Have you raised Ground III in any other petition, application, or motion filed in the state courts of Florida? Yes. The ineffective assistance of appellate counsel portion of Ground III was raised in a petition for writ of habeas corpus which was filed on March 17, 2005 in the Florida Supreme Court. The petition was denied. *Miller v. State*, 926 So. 2d 1243 (Fla. 2006), mandate issued April 13, 2006.

GROUND IV

MILLER'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE JURY IN THE PENALTY PHASE WAS IMPROPERLY MINIMIZED AND DENIGRATED IN VIOLATION OF *CALDWELL v. MISSISSIPPI*, 472 U.S. 320 (1985).

Throughout Miller's trial, the jury was repeatedly told that its penalty phase determination was merely advisory:

> The law calls them – well, listen to the additional evidence and then the jury will make a recommendation to the judge. Then the judge takes that sentencing recommendation and he has to give it great weight, and then he'll make the final sentencing decision.
>
> * * *
>
> Now, at this point it is important for you to understand that the judge can impose a death sentence no matter what the jury recommends and he can impose a life sentence

> even if the jury recommends a death sentence, but you must also realize this; whatever the jury recommends the judge must give that great weight.
>
> * * *
>
> ...the only proper recommendation is a recommendation of death for you to make to this judge so that this judge has some guidance as to what sentence to impose.
>
> * * *
>
> After hearing such aggravating and mitigating circumstances and the arguments of the attorneys, the jury will then make an advisory sentencing recommendation to the court as to whether David Miller should be sentenced to death or life imprisonment without the possibility of parole.

(T. 5, 126, 127, 968; see also T. 985-90).

By repeatedly advising the jury that their verdict is only advisory and a recommendation, and with the jury being told that the decision as to sentence rests solely with the court, Miller's jury was not adequately and correctly informed as to their role in the Florida sentencing process. The jury instructions suggested that the decision of deciding the appropriateness of a death sentence rests with the court and not them. These instructions minimized the jury's sense of responsibility for determining the appropriateness of a death sentence.

The Florida Supreme Court's decision rejecting Miller's claim of error on post-conviction review was contrary to or at a minimum involved an unreasonable application of clearly established federal

law, as well as an unreasonable determination of the facts. *See* 28 U.S.C. 2254(d).

All other facts and allegations in this petition are incorporated into Ground IV.

Exhaustion of Ground IV in state courts:

1) **Did you raise Ground IV in the Florida Supreme Court on a direct appeal of your conviction?** No.

2) **After your conviction, did you raise Ground IV in the state circuit court that sentenced you by filing a motion under Florida Rule of Criminal Procedure 3.850?** Yes.

   a) **If your answer is "yes", then state:**

      i. **Date motion filed:** September 17, 2001, stricken on January 8, 2002. A new 3.851 motion was filed on March 11, 2002, and both parties stipulated that the March 11, 2002 motion related back to October 2, 2001.

      ii. **Whether you received an evidentiary hearing:** Not on this claim.

      iii. **Result:** Denied.

      iv. **Date of Result:** April 22, 2004.

   b) **If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida?** Yes.

      i. **If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why:** N/A.

      ii. **Date appeal filed, result of appeal, date of result:** Notice of appeal filed on or about May 24, 2004. The Florida Supreme Court affirmed the denial of relief. *Miller v. State*, 926 So. 2d 1243 (Fla. 2006), mandate issued April 13, 2006.

3) Have you raised Ground IV in any other petition, application, or motion filed in the state courts of Florida? No.

GROUND V

MILLER'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE STATE COURT ERRED IN FAILING TO FIND MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.

In the instant case, evidence was presented by Miller that he suffered an abusive home environment during his early childhood. This evidence included the fact that Miller's father was an alcoholic and was physically abusive to his wife and children (T. 839-41, 864-67, 926-27). During one incident of abuse, Miller's father grabbed his mother and choked her (T. 865). She managed to get away from him, but he chased after her (T. 865). Miller's mother escaped after shooting a firearm to keep his father away from her (T. 865). Unfortunately, Miller's father turned his anger toward the children, beating them all with an electrical cord (T. 866).

Other incidents of abuse included Miller's mother being hit with a soda bottle and the children being beaten with belts (T. 841, 865). The children did not have a relationship with their father because he was an alcoholic and emotionally uninvolved with them (T. 864-65).

Additionally, Miller presented evidence that he suffered from

long term drug and alcohol abuse. Miller appeared to be a different person after he returned from the Navy (T. 847, 871-72, 930). His drug and alcohol use changed his personality and made him a different person (T. 847-49, 872-73). Dr. Krop found Miller's primary diagnosis to be alcohol abuse and depression (T. 898-99).

After hearing the testimony concerning childhood abuse as well as drug and alcohol abuse, the trial court rejected each as a mitigating circumstance. With regard to the former, the trial court stated:

> (7) The defendant has an abusive childhood and the defendant's father was an alcoholic.
>
> While these two mitigating factors were listed separately by defendant they shall be considered as one by the court since they are so related.
>
> Defendant's mother, brother and sister all testified regarding defendant's early childhood when the father was still in the home. The father apparently did abuse alcohol and on a few occasions he was abusive primarily to defendant's mother and sometimes to the children including defendant. The father was out of the home by the time defendant reached his thirteenth birthday. The defendant was raised in the home of his maternal grandparents. Their home was apparently filled with much love and support. However, defendant's brother and sister have been law abiding citizens and have earned professional careers even though they were raised in the same environment as the defendant. Defendant's sister is a law enforcement officer with the city of Durham, North Carolina. Defendant's mother indicated the defendant was bright and creative and that he was regularly taken to church and Sunday School. In fact, the witnesses described a very close, loving and supportive family.

> Although there is some aspects of the defendant's family background that may provide slight mitigation, the totality of the defendant's family background is not mitigating, thus the court has not considered it as such and given it no weight in determining the sentence to be imposed.

(R. 369-70).

With regard to Miller's drug and alcohol abuse, the trial court stated:

> (9) The defendant had an alcohol and/or drug problem.
>
> It was shown that defendant did abuse alcohol and drugs during the course of his adult life. His family tried to offer the defendant assistance. He was asked to leave his mother's home because of his unwillingness to seek help and give up his use of alcohol and drugs. However, while the defendant admitted to using drugs and alcohol on the night of this homicide, there is no convincing evidence that defendant was intoxicated or under the influence of drugs or alcohol at the time of this attempted robbery and murder. It is apparent that the defendant, notwithstanding the offer of help from his family, intentionally chose his life on the street, including the use of drugs and alcohol. Therefore, the court does not consider this as a mitigating factor and shall not give it any weight in the consideration of the sentence to be imposed.

(R. 370-71).

Miller submits that the trial court erroneously failed to consider valid mitigation, resulting in a fundamentally unfair trial and violating his right to due process under the Fourteenth Amendment. As a result, the sentencing process was skewed and his death sentence is unconstitutional. Habeas relief is warranted.

The Florida Supreme Court's decision rejecting Miller's claim

on direct appeal review was contrary to or at a minimum involved an unreasonable application of clearly established federal law, as well as an unreasonable determination of the facts. *See* 28 U.S.C. 2254(d). Where evidence is sufficient to support mitigation, Miller's trial judge violated his federal Constitutional rights by failing to consider that mitigation. *See Parker v. Dugger*, 498 U.S. 308 (1991); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978)(plurality opinion).

To the extent that this Court finds it was reasonable to find no error in upholding the trial court's rejection of these mitigators, Miller submits that trial counsel was ineffective for failing to fully investigate and present evidence regarding Miller's abusive childhood background, mental illness, and substance abuse. *See supra* Claim One.

All other facts and allegations in this petition are incorporated into Ground V.

Exhaustion of Ground V in state courts:

1) Did you raise Ground V in the Florida Supreme Court on a direct appeal of your conviction? Yes.

2) After your conviction, did you raise Ground V in the state circuit court that sentenced you by filing a motion under Florida Rule of Criminal Procedure 3.850? No.

a) If your answer is "yes", then state:

i. Date motion filed: N/A.

ii. Whether you received an evidentiary hearing: N/A.

iii. Result: N/A.

iv. Date of Result: N/A.

b) If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida? N/A.

i. If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why: N/A.

ii. Date appeal filed, result of appeal, date of result: N/A.

3) Have you raised Ground V in any other petition, application, or motion filed in the state courts of Florida? No.

GROUND VI

MILLER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY FLORIDA'S PRIOR CAPITAL SENTENCING SCHEME, WHICH DENIED HIM A JURY DETERMINATION OF EACH OF THE FACTS NECESSARY TO IMPOSE A DEATH SENTENCE UNDER STATE LAW, AND WHICH FAILED TO REQUIRE JURY UNANIMITY TO IMPOSE A DEATH SENTENCE.

Miller's death sentence violates the dictates of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 20 (Fla. 2016). In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact necessary to impose the death penalty under Florida law. 136 S.Ct. at 620-22. Those findings included: 1) the aggravating factors that were proven beyond a reasonable doubt; 2)

whether those aggravators were "sufficient" to justify the death penalty; and 3) whether those aggravators outweighed the mitigation. Florida's unconstitutional scheme, however, had an advisory jury render a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then empowered the sentencing judge alone, notwithstanding the jury's recommendation, to conduct the required fact-finding. *Id*. at 622. The Court held that the jury, not the judge, must make the findings of fact required to impose the death penalty. *Id*.

In *Hurst v. State*, the Florida Supreme Court explained that the Eighth Amendment also requires unanimous jury fact-finding as to 1) which aggravating factors were proven; 2) whether those aggravators were sufficient to impose the death penalty; and 3) whether those aggravators outweighed the mitigation. 202 So. 3d at 53-59. Each of those determinations are elements that must be found by a jury unanimously and beyond a reasonable doubt. *Id*. at 57. In addition to rendering unanimous findings on each of those elements, the Florida Supreme Court explained that the jury must unanimously recommend the death penalty before a death sentence may be imposed. *Hurst*, 202 So. 3d at 57 ("[B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors

that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."). The Florida Supreme Court cautioned that, even if the jury unanimously found that each of the elements required to impose the death penalty was satisfied, the jury was not required to recommend the death penalty. *Id*. at 57-58 ("We equally emphasize that . . . we did not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds the aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.").

Miller's jury was never asked to make unanimous findings as to any of the elements required to impose a death sentence under Florida law. Instead, after being instructed that its verdict was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, *supra* Claim IV, Miller's jury rendered a non-unanimous, generalized advisory recommendation to impose the death penalty. The record does not reveal whether the jurors unanimously agreed that any particular aggravating factor was proven beyond a reasonable doubt, or unanimously agreed that those aggravators were sufficient to impose the death penalty, or unanimously agreed that those aggravators outweighed the

mitigation. However, the record is clear that Miller's jurors were not unanimous as to whether the death penalty should even be recommended to the court. Indeed, they rendered a death verdict by the slimmest possible margin: 7 to 5. Miller's death sentence violates the Sixth and Eighth Amendments to the United States Constitution.

The Florida Supreme Court's *Hurst* retroactivity cutoff, drawn at *Ring v. Arizona*, 536 U.S. 584 (2002) has allowed for the arbitrary and capricious application of Florida's death penalty, in violation of the Eighth Amendment, and denied Miller–a pre-*Ring* prisoner–the equal protection of the laws, in violation of the Eighth Amendment.

The Florida Supreme Court's decision rejecting Miller's claim on state habeas review was contrary to or at a minimum involved an unreasonable application of clearly established federal law, as well as an unreasonable determination of the facts. *See* 28 U.S.C. 2254(d). The Florida Supreme Court's opinion denying *Hurst* relief in Miller's case involved no merits review of his federal Constitutional claims, and simply stated that because Miller's sentence of death became final in 2001, *Hurst* did not apply retroactively. *Miller v. State*, 237 So. 3d 921 (Fla. 2018), rehearing stricken February 26, 2018, certiorari denied October 29, 2018.

Although there is a general rebuttable presumption that when a federal claim is not discussed in a state court's decision, it was nonetheless rejected by the state court on the merits, that presumption is rebutted here by the Florida Supreme Court's erroneous belief that its state-law retroactivity cutoff is not subject to federal constitutional scrutiny. In its opinion in Miller's case specifically, like its opinions in approximately 100 similar pre-*Ring* cases, the Florida Supreme Court did not reference federal law at all, even though Miller's arguments focused almost exclusively on the Eighth and Fourteenth Amendments. When Miller filed a motion for rehearing imploring the Florida Supreme Court to address his federal constitutional arguments, the Florida Supreme Court continued to refuse to discuss federal law. Thus, there was no adjudication on the merits.

Even if this Court concludes that the Florida Supreme Court *did* decide Miller's Eighth and Fourteenth Amendment claims on the merits, the Court should still grant Miller federal habeas relief under *Hurst* because the Florida Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established federal law within the meaning of 2254(d). Although the United States Supreme Court has clearly articulated the relevant Eighth and Fourteenth Amendment standards, the Florida Supreme Court has contravened or, at a minimum unreasonably

applied, those standards with respect to its *Hurst* retroactivity cutoff. This is particularly harmful in Miller's case, where he received a death sentence by the barest margin (7 to 5). It is also particularly harmful in Miller's case because Miller's death sentence became final shortly before the cutoff drawn by the Florida Supreme Court at *Ring*, and after *Apprendi v. New Jersey*, 523 U.S. 224 (1998), which was the foundation for both *Ring* and *Hurst*. Additionally, there is a *Caldwell* error inherent in every *Hurst* error, which provides an additional Eighth Amendment basis for Miller's assertion that the *Hurst* retroactivity cutoff denied relief in a manner resulting in arbitrary application of the death penalty. *See supra* Claim IV.

All other facts and allegations in this petition are incorporated into Ground VI.

Exhaustion of Ground VI in state courts:

1) **Did you raise Ground VI in the Florida Supreme Court on a direct appeal of your conviction?** No.

2) **After your conviction, did you raise Ground VI in the state circuit court that sentenced you by filing a motion under Florida Rule of Criminal Procedure 3.850?** No, but Miller's post-conviction counsel did challenge his sentence under *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) in his 3.850 motion.

   a) If your answer is "yes", then state:

      I. Date motion filed: N/A.

ii. Whether you received an evidentiary hearing: N/A.

iii. Result: N/A.

iv. Date of Result: N/A.

b) If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida? N/A.

I. If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why: N/A.

ii. Date appeal filed, result of appeal, date of result: N/A.

3) Have you raised Ground VI in any other petition, application, or motion filed in the state courts of Florida? Yes. Ground VI was raised in a petition for writ of habeas corpus that was filed on June 28, 2017 in the Florida Supreme Court. The petition was denied on January 31, 2018. *Miller v. State*, 237 So. 3d 921 (Fla. 2018), rehearing stricken February 26, 2018, certiorari denied October 29, 2018.

. . . .

15. Have you previously filed any petitions, applications, or motions with respect to your judgment and conviction in any federal court? No.

16. If your answer to 16 was "yes," give the following information: 1) Name of court; 2) Nature of proceedings and date action filed; 3) Grounds raised. N/A.

17. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No.

18. If you have previously filed a petition for writ of habeas corpus related to this conviction and sentence in federal court, you must first move in the appropriate court of appeal for an order authorizing the federal district court to consider the application. Have you filed such a motion? N/A.

19. **Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:**

a) **At preliminary hearing:**

Public Defender's Office for the Fourth Judicial Circuit.

b) **At arraignment and plea:**

Same

c) **At trial:**

Refik Eler.

d) **At sentencing:**

Same.

e) **On appeal:**

Nancy A. Daniels and W.C. McLain.

f) **In any post-conviction proceeding:**
Capital Collateral Representative kna/ Capital Collateral Regional Counsel; Heidi Brewer, Robert A. Norgard, Registry counsel.

g) **On appeal from any adverse ruling in post-conviction proceeding:**

Robert A. Norgard, Registry counsel.

20. **Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?** Yes.

21. **Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?** No, death.

a) **If so, give name and location of court which imposed sentence to be served in the future:** N/A.

b) Date and length of sentence to be served in the future: N/A.

c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? N/A.

GROUND VII

MILLER'S CONVICTION AND DEATH SENTENCE VIOLATE THE FEDERAL CONSTITUTION BECAUSE HE WAS NOT COMPETENT TO STAND TRIAL.

Miller's state conviction and death sentence violate the federal Constitution because Miller was not competent at the time of his trial. As the facts above demonstrate, Miller's psychiatric disorders, especially when coupled with his brain damage and trauma history, rendered him incompetent to be tried for capital murder. Due to his incompetency during all critical stages of his trial and appeals process, Miller's continued confinement on death row violates the Fifth, Sixth, Eighth, and Fourteenth Amendments. Additionally, undersigned counsel have consulted with Dr. Krop, who asserts that he was unaware of the full range of information regarding Miller's auditory hallucinations, religious preoccupation, and delusions as assessed by Dr. Regnier. Dr. Krop stated that had he been aware of these facts, he would certainly have had concerns that Miller was incompetent to proceed, and would have recommended a renewed competency evaluation.

Criminal proceedings against an incompetent defendant violate due process. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This due process right cannot be waived. *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

At the time of Miller's trial, he did not have the capacity to consult with his counsel with a reasonable degree of understanding, and he did not have a rational and factual understanding of the legal proceedings to which he was subjected. *Dusky v. United States*, 362 U.S. 402 (1960).

The evidence presented by Miller, taken as a whole, demonstrates his incompetency by a preponderance of the evidence. *James v. Singletary*, 957 F.2d 1562 (11th Cir. 1992).

To the extent that the State argues procedural default of this claim, Miller asserts that post-conviction counsel's failure to raise this claim during state court litigation amounts to cause for overcoming procedural default, and the error was prejudicial to Miller.

All other facts and allegations in this petition are incorporated into Ground VII.

Exhaustion of Ground VII in state courts:

1) **Did you raise Ground VII in the Florida Supreme Court on a direct appeal of your conviction?** No.

2) **After your conviction, did you raise Ground VII in the state circuit court that sentenced you by filing a motion under**

Florida Rule of Criminal Procedure 3.850? No.

a) If your answer is "yes", then state:

I. Date motion filed: N/A.

ii. Whether you received an evidentiary hearing: N/A.

iii. Result: N/A.

iv. Date of Result: N/A.

b) If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida? N/A.

I. If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why: N/A.

ii. Date appeal filed, result of appeal, date of result: N/A.

3) Have you raised Ground VII in any other petition, application, or motion filed in the state courts of Florida? No.

. . . .

15. Have you previously filed any petitions, applications, or motions with respect to your judgment and conviction in any federal court? No.

16. If your answer to 16 was "yes," give the following information: 1) Name of court; 2) Nature of proceedings and date action filed; 3) Grounds raised. N/A.

17. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No.

18. If you have previously filed a petition for writ of habeas corpus related to this conviction and sentence in federal court, you must first move in the appropriate court of appeal for an order authorizing the federal district court to

consider the application. Have you filed such a motion? N/A.

19. **Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:**

a) At preliminary hearing:

Public Defender's Office for the Fourth Judicial Circuit.

b) At arraignment and plea:

Same

c) At trial:

Refik Eler.

d) At sentencing:

Same.

e) On appeal:

Nancy A. Daniels and W.C. McLain.

f) In any post-conviction proceeding:
Capital Collateral Representative kna/ Capital Collateral Regional Counsel; Heidi Brewer, Robert A. Norgard, Registry counsel.

g) On appeal from any adverse ruling in post-conviction proceeding:

Robert A. Norgard, Registry counsel.

20. **Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?** Yes.

21. **Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?** No, death.

a) If so, give name and location of court which imposed

sentence to be served in the future: N/A.

b) Date and length of sentence to be served in the future: N/A.

c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? N/A.

GROUND VIII

MILLER'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984) IN FAILING TO INVESTIGATE AND PRESENT EVIDENCE THAT MILLER WAS INCOMPETENT AT THE TIME OF HIS TRIAL.

Miller's state conviction and death sentence violate the federal Constitution because defense counsel failed to investigate and present evidence that Miller was not competent to stand trial. This violated Miller's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Trial counsel's failure prejudiced Miller. Once a genuine doubt has been raised as to a defendant's competency, the court must conduct a competency hearing. *Pate v. Robinson*, 383 U.S. 375 (1966). The defendant cannot waive the hearing.

Dr. Krop evaluated Miller in October and November of 1997, and made a cursory competency finding without full record review. Despite the numerous and continuous red flags that Miller was not competent to stand trail, no further inquiry was conducted regarding his competency. Trial counsel failed to raise the issue

of Miller's incompetency to the court. Counsel was obligated to investigate Miller's competency by retaining an expert to conduct a competency assessment of Miller or by requesting that the court appoint an expert for such purpose. *Agan v. Singletary*, 12 F.3d 1012 (11th Cir. 1994).

Dr. Krop's 1997 evaluation–at prior attorney Chipperfield's request–does not absolve trial counsel's failure to investigate red flags of Miller's incompetency closer to the time of trial. Any finding that Miller was competent in October of 1997 does not mean Miller was competent several months later at the time of his trial. *Drope v. Mississippi*, 420 U.S. 162 (1975). Additionally, undersigned counsel have consulted with Dr. Krop, who asserts that he was unaware of the full range of information regarding Miller's auditory hallucinations, religious preoccupation, and delusions as assessed by Dr. Regnier. Dr. Krop stated that had he been aware of these facts, he would certainly have had concerns that Miller was incompetent to proceed, and would have recommended a renewed competency evaluation.

If trial counsel had competently investigated, they would have seen that Miller was not competent to stand trial, or they would have questioned his competency enough to require an evaluation. Miller had voluminous medical records diagnosing him with multiple psychiatric and neuropsychiatric disorders (most if which not all

predate his crime and trial). Miller's family history was rife with biological risk factors for schizophrenia and psychosis. Further, counsel was on notice that Miller had a longstanding drug and alcohol history, and that drugs impact brain chemistry long after physical withdrawal is complete. There is a reasonable probability that a timely and adequate assessment would have concluded Miller was not competent to stand trial. *Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988).

Trial counsel's representation fell below an objective level of reasonableness and, but for counsel's deficient performance, there is a reasonable likelihood that an evaluation would have found him incompetent. *Strickland v. Washington*, 466 U.S. 688 (1984).

Had trial counsel conducted a reasonable investigation, including investigating Miller's mental health and trauma history, they would have uncovered readily available evidence detailed above that Miller was not competent to proceed with his trial. Miller's conviction and sentence therefore cannot withstand constitutional scrutiny.

To the extent that Respondent argues procedural default of this claim, Miller asserts that post-conviction counsel's failure to raise this claim during initial collateral review amounts to cause for overcoming procedural default, and the error was

prejudicial to Miller.

All other facts and allegations in this petition are incorporated into Ground VIII.

Exhaustion of Ground VIII in state courts:

1) **Did you raise Ground VIII in the Florida Supreme Court on a direct appeal of your conviction?** No.

2) **After your conviction, did you raise Ground VIII in the state circuit court that sentenced you by filing a motion under Florida Rule of Criminal Procedure 3.850?** No.

   a) **If your answer is "yes", then state:**

      I. **Date motion filed:** N/A.

      ii. **Whether you received an evidentiary hearing:** N/A.

      iii. **Result:** N/A.

      iv. **Date of Result:** N/A.

   b) **If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida?** N/A.

      I. **If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why:** N/A.

      ii. **Date appeal filed, result of appeal, date of result:** N/A.

3) **Have you raised Ground VIII in any other petition, application, or motion filed in the state courts of Florida?** No.

. . . .

15. **Have you previously filed any petitions, applications, or motions with respect to your judgment and conviction in any**

federal court? No.

16. **If your answer to 16 was "yes," give the following information: 1) Name of court; 2) Nature of proceedings and date action filed; 3) Grounds raised.** N/A.

17. **Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?** No.

18. **If you have previously filed a petition for writ of habeas corpus related to this conviction and sentence in federal court, you must first move in the appropriate court of appeal for an order authorizing the federal district court to consider the application. Have you filed such a motion?** N/A.

19. **Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:**

    a) **At preliminary hearing:**

    Public Defender's Office for the Fourth Judicial Circuit.

    b) **At arraignment and plea:**

    Same

    c) **At trial:**

    Refik Eler.

    d) **At sentencing:**

    Same.

    e) **On appeal:**

    Nancy A. Daniels and W.C. McLain.

    f) **In any post-conviction proceeding:**
    Capital Collateral Representative kna/ Capital Collateral Regional Counsel; Heidi Brewer, Robert A. Norgard, Registry counsel.

g) On appeal from any adverse ruling in post-conviction proceeding:

Robert A. Norgard, Registry counsel.

20. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes.

21. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No, death.

a) If so, give name and location of court which imposed sentence to be served in the future: N/A.

b) Date and length of sentence to be served in the future: N/A.

c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? N/A.

GROUND IX

THE CUMULATIVE EFFECT OF THE FEDERAL CONSTITUTIONAL ERRORS BY THE STATE COURTS UNDERMINE THE RELIABILITY OF MILLER'S CONVICTION AND DEATH SENTENCE UNDER THE EIGHTH AMENDMENT.

The cumulative effect of the federal constitutional errors by the state courts, including those described above, undermine the reliability of Miller's conviction and death sentences, in violation of the Eighth Amendment. As a result of the errors, which had a substantial and injurious effect on determining the outcome of the proceedings, Miller's death sentence is not legitimate and does not carry the societal appearance of legitimacy

required for the death penalty. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Beck v. Alabama*, 477 U.S. 625, 637 (1980); *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Each claim in this petition individually warrants relief. However, even if the Court does not grant relief on any individual claim, it should consider the errors in the case cumulatively and grant relief on that basis. Considered cumulatively, the federal constitutional errors in Miller's case had a prejudicial effect on the outcome. But for the errors, Miller would not be on death row.

To the extent that Respondent argues procedural default of this claim, Miller asserts that post-conviction counsel's failure to raise this claim during initial collateral review amounts to cause for overcoming procedural default, and the error was prejudicial to Miller.

All other facts and allegations in this petition are incorporated into Ground IX.

Exhaustion of Ground IX in state courts:

1) **Did you raise Ground IX in the Florida Supreme Court on a direct appeal of your conviction?** No.

2) **After your conviction, did you raise Ground IX in the state circuit court that sentenced you by filing a motion under Florida Rule of Criminal Procedure 3.850?** No.

a) If your answer is "yes", then state:

I. Date motion filed: N/A.

ii. **Whether you received an evidentiary hearing:** N/A.

iii. **Result:** N/A.

iv. **Date of Result:** N/A.

b) **If your Rule 3.850 Motion was denied, did you file an appeal of that denial with the Supreme Court of Florida?** N/A.

I. **If you failed to appeal the denial of your Rule 3.850 motion, explain briefly why:** N/A.

ii. **Date appeal filed, result of appeal, date of result:** N/A.

3) **Have you raised Ground IX in any other petition, application, or motion filed in the state courts of Florida?** No.

. . . .

15. **Have you previously filed any petitions, applications, or motions with respect to your judgment and conviction in any federal court?** No.

16. **If your answer to 16 was "yes," give the following information: 1) Name of court; 2) Nature of proceedings and date action filed; 3) Grounds raised.** N/A.

17. **Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?** No.

18. **If you have previously filed a petition for writ of habeas corpus related to this conviction and sentence in federal court, you must first move in the appropriate court of appeal for an order authorizing the federal district court to consider the application. Have you filed such a motion?** N/A.

19. **Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:**

a) **At preliminary hearing:**

Public Defender's Office for the Fourth Judicial Circuit.

b) **At arraignment and plea:**

Same

c) **At trial:**

Refik Eler.

d) **At sentencing:**

Same.

e) **On appeal:**

Nancy A. Daniels and W.C. McLain.

f) **In any post-conviction proceeding:**
Capital Collateral Representative kna/ Capital Collateral Regional Counsel; Heidi Brewer, Robert A. Norgard, Registry counsel.

g) **On appeal from any adverse ruling in post-conviction proceeding:**

Robert A. Norgard, Registry counsel.

20. **Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?** Yes.

21. **Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?** No, death.

a) **If so, give name and location of court which imposed sentence to be served in the future:** N/A.

b) **Date and length of sentence to be served in the future:** N/A.

c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? N/A.

CONCLUSION

For the reasons stated herein, the judgements and sentences of Miller should be reversed.

Respectfully submitted,

/s/TERRI L. BACKHUS
TERRI L. BACKHUS
KATHERINE A. BLAIR
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 N. Bronough St., Ste. 4200
Tallahassee, Florida 32301-1300
(850) 942-8818
terri_backhus@fd.org

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this filing was served on all parties through the CM/ECF system, in compliance with this Court's electronic filing rules.

/s/ TERRI L. BACKHUS
TERRI L. BACKHUS

APPENDIX A-9

February 1, 2019, Respondents' Motion to Substitute CHU-N with CHU-M

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v.

CASE NO. 3:17-cv-932-J-39JBT
CAPITAL CASE

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

MOTION FOR SUBSTITUTION OF CAPITAL HABEAS UNIT-NORTH WITH CAPITAL HABEAS UNIT-MIDDLE

COMES NOW, Respondents, Secretary, Department of Corrections, et al., by and through the undersigned counsel, and hereby requests that this Court substitute current federal habeas counsel, Capital Habeas Unit-North (CHU-North) with the Capital Habeas Unit-Middle (CHU-Middle) in this case to litigate the timeliness of the pending habeas petition. In addition to CHU-Middle being the appropriate office, CHU-North has a conflict in arguing equitable tolling.

Petitioner was convicted of first-degree murder and aggravated battery and was sentenced to death. *Miller v. State*, 770 So. 2d 1144, 1146 (2000). On August 31, 2000, the Florida Supreme Court affirmed the judgment and sentence on direct

appeal. *Id*. at 1150. The judgment and sentence became final on November 29, 2000, when the time permitted for Petitioner to file a petition for writ of certiorari in the United States Supreme Court expired. Fla. R. Crim. P. 3.851(d)(1)(A) (A judgment and sentence become final "90 days after the opinion becomes final."); *Gonzalez v. Thaler*, 565 U.S. 134 (2012) (the limitations period starts to run on issuance of the opinion). Petitioner filed "a shell motion for postconviction relief on September 27, 2001," approximately 302 days after the judgement and sentence became final and an amended version of which was filed on March 11, 2002. *Miller v. State*, 926 So. 2d 1243, 1248 (Fla. 2006). On March 23, 2006, the Florida Supreme Court affirmed the denial of Petitioner's post-conviction claims and denied the petition for writ of habeas corpus and the Mandate was issued on April 13, 2006. *Id*. at 1246; *Lugo v. Sec'y, Fla. Dep't. of Corr.*, 750 F.3d 1198, 1204 (11th Cir. 2014) (stating that the issuance of the mandate ended any statutory tolling period citing *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (holding that a state postconviction motion remains pending until the mandate issues in the appeal)). The statute of limitations for filing a federal habeas petition ran on June 15, 2006, 63 days after the post-conviction Mandate was issued. Petitioner did not file a federal habeas petition for the next 12 years.

Petitioner filed a state habeas petition on June 28, 2017 raising a *Hurst* claim. *Miller v. Jones*, 237 So. 3d 921 (Fla. 2018), *cert. denied*, 139 S.Ct. 152 (2018). The Florida Supreme Court denied the claim on January 31, 2018, published the decision on April 26, 2018, and certiorari was denied by the United States Supreme Court on October 1, 2018. The Petition was not filed until January 30, 3019, 279 days after the Florida Supreme Court published its opinion and 121 days after certiorari was denied. (Doc. 15).

On August 15, 2017, CHU-North filed a Motion to be appointed federal habeas counsel for Petitioner. (Doc. 1). On August 24, 2017, this Court granted the Motion to Appoint CHU-North and on September 22, 2017, Billy Nolas of the CHU-North filed a Notice of Appearance. (Doc. 3, 4). This Court ordered Petitioner to file a notice informing the Court of "how petitioner intends to proceed." (Doc. 6). Petitioner requested for "this Court to continue the matter by holding it in abeyance for the time being so that Petitioner may properly bring claims in a 28 U.S.C. § 2254 petition after exhausting state-court *Hurst* remedies." (Doc. 7 at 3). Respondents objected to a stay based on *Hurst*. (Doc. 8). This Court administratively closed the case and ordered Petitioner to file status reports on the pending state court proceedings. (Doc. 10). On January 23, 2019, Respondents filed a Motion to Lift Stay, stating that the Petitioner had exhausted

his state court *Hurst* claim. (Doc. 14); *Miller v. Jones*, 237 So. 3d 921 (Fla. 2018), *cert. denied*, 139 S. Ct. 152 (2018). Respondents also asserted that any federal habeas petition would be untimely and that there are no exceptions which excuse the untimeliness. (Doc. 14 at 3). On January 30, 2019, Petitioner filed a Petition for writ of habeas corpus in this Court. (Doc. 15). The Petition asserts nine grounds for relief: (1) Ineffective assistance of counsel at the penalty phase for failing to present mitigation, (2) ineffective assistance of counsel for failing to present evidence to mitigate the prior violent felony aggravating circumstance, (3) ineffective assistance of counsel for failing to object to improper closing arguments, (4) a jury instruction in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), (5) the trial court erred in failing to find mitigation evidence established by the evidence, (6) a *Hurst* claim, (7) incompetence to stand trial, (8) ineffective assistance of counsel for failing to discover incompetence to stand trial, and (9) cumulative error. (Doc. 15 at 62, 96, 103, 107, 110, 114, 122, 126, 131).

In the Petition, Petitioner acknowledges the untimeliness of the Petition, asserts that equitable tolling applies, and states that the supporting argument for equitable tolling will be addressed in the forthcoming memorandum of law. (Doc. 15 at 9). Petitioner asserts that the statute of limitations expired on August 3, 2006. (Doc. 15 at 9). Even if equitable tolling does apply to Petitioner based on

previous counsel's conduct in failing to file a timely Petition, this Petition was still filed 524 days after the appointment of CHU-North. Thus, the argument regarding equitable tolling would also have to apply to the time between the date which CHU-North was appointed by this Court, August 24, 2017, and the date when the Petition was filed, January 30, 2019. This necessarily puts CHU-North's own conduct at issue and creates a conflict of interest with that office with their own argument regarding equitable tolling.

"[L]ower courts have the responsibility to ensure that § 2254 petitioners have conflict-free counsel." *Stewart v. Sec'y, Fla. Dept. of Corr.*, 635 Fed. Appx. 711 (11th Cir. 2015) (citing *Martel v. Clair*, 565 U.S. 648 (2012); *Christeson v. Roper*, 135 S.Ct. 891 (2015)). The Eleventh Circuit has recognized the ethical dilemma habeas counsel faces from being placed in the position of arguing for equitable tolling or ineffectiveness based on their own conduct. In *Stewart*, because the current federal habeas counsel did not timely file the federal habeas petition, there was an actual conflict of interest as to the equitable tolling issues. *Id*. at 717. Because of that actual conflict of interest, the Eleventh Circuit vacated and remanded the case back to the district court in order to appoint conflict-free counsel to raise the claim of equitable tolling. *Id*.

More recently, the Eleventh Circuit held the district court erred in failing to hold an evidentiary hearing on the issue of statutory and equitable tolling. *Brown v. Sec'y, Dept. of Corr.*, no. 17-10027, 2018 WL 4932715 (11th Cir. Oct. 11, 2018). Counsel conceded "that his conduct might support an argument for equitable tolling" because he "waited nearly three years after he was appointed" to file the federal habeas petition which "created an unwaivable conflict of interest" and therefore he should be discharged. *Id*. at *8, *17. The Eleventh Circuit in the "interests of justice" agreed that conflict-free habeas counsel should be appointed to replace current habeas counsel and appointed conflict free counsel to raise the issue of equitable tolling. *Id*. at *8.

The CHU-Middle was recently established and is operational. Given that the CHU-Middle was created for the specific purpose of litigating capital cases that arise in the Middle District, especially those capital cases involving a missed deadline, such as this one, the CHU-Middle should be appointed as substitute conflict-free habeas counsel in this case. Accordingly, this Court should appoint the CHU-Middle as substitute conflict-free federal habeas counsel to litigate the equitable tolling issue.

Conclusion

WHEREFORE, this Court should remove CHU-North and substitute CHU-Middle as counsel for Petitioner.

Respectfully submitted,

ASHLEY MOODY
Attorney General

/s/ Jennifer A. Donahue
JENNIFER A. DONAHUE
Assistant Attorney General
Florida Bar No.: 50639
PL-01, The Capitol
Tallahassee, FL 32399-1050
jennifer.donahue@myfloridalegal.com
capapp@myfloridalegal.com
Phone: (850) 414-3580
Fax: (850) 487-0997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic filing to Terri Backhus, terri_backhus@fd.org and Sean Gunn, sean_gunn@fd.org, Attorneys for Petitioner, this 1st day of February, 2019.

/s/ Jennifer A. Donahue
JENNIFER A. DONAHUE

APPENDIX A-10

April 8, 2019, Petitioner's Memorandum of Law In Support of Habeas Corpus Petition

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v. **CASE NO. 3:17-cv-932-J-39JBT**

SECRETARY, Florida Department of Corrections, et al., **CAPITAL CASE**

Respondents.
_____/

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HABEAS CORPUS PETITION

TERRI L. BACKHUS
KATHERINE A. BLAIR
SEAN T. GUNN
Office of the Federal
Public Defender
Northern District of Florida
Capital Habeas Unit
227 N. Bronough St., Ste. 4200
Tallahassee, Florida 32301-1300
(850) 942-8818
Terri_backhus@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS.. i

TABLE OF CITATIONS ii

STANDARD OF REVIEW 1

A. DEFERENCE FOR CLAIMS ADJUDICATED IN STATE COURT 1

B. DEFERENCE FOR CLAIMS NOT ADJUDICATED IN STATE COURT.. 4

EQUITABLE TOLLING 6

GROUNDS FOR RELIEF 8

I. INEFFECTIVE ASSISTANCE OF COUNSEL-PENALTY PHASE. . . 8

A. INTRODUCTION 8

B. THE STATE COURT'S DETERMINATION 10

C. ANALYSIS 12

D. *MARTINEZ V. RYAN* 28

II. INEFFECTIVE ASSISTANCE OF COUNSEL-THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR 31

III. INEFFECTIVE ASSISTANCE OF COUNSEL-FAILURE TO OBJECT 36

IV. *CALDWELL v. MISSISSIPPI* 43

V. STATE COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES. 45

VI. *HURST V. FLORIDA* 50

VII. COMPETENCY TO STAND TRIAL 55

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL-COMPETENCY TO STAND TRIAL 56

IX. CUMULATIVE ERROR 61

CONCLUSION 62

CERTIFICATE OF COMPLIANCE 63

CERTIFICATE OF SERVICE 63

TABLE OF CITATIONS

Alexander v. Dugger, 841 F.2d 371 (11th Cir. 1988) . . . 59

Allen v. State, 662 So. 2d 323 (Fla. 1995). 40

Apprendi v. New Jersey, 523 U.S. 224 (1998).. 53

Asay v. State, 210 So. 3d 1 (Fla. 2016).. 51

Bevel v. State, 221 So. 3d 1168 (Fla. 2017).. 18

Bishop v. United States, 350 U.S. 961 (1956) 59

Bolarinwa v. Williams, 593 F.3d 226 (2d Cir. 2010). . . . 7

Brecht v. Abrahamson, 507 U.S. 619 (1993).. . . . . 49, 50

Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991).. 39

Brumfield v. Cain, 135 S.Ct. 2269 (2015). 3

Buchanan v. Angelone, 522 U.S. 269 (1998).. 37

Caldwell v. Mississippi, 472 U.S. 320 (1985). 44, 45

Card v. State, 803 So. 3d 613 (Fla. 2001).. 42

Christeson v. Roper, 135 S.Ct. 891 (2015).. 29

Coker v. State, 978 So. 2d 809 (Fla. 1st DCA 2008). . . . 58

Cone v. Bell, 556 U.S. 449 (2009) 5

Conklin v. Schofield, 366 F.3d 1191 (11th Cir. 2004) . . 61

Cooper v. Secretary, Dep't. of Corrs.,
646 F.3d 1328 (11th Cir. 2011). 30

Cullen v. Pinholster, 563 U.S. 170 (2011).. . . . . 4, 5

Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). . . . 42

Danforth v. Minnesota, 552 U.S. 264 (2006). 54

Daniel v. Comm'r, Ala. Dep't of Corrs.,
822 F.3d 1248 (11th Cir. 2016). 2, 4

Darden v. State, 475 So. 2d 217 (Fla. 1985).. 45

DeLuca v. State, 736 So. 2d 1222 (Fla. 4th DCA 1999). . . 39

Depew v. Anderson, 311 F.3d 742 (6th Cir. 2002).. . . . 36

Detrich v. Ryan, 740 F.3d 1237 (9th Cir. 2013). . 6, 56, 57

Diaz v. Kelly, 515 F.3d 149 (2d Cir. 2008). 6

Donnelly v. DeChristoforo, 416 U.S. 637 (1974). . . . 37, 42

Douglas v. State, 141 So. 3d 107 (Fla. 2012). 17, 18

Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008) 8

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985).. 41

Drake v. State, 441 So. 2d 1079 (Fla. 1983).. 40

Drope v. Missouri, 420 U.S. 162 (1975) 59

Dusky v. United States, 362 U.S. 402 (1960).. 55

Eagle v. Linaham, 268 F.3d 1306 (11th Cir. 2001). . . 41, 43

Eddings v. Oklahoma, 455 U.S. 104 (1982). . . 45, 46, 47, 48

Eisenstadt v. Baird, 405 U.S. 438 (1972). 55

Elledge v. State, 346 So. 2d 948 (Fla. 1977). 33

Evitts v. Lucey, 469 U.S. 387 (1985). 42

Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999).. 7

Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1989).. 59

Gregg v. Georgia, 428 U.S. 153 (1976).. 24

Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) 39

Harrington v. Richter, 562 U.S. 86 (2011).. 1

Hinton v. Alabama, 571 U.S. 263 (2014). 39

Holland v. Florida, 560 U.S. 631 (2010) 7

Hurst v. Florida, 136 S.Ct. 616 (2016). . . . . *passim*

Hurst v. State, 202 So. 3d 20 (Fla. 2016).. . . . . 45, 52

James v. Singletary, 957 F.2d 1562 (11th Cir. 1992).. . 55

Kelly v. State, 842 So. 2d 223 (Fla. 1st DCA 2003). . . . 39

Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967). 58

Kotteakos v. United States, 328 U.S. 750 (1946).. 49

Kyles v. Whitley, 514 U.S. 419 (1995).. 27

Lawhorn v. Allen, 519 F.3d 1272 (11th Cir. 2008). . . . 39

Lockett v. Ohio, 438 U.S. 586 (1978). 46, 48

Martinez v. Ryan, 566 U.S. 1 (2012). . . . . *passim*

Masse v. Sec'y, Fla. Dep't of Corrs.,
700 F. App'x 890 (11th Cir. 2017) 61

Matire v. Wainwright, 811 F. 2d 1430 (11th Cir. 1987).. . 43

McDonald v. State, 743 So. 2d 501 (Fla. 1999).. 38

McSwain v. Davis, 287 Fed.Appx. 450 (6th Cir. 2008).. . . 7

Medina v. Secretary, 59 F.3d 1095 (11th Cir. 1995). . . . 55

Miller v. Jones, 237 So. 3d 921 (Fla. 2018).. 52

Miller v. State, 926 So. 2d 1243 (Fla. 2006)... . . . *passim*

Miller v. State, 770 So. 2d 1144 (Fla. 2000). . . 26, 46, 48

Miller-El v. Cockrell, 537 U.S. 322 (2003). 3

Montgomery v. Louisiana, 136 S.Ct. 718 (2016).. 54

Mosley v. State, 209 So. 3d 1248 (Fla. 2016). 51

Napolitano v. Sec'y, Fla. Dep't of Corrs.,
2017 WL 7341482 (11th Cir. Oct. 30, 2017).. 61

Nelson v. Sec'y, Dept. of Corrs., 2012 WL 834130
(M.D. Fla. March 13, 2012) 56

Panetti v. Quarterman, 551 U.S. 930 (2007). 3

Pate v. Robinson, 383 U.S. 375 (1966).. 55

Penry v. Lynaugh, 492 U.S. 302 (1989).. . . . . 10, 45

Porter v. McCollum, 558 U.S. 30 (2009). . . . . *passim*

Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). 41

Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). 40

Ring v. Arizona, 536 U.S. 584 (2002). 50, 53

Rompilla v. Beard, 545 U.S. 374 (2005). 28, 31, 32

Shellito v. State, 121 So. 3d 445 (Fla. 2013).. 18

Smith v. Texas, 543 U.S. 37, 45 (2004) 47

Spargo v. State, 132 So. 3d 354 (Fla. 1st Dist. 2014).. . 19

Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994).. 36

State v. Morrison, 236 So. 3d 204 (Fla. 2016).. . . . 15, 16

Strickland v. Washington, 466 U.S. 668 (1984).. . . . *passim*

Sullivan v. Sec'y, Fla. Dep't of Corrs.,
837 F.3d 1195 (11th Cir. 2016). 57

Tedder v. State, 322 So. 2d 908 (Fla. 1975).. 49

Trevino v. Thaler, 569 U.S. 413 (2013). 5, 29, 56

United States v. Calderon, 127 F.3d 1314 (11th Cir. 1997)
... . 61

United States v. Eyster, 948 F.2d 1196 (11th Cir. 1991)
... . 42

United States v. Lopez, 590 F.3d 1238 (11th Cir. 2009). . 61

United States v. Ramirez, 426 F.3d 1344 (11th Cir. 2005)
... . 61

Urbin v. State, 714 So. 2d 411 (Fla. 1998). 40

Wiggins v. Smith, 539 U.S. 510 (2003)... . . . . *passim*

Williams v. Taylor, 529 U.S. 362 (2000).. . . . . 1, 2, 8, 9

Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985).. 41

STANDARD OF REVIEW

This Court's review of a habeas petition under 28 U.S.C. § 2254 is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Even under AEDPA, the writ of habeas corpus "stands as a safeguard against imprisonment of those held in violation of the law," and this Court must be "vigilant and independent" in reviewing Miller's petition. *Harrington v. Richter*, 562 U.S. 86, 91 (2011). "[E]rrors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ." *Williams v. Taylor*, 529 U.S. 362, 375 (2000).

A. DEFERENCE FOR CLAIMS ADJUDICATED IN STATE COURT

Section 2254(d) dictates how a federal habeas court must treat claims that were "adjudicated on the merits" in state court. It provides that a court may grant habeas relief where the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Williams, 529 U.S. at 412-13.

The United States Supreme Court has offered guidance on the meaning of these provisions. In *Williams*, the Court instructed:

> under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

529 U.S. 412-13; *see also Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1258-59 (11th Cir. 2016).

The "contrary to" clause in § 2254(d)(1) embodies instances where "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams*, 529 U.S. at 405. The relevant law is the Supreme Court's holdings at the time of the state court decision. *Id.* at 412.

The "'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). Unreasonable in this context means "objectively unreasonable." *Williams*, 529 U.S. at 409. The

Supreme Court has made clear that this standard does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

Section 2254(d)(2) involves an unreasonable determination of the facts in light of the evidence presented to the state court. When assessing the state court's factual findings, the federal court affords the state court deference. *Brumfield v. Cain*, 135 S.Ct. 2269, 2277 (2015). If reasonable minds could disagree about the state court's findings, that is not unreasonable. *Id.* However, the Supreme Court has clarified:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Thus, neither AEDPA nor the decisions of the Supreme Court have vitiated habeas review or diminished this Court's obligation to review claims of constitutional error with utmost care and, where error is found, to correct it.

When a state court has adjudicated a federal claim on the merits, the habeas court's analysis under § 2254(d)(1) is limited to the record that was before the state court. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). However, once a petitioner has established that the state court decision was either contrary to or an unreasonable application of federal law, or that the state court findings of fact were unreasonable, there are three main effects: (1) the district court, "no longer bound by § 2254(d)", reviews the record *de novo*, *see Daniel*, 822 F.3d at 1280; (2) the court is no longer "limited to consideration of the facts developed in the state court record when evaluating the merits of [petitioner's] claim", *see id.*; and (3) the court is free to grant habeas relief.

B. DEFERENCE FOR CLAIMS NOT ADJUDICATED IN STATE COURT

Section 2254(d) and its implied deference apply only where the state court adjudicated the merits of the federal claim. *See Pinholster*, 563 U.S. at 185 ("not all federal habeas claims by state prisoners fall within the scope of § 2254(d)"). If the state court did not reach the merits of a federal claim and the claim is not otherwise barred from habeas review, there was no adjudication on the merits in

state court. *See, e.g.*, *Cone v. Bell*, 556 U.S. 449, 472 (2009) (because the state courts did not reach the merits of a *Brady* claim, "federal habeas review is not subject to the deferential standard that applies under AEDPA").

Similarly, if a state court renders a decision on only part of a federal claim, only that part of the claim addressed by the state court receives AEDPA review. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*.").

Finally, § 2254(d) does not apply to claims where a petitioner brings a claim in federal court after establishing cause for not exhausting the claim in state court. For example, the restraints in § 2254(d) and *Pinholster* do not apply to claims brought under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Under *Martinez*, a habeas petitioner may assert post-conviction counsel's ineffectiveness to establish cause and overcome the procedural default for not raising a claim of ineffective assistance of trial counsel in state court. *Martinez*, 566 U.S. at 17. *Trevino* then extended *Martinez* to states that "in theory grant[] permission [to bring an ineffectiveness claim

on direct appeal] but, as a matter of procedural design and systemic operation, den[y] a meaningful opportunity to do so". 569 U.S. 429.

Because the first opportunity to present an ineffective assistance of trial counsel claim in this situation would be in federal court under *Martinez* and *Trevino*, there is no state proceeding to defer to. "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state [post-conviction] counsel's ineffectiveness had been in state [post-conviction] proceedings where the same ineffective counsel represented him." *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013). Accordingly, a district court should take the steps necessary to develop a record sufficient for determining the ineffective assistance of counsel claim. *Id*.

EQUITABLE TOLLING

A litigant seeking equitable tolling must show diligence in pursuing his rights and that some extraordinary circumstance prevented timely filing. "Extraordinary" refers to the severity of an obstacle standing in the way of a prisoner's timely filing. *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008). Mental illness can form the basis for

equitable tolling of the AEDPA statute of limitations. *Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *see also McSwain v. Davis*, 287 Fed.Appx. 450, 456 (6th Cir. 2008); *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999). Whether equitable tolling is warranted on this basis is a "highly case-specific inquiry." *Bolarinwa*, 593 F.3d at 232 (citations omitted). The specifics of Miller's case justify equitable tolling. As Miller's petition indicates, Miller suffers from severe schizophrenia and other mental health conditions that rendered him incompetent and unable to communicate with his attorneys or make rational decisions regarding his legal rights.

This impediment was compounded by the egregious failures of Miller's post-conviction counsel. *See Holland v. Florida*, 560 U.S. 631, 651 (2010) (recognizing that professional misconduct can constitute an extraordinary circumstance warranting equitable tolling). Here, there can be no doubt that counsel's conduct amounts to more than "a garden variety claim of excusable neglect". *See Holland*, 560 U.S. at 652. Despite inheriting Miller's case prior to his state post-conviction evidentiary hearing – well before his AEDPA deadline – counsel inexplicably failed to file a habeas

petition or do any further work on Miller's case after state post-conviction relief was denied by the Florida Supreme Court. Equitable tolling is warranted on these grounds. To the extent Respondent asserts untimeliness, a hearing is appropriate to resolve any dispute regarding equitable tolling. *See, e.g., Downs v. McNeil*, 520 F.3d 1311, 1325 (11th Cir. 2008)(finding an evidentiary hearing appropriate for fact-finding relevant to equitable tolling analysis).

GROUNDS FOR RELIEF

I. INEFFECTIVE ASSISTANCE OF COUNSEL-PENALTY PHASE

A. INTRODUCTION

An ineffective assistance of counsel claim is comprised of two components, deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[T]o establish ineffectiveness, a 'defendant must show that counsel's performance fell below an objective standard of reasonableness.'" *Williams*, 529 U.S. at 390-91 (quoting *Strickland*, 466 U.S. at 688).

In *Williams*, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until a week before trial, "failed to conduct an investigation that would have uncovered extensive

records," "failed to seek prison records," and "failed to return phone calls of a certified public accountant." 529 U.S. at 395-96. In her concurring opinion, Justice O'Connor explained that "trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation," and as a result, this was a "failure to conduct the requisite, diligent investigation." *Id.* at 415.

In *Wiggins*, 539 U.S. at 526, the Supreme Court discussed counsel's decision to limit the scope of the investigation into potential mitigating evidence and the reasonableness of counsel's investigation. The Court said:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Id. at 526.

Subsequently, in *Porter*, 558 U.S. at 41, the Supreme Court found deficient performance where "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." As the Supreme Court noted, "[E]vidence

about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable." *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)).

B. THE STATE COURT'S DETERMINATION

In its opinion, the Florida Supreme Court addressed Miller's claim that trial counsel failed to adequately investigate and present mitigating evidence. *Miller v. State*, 926 So. 2d 1243, 1249 (Fla. 2006). With regard to Miller's assertion that trial counsel failed to obtain an adequate mental health evaluation, the Florida Supreme Court cited to trial counsel Refik Eler's testimony that "his task in investigating the case was made easier by the extensive groundwork laid by Assistant Public Defender Chipperfield, who initially had the case, and had prepared it 'almost ready to try.'" *Id.* at 1249. The Florida Supreme Court also cited to Dr. Krop's time records and testimony showing that he had spoken with an attorney just before trial and after he had interviewed Miller's family and administered neuropsychological testing on Miller. *Id.* Further, the Florida Supreme Court relied on Eler's testimony that he had a specific recollection of having discussed the case with Dr. Krop and recalled that Dr. Krop had emphasized Miller's

frontal lobe deficit and alcohol abuse. *Id.* And, the Florida Supreme Court cited to the fact that Eler had access to extensive background materials. *Id.*

With regard to trial counsel's failure to interview Debra Lee, the substance abuse counselor and social worker who worked with Miller for an 18 month period, the Florida Supreme Court stated that Eler was aware of her potential testimony and that he did not contact her directly because former counsel Chipperfield had already done so. *Miller*, 926 So. 2d at 1249. The Florida Supreme Court stated that Eler was aware of Lee's role with regard to the 1996 VA in-patient treatment that Miller received, and that he had possession of those files. *Id.* The Florida Supreme Court relied on Eler's evidentiary hearing testimony that he decided not to present Lee as a witness because she was a social worker and not a mental health expert; and that she did not counsel, treat, or test Miller. *Id.* The Florida Supreme Court concluded that the "trial court did not err in rejecting Miller's argument that trial counsel Eler did not perform a proper investigation since the record supports a conclusion that Eler researched all reasonable areas of mitigation, including the work and research of prior defense counsel." *Id.* at 1250.

As to the claim that trial counsel did not elicit adequate mitigating evidence from Dr. Krop at the penalty

phase, the Florida Supreme Court found no error in the trial court's determination that "Mr. Eler made a tactical decision to not admit Defendant's VA hospital records at trial because they contained in his opinion information detrimental to the defense." *Miller*, 926 So. 2d at 1250. The Florida Supreme Court further stated that "[t]rial counsel was concerned that the introduction of these records would have opened the door to damaging cross-examination and possible rebuttal witnesses." *Id.* at 1251. The Florida Supreme Court concluded that "the trial court did not err in finding counsel's strategy as to how much information to secure from Dr. Krop and from family members to be reasonable." *Id.* Additionally, the Florida Supreme Court "agree[d] with the trial court's finding that counsel's conduct was reasonable in concluding that presenting the mental records could have been a two-edged sword." *Id*. at 1252.

C. ANALYSIS

The Florida Supreme Court's determination was contrary to and an unreasonable application of clearly established federal law and involved an unreasonable determination of the facts. Indeed, the Florida Supreme Court's determination resembles more of "a *post hoc* rationalization of counsel's conduct than an accurate description of [] [his] deliberations prior to sentencing." *Wiggins*, 539 U.S. at 526-27. For instance, trial

counsel Eler testified during the post-conviction evidentiary hearing that he deferred to Dr. Krop as to issues that he needed to raise for the jury (PCT. 1499, 1522). Eler acknowledged that certain evidence, such as the psychological trauma suffered by Miller as a result of the dysfuntion in his family, would have been important for the judge and jury to hear (PCT. 1504). Eler's reason for not presenting this testimony was because he did not think that Dr. Krop told him this was a feature he needed to bring out (PCT. 1504). Yet, in addition to the fact that Eler barely spoke to Dr. Krop prior to his testimony, the record reflects that Dr. Krop was unaware of this supposed deference: "[I]n terms of what areas that might be used as potential mitigation I really can't recall suggesting to an attorney what he or she should bring up or should not." (PCT. 1701). And, Dr. Krop expressed surprise that this information was not brought up by Eler (PCT. 1707)("[A]nd at that point I did indicate that I was somewhat surprised that I was not asked to address that issue."). Dr. Krop had in fact brought this information to the attention of Chipperfield in his initial evaluation, where he indicated that it needed to be explored as a potential mitigating factor (PCT. 1707).[1]

[1] In his letter to Chipperfield, Dr. Krop stated, "Mr. Miller appears to derive from a dysfunctional family environment and

In *Porter*, the Supreme Court found that trial counsel "ignored pertinent avenues for investigation of which he should have been aware." 558 U.S. at 40. As a result, the Supreme Court determined that "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." *Id*. at 41.

In Miller's case, the public defender had retained Dr. Krop, outlined some areas of potential investigation, and procured numerous records for him (PCT. 1491). Dr. Krop wrote a letter back to the public defender requesting additional interviews and offering a very preliminary opinion on certain mitigation (PC Exhibit 1/A at Vol. II, Section 8). Further, an initial contact had been made with Debra Lee by the public defender (PCT. 1604-05). Subsequently, however, trial counsel Eler failed to complete the investigation, speak with lay witnesses, and speak with the mental health expert prior to trial. Eler did nothing substantive regarding the penalty phase other than receiving the files from the public defender's office and briefly talking to Dr. Krop. Similar to

---

has a number of unresolved conflicts related to his dysfunctional family situation. Although he shares some insight into the dynamics underlying his lifestyle and overall adjustment problems, he has never been able to resolve the conflicts in a satisfactory manner." (PC Exhibit 1/A at Vol. II, Section 8).

Porter, Miller's trial counsel failed in his duty to conduct a reasonable investigation.

In *State v. Morrison*, 236 So. 3d 204, 220 (Fla. 2016), the Florida Supreme Court considered an almost identical set of circumstances, as Eler inherited the case from public defender Chipperfield, Dr. Krop conducted a preliminary review, and Eler claimed to have relied on Dr. Krop to assess the mitigation. Thereafter, as in Miller's case, Eler did nothing, claiming the public defender had done all the work for him. The Florida Supreme Court rejected Eler's testimony, finding that he was deficient for failing to adequately investigate and prepare for the penalty phase.

> It is apparent from the record that trial counsel performed almost no investigation of Morrison's mental health and social background in preparation for the penalty phase in Morrison's case. **As the postconviction court explained: "[Trial counsel] misguidedly believed [Morrison's] case was ready for trial when he was assigned to represent [Morrison]." Trial counsel unreasonably failed to provide Dr. Krop with the requested additional information necessary to adequately assess Morrison's case for mitigation. As the postconviction court explained: "Although [trial counsel] testified he relied on Dr. Krop [to address mental health mitigation], he admittedly did not investigate the doctor's involvement in [Morrison's] case. Doing so would have revealed Dr. Krop's request for more information."** Trial counsel unreasonably relied primarily on Chipperfield's notes to formulate a mitigation strategy for Morrison's case. As the postconviction court explained: "Chipperfield's

> notes amount to no more than a very cursory attempt to come up with ideas for mitigation. There is nothing to show a well thought out strategy based on a reasonable investigation as characterized by [trial counsel]." There were sufficient facts in this case to place trial counsel on notice that further investigation of mental health and social background mitigation was necessary. Consequently, trial counsel's failure to investigate this line of defense was not reasonable under prevailing professional norms. We thus agree with the postconviction court that trial counsel's "unreasonable lack of preparation and investigation for [Morrison's] penalty phase" constituted deficient performance.

Id. at 220 (emphasis added).

The Florida Supreme Court's determination in *Morrison* demonstrates the unreasonableness of its decision here. Eler's *post-hoc* rationalizations were rejected in *Morrison*, and they should be rejected in Miller's case as well. Once Eler assumed representation of Miller from the public defender, it was incumbent upon him to affirmatively pursue continued investigation and follow through with the presentation of evidence at the penalty phase and not simply rely upon the unfinished investigation commenced by Chipperfield. Eler clearly failed in this regard. He did not follow through with the preliminary investigation with Dr. Krop, and he failed to follow through with the investigation of Miller's mental health history in North Carolina and to

utilize Lee as a witness.

Eler's incompetent representation was not limited to the two aforementioned instances. Rather, Eler has a lengthy history of rendering deficient performance in capital trials. *See* https://www.jacksonville.com/news/crime/2016-08-24 /story/matt-shirks-top-assistant-has-been-ineffective-four-times-raising ("Last December, Rob Smith, an attorney and research fellow at Harvard University, published a story on Slate.com that listed Eler as one of the worst defense attorneys in the country."; "Harvard Law School published a report that month on unfair death sentences that used Eler as the lone example of how ineffective defense attorneys affect sentencing.").

In *Douglas v. State*, 141 So. 3d 107, 117 (Fla. 2012), Eler was cited for failing to follow up on Dr. Krop's pretrial report and for failing to introduce his client's mental health records during the penalty phase:

> It appears that counsel, at a minimum, performed a background investigation into Douglas's social history in preparation for the penalty phase. However, **it is undisputed that the pretrial report Dr. Krop issued to counsel requested the opportunity to review additional information from counsel, as well as to schedule a follow-up evaluation to discuss the crime with Douglas and coordinate interviews with his family members.** Other than billing records, which reflect only one review by counsel of Dr. Krop's preliminary report, nothing in the record shows that counsel followed up with Dr. Krop's requests, investigated whether Dr. Krop could testify to the existence of any

> mental health mitigation, were informed by Dr. Krop of information that would be harmful to the defense, or attempted to secure another mental health expert to conduct an evaluation of Douglas. **Nor did trial counsel introduce any records concerning Douglas's mental health during the penalty phase.**

Id. at 120 (emphasis added). The Florida Supreme Court concluded there were sufficient facts in the case to place counsel on notice that further investigation of mental health mitigation was necessary, and counsel's failure to investigate this line of defense was not reasonable under prevailing professional norms. *Id.* at 121.

In *Shellito v. State*, 121 So. 3d 445, 456 (Fla. 2013), the Florida Supreme Court again found that Eler rendered deficient performance at the penalty phase for not following up on his mental health expert's report: "Although Dr. Miller, who had performed a competency evaluation, was consulted at this point, there was no true follow-up on the matters indicated in the various reports. Yet counsel made a marginal attempt to present organic brain damage and other impairment as mitigation."

In *Bevel v. State*, 221 So. 3d 1168, 1180-81 (Fla. 2017), in which Eler was the primary guilt phase counsel paired with an inexperienced penalty phase counsel, the Florida Supreme

Court found that an unreasonable mitigation investigation had been conducted. And in *Spargo v. State*, 132 So. 3d 354, 356-57 (Fla. 1st Dist. 2014), while not a death penalty case, Eler was yet again found to be deficient, this time for failing to adopt and present his client's motions to withdraw the plea because, "under these circumstances, appellant had an affirmative right to withdraw the plea, and counsel's failure to correctly advise or advocate appellant's desire in this instance constitutes deficient performance."

Eler's performance in Miller's case likewise fell below the level of competent representation. In *Porter*, the Supreme Court determined that, "It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.' *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)." *Porter*, 558 U.S. at 39. The Supreme Court concluded that "[t]he investigation conducted by Porter's counsel clearly did not satisfy those norms." *Id*. Similar to *Porter*, Eler failed to fulfill his obligations under the prevailing professional norms in existence at the time. Despite the "duty of the lawyer to conduct a prompt investigation of the circumstances

of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction," ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (c) at 93 (1989), Eler conducted no penalty phase investigation. Just as in *Porter*, and as in the aforementioned cases, Eler rendered constitutionally deficient performance.

Had he conducted a reasonable investigation of his own by effectively completing preparation of the penalty phase, Eler would have discovered vital mitigation evidence. Eler would have learned that Debra Lee had spent nearly two years with Miller just before the instant case.[2] He would have learned of the lengthy substance abuse Miller suffered and he would have had a witness who could have testified to the extensive

---

[2] In his transfer memo to Eler, Chipperfield stated:

> She [Debra Lee] is a good source of information about David's problems when he was living on the streets of North Carolina as an alcoholic. She was impressed with his sincerity and his desire to do something right in his life. I think she would make a great penalty phase witness, although I've never met her. I think she would also be a good contact person for your trip to North Carolin[a] to gather mitigation.

Of course, not only did Eler not contact Lee, he never traveled to North Carolina.

duration of that abuse. Eler would have had a witness who could have testified to Miller's attempts at treatment, the lack of supportive services to ensure a reasonable chance of success, and his continuing remorse over the previous incident. Eler would have found a witness who could have offered compelling testimony about the mental and emotional health of Miller from both his medical records and from her own observations, including the abuse he suffered as a child. Such testimony would have conclusively rebutted the trial court's rejection of the mitigating factors of abusive childhood and substance abuse (R. 369-71).

Moreover, Eler wholly failed to investigate the strength of the mental and emotional health issues when he neglected to discuss the case with his own mental health expert. Eler did not review Dr. Krop's conclusions with him or discuss the case with him during the pretrial stages. Instead, Eler waited until the day before Dr. Krop was scheduled to testify to speak with him. This conversation with Dr. Krop lasted no more than one half hour (PCT. 1698). If Eler was planning to rely on Dr. Krop's decision regarding what testimony he should present, as he testified at the evidentiary hearing, then Eler certainly should have taken the time to talk to him and

solicit his advice in advance of trial. Eler instead did nothing. He did not make the decision about what evidence to present and he did not let Dr. Krop know that he was leaving the decision about what evidence should be presented to Dr. Krop. Eler's utilization of his mental health expert fell below acceptable standards and was deficient performance. *Strickland v. Washington*, 466 U.S. 668.

Contrary to the Florida Supreme Court's determination, simply because trial counsel claims "strategy", this does not immune him from review. What is also required is that counsel's strategic decision be reasonable, which was not the case here. As the Eleventh Circuit reiterated in *Hardwick v. Crosby*, 320 F.3d 1127, 1185-86 (11th Cir. 2003):

> We caution that attorney strategy is not a shield or panacea for failure to investigate all mitigating evidence in a capital case. '**[T]he mere incantation of 'strategy' does not insulate attorney behavior from review**; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, **and that choice must have been reasonable under the circumstances**.' n208 *Stevens v. Zant, 968 F.2d 1076, 1083; Bolender, 16 F.3d at 1558.* In *Strickland*, 'the Court recognized that merely invoking the word strategy to explain errors was insufficient since 'particular decisions must be **directly assessed for reasonableness** [in light of] all the circumstances''

(Emphasis added).

In its decision in *Porter*, the Supreme Court also addressed the state court's failure to properly apply the appropriate standard as to constitutional ineffective assistance of counsel. The Supreme Court was particularly critical of the state court's application of the controlling standard used to measure a claim of penalty phase ineffective assistance of counsel. The Supreme Court determined that "[t]he Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter*, 558 U.S. at 42. For example, the Supreme Court determined that the state court unreasonably discounted to irrelevance the evidence of Porter's abusive childhood, and it also unreasonably concluded that Porter's military service would be reduced to inconsequential proportions "simply because the jury would also have learned that Porter went AWOL on more than one occasion." *Id.* at 43.

In *Miller*, as in *Porter*, the Florida Supreme Court unreasonably applied the controlling standards. It either did not consider or unreasonably discounted much of the mitigation set forth by Miller at the post-conviction evidentiary hearing. *See Miller*, 926 So. 2d at 1251-52. For example, with

regard to mental health mitigation, the Florida Supreme Court found that trial counsel's failure to utilize the VA hospital records was reasonable because presenting them "could have been a two-edged sword." *Id.* at 1252. This is the same analysis which the Florida Supreme Court applied in *Porter v. State* and which was subsequently rejected by the United States Supreme Court as unreasonable: "While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge." *Porter*, 558 U.S. at 43.

In Miller's penalty phase proceeding, substantial mitigating evidence never reached the court as a result of trial counsel's deficient performance. The evidence that was presented provided only limited insight into the "particularized characteristics of the individual defendant." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). Trial counsel failed to present significant evidence of Miller's severe mental illness and emotional disturbances. Miller's mental health issues were well documented throughout his medical records, military records, VA records, and through the

testimony of family members and Lee. Had Eler presented testimony about Miller's longstanding mental illness and drug abuse, the jury would have learned that Miller had a family history of schizophrenia. Miller began to exhibit evidence of a schizoid personality while in the military at age 18, the time period when his substance abuse began. Miller's battle with mental illness continued uninterrupted throughout his life from that point forward. It included both voluntary hospitalizations and involuntary commitments. His illness was so significant that his mental health was recognized and documented by the criminal court of North Carolina (PC Ex. 1/A, Vol. II, Section 4). There, Miller's substance abuse, mental illness, and alcoholism were found to be legally mitigating in a second degree murder charge. *Id.* This illness led to a life of marginal existence on the streets and a life lived in homeless shelters. Coupled with a defined frontal lobe deficiency, Miller's substance abuse, schizophrenia and paranoia prevented him from functioning appropriately in society and led to severe depression.

Additionally, had Eler conducted an adequate investigation, the jury would have learned that Miller witnessed the rapes of his sisters by his cousins and that he

was beaten by his father for reporting what he had witnessed (PCT. 1589, 1598-99, 1708). The trial record would have contained evidence of the emotional deprivation Miller suffered as a child, the emotional deprivation he suffered as a result of his mother's withdrawal in response to his father's violence, and the effect his father's alcoholism had on him. Yet, because of Eler's deficient performance, the trial court rejected as a mitigating factor the childhood abuse suffered by Miller (R. 369-70).

The trial court also rejected the nonstatutory mitigating factor of drug and alcohol abuse (R. 370-71). While that finding was not affirmed by the Florida Supreme Court, it found the error to be harmless in light of the aggravation. *Miller v. State*, 770 So. 2d 1144, 1150 (Fla. 2000). However, trial counsel had evidence available to him that documented a long-term polysubstance abuse and failed to present it. Had this compelling evidence been presented, a finding of harmless error by the Florida Supreme Court would not have been appropriate.

The only evidence of alcohol abuse testified to by the family was that Miller drank and chose to leave his mother's residence rather than discontinue drinking. The jury did not

hear the depth of addiction that Miller suffered and that his addictions were documented for much of his adult life. Further, the jury did not learn that Miller was hospitalized just four months prior to this crime for treatment which included substance abuse/addiction (PCT. 1591-1601).

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995)(discussing identity between *Strickland* prejudice standard and *Brady* materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*.

The Florida Supreme Court in its opinion conducted no analysis with regard to *Strickland*'s prejudice prong. As such, *de novo* review is warranted. *See Wiggins*, 539 U.S. at

534 ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."); *see also Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, [] and so we examine this element of the *Strickland* claim de novo").

When a proper review is conducted, it is evident that Miller was prejudiced as a result of trial counsel's deficient performance. Had trial counsel properly investigated and presented the available evidence, the jury would have had a greater appreciation for the aspects of his conduct and character and there is, at the very least, a reasonable probability that the result of the penalty phase would have been different. *Strickland*, 466 U.S. at 694.

D. *MARTINEZ V. RYAN*

The Florida Supreme Court unreasonably denied relief with regard to Miller's claim of penalty phase ineffective assistance of counsel. However, to the extent this Court finds the state court decision not unreasonable, Miller submits that this claim was not adequately presented to the state courts pursuant to *Martinez v. Ryan*, 566 U.S. 1, and

Trevino v. Thaler, 569 U.S. 413.

Particularly in a capital case, post-conviction counsel's ineffectiveness in failing to develop a sufficient record in state court should not curtail federal review, or preclude a federal evidentiary hearing or expansion of the record. *See Martinez*, 566 U.S. 1; *Trevino*, 569 U.S. 413; *Christeson v. Roper*, 135 S.Ct. 891 (2015). To the extent that post-conviction counsel failed to adequately develop the state court record in support of this claim, that ineffectiveness must not confine this Court's review to an incomplete state court record. Instead, this Court should consider the full evidence presented in Miller's habeas petition in analyzing his ineffective assistance of trial counsel claim.

Martinez carves out an exception to procedural default where a post-conviction attorney's ineffectiveness prevented a claim from being properly raised and presented to the state court (cause) and that failure has prejudiced the habeas litigant. *Strickland v. Washington*, 466 U.S. 668, governs the assessment of reasonable performance by a post-conviction attorney. Thus, Miller must show that post-conviction counsel's representation fell below an objective standard of reasonableness. *Id.* at 688.

The prejudice standard under *Martinez* is more easily established than under *Strickland* – Miller must only show that the underlying, otherwise-defaulted ineffectiveness claim is substantial, "which is to say that the claim has some merit." *Martinez*, 566 U.S. at 14. Like *Strickland*, however, assessment of prejudice requires consideration of "the totality of the evidence before the judge[.]" *Strickland*, 466 U.S. at 695.

Here, post-conviction counsel's performance was objectively unreasonable. Post-conviction counsel had a duty to present all reasonably available mitigating evidence in a manner that preserved the issue for subsequent review. *See Wiggins*, 539 U.S. at 524, *see also* ABA Guidelines for Appointment and Performance in Death Penalty Cases (2003) ("ABA Guidelines") 10.15.1 (B-C). In dereliction of this duty and without any strategic reason, counsel failed to present multiple critical witnesses (including former counsel Chipperfield) and evidence that Miller suffered from paranoid schizophrenia and was under its effect at the time of the crime. Thus, post-conviction counsel created a state court record containing only a "small sliver" of the available mitigation and mental health evidence. *See Cooper v.*

Secretary, Dept. of Corrs., 646 F.3d 1328, 1355 (11th Cir. 2011).

There was no justifiable strategic reason to omit readily available lay and expert testimony on these matters. As outlined above and in Miller's habeas petition, trial counsel failed to present significant mitigating evidence. Post-conviction counsel failed to properly develop the record by omitting lay and expert testimony regarding Eler's deficient performance and Miller's background. Because the underlying claim is "substantial," *Martinez*, 566 U.S. at 14, post-conviction counsel's unreasonable failure to fully raise and present the claim constitutes cause and prejudice to excuse any default.

II. INEFFECTIVE ASSISTANCE OF COUNSEL-THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR

In *Wiggins*, 539 U.S. at 524, the United States Supreme Court stated, "[I]nvestigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." (emphasis in original)(citations omitted). In *Rompilla*, 545 U.S. at 386, n.5, the Supreme Court found trial counsel ineffective

for failing to review the circumstances of a prior violent felony conviction which the State was going to utilize as an aggravating circumstance. As the Court explained: "We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest." *Id.*

During Miller's penalty phase, the State relied on his 1983 North Carolina conviction for second degree murder to establish the aggravating circumstance of prior violent felony (T. 824-26). The State offered into evidence only the judgment and sentence for this conviction (*id.*). No additional testimony as to the underlying facts of the conviction and subsequent sentence were introduced as evidence by either the State or Miller's trial counsel.

In addressing whether trial counsel was ineffective for failing to challenge the weight afforded to the aggravating factor, the Florida Supreme Court cited to trial counsel's testimony at the post-conviction evidentiary hearing that he was aware of the aggravator and was trying to minimize it; and that he did not want the jury to focus on the prior murder

conviction. *Miller*, 926 So. 2d at 1252. The Florida Supreme Court stated, "Although we acknowledge that reasonable counsel could differ on such a strategy, we find no error in the trial court concluding that it is not outside of the realm of providing competent counsel." *Id.* Further, the Florida Supreme Court found *Rompilla* to be inapplicable: "Because this case, unlike *Rompilla*, involves an informed attorney making an informed and strategic decision, *Rompilla* is inapplicable here." *Id.*

Miller submits that the Florida Supreme Court's determination is contrary to and an unreasonable application of clearly established federal law. Moreover, the court's ruling is based on an unreasonable determination of the facts. Where the State seeks to use the prior violent felony aggravator, it is allowed to present the underlying facts of the prior incident subject to the limitation that the prior conviction cannot be retried. *Elledge v. State*, 346 So. 2d 948 (Fla. 1977). Whether the State would be permitted to introduce negative facts was not dependent on whether Eler presented the findings of the North Carolina judge and the mental health findings that so clearly mitigated this most serious aggravator. The State was legally allowed to present

the factual circumstances of the prior conviction irrespective of what Eler chose to present in mitigation of the aggravator. Additionally, Eler admitted that he knew prior to the penalty phase that the State had not secured the presence of any witnesses from North Carolina. Thus, there was no State witness who would have testified negatively to any presentation of evidence or records by Eler which would have mitigated the prior conviction:

> Q Did you find it to be reasonable strategy by defense counsel in a capital case to simply just ignore an aggravating factor because it's bad and you want to just not do anything about it?
>
> A I don't think we ignored it. We were aware of it. We were trying to minimize it and one of the ways that I consider reasonable in minimizing something is to gloss over and also not allow them to present more evidence on it and I thought that's what I was doing.
>
> Q But the State had already presented their case. They had already presented judgments and sentences, right?
>
> A True.

(PCT. 1525-26).

Eler was unable to identify a single fact he believed the State would bring out that would be any more negative than the existence of the conviction. Indeed, the conviction itself was the strongest weapon the State had. Any additional

evidence would have weakened the aggravator to the disadvantage of the State. Obviously it would not have helped the State to have the North Carolina judge's conclusion regarding the mitigation in that case come before the jury.

When further questioning showed the unsoundness of Eler's decision, he claimed he did not want to get into any of the mental health issues that existed at the time of the prior conviction because he thought the VA records would show that Miller pushed another patient. Once again, however, Eler's "decision" was flawed because, as Debra Lee testified, "I never witnessed any of that behavior and had no prior knowledge of that, not during the time that I knew him." (PCT. 1007).

Contrary to the Florida Supreme Court's determination, Eler's *post-hoc* rationalizations do not change the fact that his "strategic" decision was not reasonable. *See Wiggins*, 539 U.S. at 526; *Strickland,* 466 U.S. at 691. Due to Eler's failure to explain and mitigate the prior conviction, Miller was significantly prejudiced at trial. The prior violent felony conviction was the most important sentencing consideration to the trial judge as reflected in the sentencing order: "The defendant's prior conviction for murder

is most appalling and has been given great weight. The court cannot imagine a greater aggravating factor unless it pertains to the method of the prior murder or the nature of the victim." (PCR. 374-75).

In a capital sentencing proceeding, "[t]he basic concerns of counsel [] are to neutralize the aggravating factors advanced by the state, and to present mitigating evidence."). *See Starr v. Lockhart*, 23 F.3d 1280, 1285 (8th Cir. 1994). Trial counsel had evidence at his fingertips to counter the aggravating circumstance, yet failed to use it despite his obligation to do so. Contrary to the Florida Supreme Court's determination, if counsel presented the underlying facts of the conviction, there is a reasonable probability that the outcome of the proceedings would have been different. This is especially so in light of the fact that death was recommended by a vote of 7-5, the slimmest of legal margins.

III. INEFFECTIVE ASSISTANCE OF COUNSEL-FAILURE TO OBJECT

When a prosecutor's comments "are so egregious that they effectively 'foreclose the jury's consideration of . . . mitigating evidence,' the jury is unable to make a fair, individualized determination as required by the Eighth Amendment." *Depew v. Anderson*, 311 F.3d 742, 748 (6th Cir.

2002) (*citing Buchanan v. Angelone*, 522 U.S. 269, 277 (1998)). It is well-settled that improper prosecutorial misconduct can "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

In addressing Miller's claim that his trial counsel failed to object to improper argument by the State, the Florida Supreme Court noted that the trial court found it was within the wide range of professional judgment for counsel to make a tactical decision not to object. *Miller*, 926 So. 2d at 1253. According to the Florida Supreme Court, "This finding was essentially predicated upon defense counsel's testimony that his usual professional judgment at trial is to avoid objecting to the State's arguments except when absolutely necessary, and, instead, to respond in his own arguments to the State's excesses." *Id*. On this basis, the Florida Supreme Court found no error. *Id*. Thus, even though the Florida Supreme Court "clearly disapprove[d]" of the argument regarding Albert Floyd and agreed that it came "dangerously close to using victim impact evidence as a nonstatutory aggravator", the court found no error in the trial court's determination that Eler was not ineffective for strategically

deciding not to object. *Id.* at 1255.

The Florida Supreme Court's ruling was contrary to and an unreasonable application of clearly established federal law and involved an unreasonable determination of the facts. Eler's reasoning for not objecting was premised upon a convoluted and incorrect understanding of the concept of fundamental error. Eler indicated that he only objects in closing argument when the error was so egregious that it was fundamental (PCT. 1557). Yet, the legal definition of fundamental error is error which is unobjected to, but "reaches down to the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999). Eler apparently failed to grasp the ramifications of only objecting to error deemed "fundamental" because the very nature of fundamental error is that it requires no objection in order to be preserved for appeal. A strategy of objecting to only fundamental error wholly fails to preserve what would otherwise be reversible error on appeal and reversible error needs an objection.

Eler's "tactical" decision to remain silent in the face

of clear-cut impropriety was based upon his ignorance of the rule of law regarding objections, record preservation, and the concept of fundamental error. *See Hinton v. Alabama*, 571 U.S. 263 (2014) (finding counsel's ignorance of the law unacceptable and a form of ineffective assistance to the client). No tactical motive can be ascribed to an attorney whose omissions are based on ignorance. *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991). "[S]o called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." *Hardwick v. Crosby*, 320 F.3d 1127, 1185-86 (11th Cir. 2003) (citation omitted) (note omitted). *See also Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008) (Trial counsel's "decision was not made after a thorough investigation of the law but was made based on a gross misunderstanding of a clear rule of Alabama criminal procedure.").

Miller was prejudiced as a result of trial counsel's deficient performance. A prosecutor may not vouch for the credibility of a witness by expressing an opinion as to whether the witness is telling the truth. *Kelly v. State*, 842 So. 2d 223 (Fla. 1st DCA 2003); *DeLuca v. State*, 736 So. 2d

1222 (Fla. 4th DCA 1999). Moreover, the argument of the prosecutor which exhorted the jury to return a death sentence because Miller would have killed someone else if not stopped was asking the jury to base a death sentence on a nonstatutory aggravating factor. This argument was made no less than six times without objection. Section 921.141, Florida Statutes (1997), sets forth the statutory aggravating circumstances that the State may rely upon in seeking the death penalty. The Florida Supreme Court has consistently held that it is improper for the State to argue nonstatutory aggravation as a reason for a jury to recommend a death sentence. *Allen v. State*, 662 So. 2d 323 (Fla. 1995); *Drake v. State*, 441 So. 2d 1079 (Fla. 1983).

Finally, with regard to the prosecutor's argument invoking sympathy for the jury, the incendiary rhetoric had the intended purpose of improperly inflaming the jury. *See Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989) (improper for prosecutor to argue that the jury should show the same level of mercy to the defendant that he had showed to the victim); *Urbin v. State*, 714 So. 2d 411 (Fla. 1998)(same).

The prosecution's arguments violated Miller's constitutional rights and rendered his conviction and death

sentence fundamentally unfair and unreliable. *See Drake v. Kemp*, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(*en banc*); *Potts v. Zant*, 734 F.2d 526, 536 (11th Cir. 1984); *Wilson v. Kemp*, 777 F.2d 621 (11th Cir. 1985). Here, as in *Potts*, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent and unprejudicial consideration the law requires." 734 F.2d at 536. In the instant case, as in *Wilson*, the State's closing argument "tend[ed] to mislead the jury about the proper scope of its deliberations." 777 F.2d at 626. In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." *Id*. at 627. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." *Id*.

As an additional matter, Miller was denied the effective assistance of appellate counsel. The legal principles supporting the claims omitted from his direct appeal were well-established at the time, and the claims were "apparent on the face of the transcript." *Eagle v. Linaham*, 268 F.3d 1306, 1322 (11th Cir. 2001). Miller had the constitutional right to the effective assistance of counsel for purposes of presenting

his direct appeal to the Florida Supreme Court. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

In addressing appellate counsel's ineffectiveness, the Florida Supreme Court stated that trial counsel failed to object to the comments, thus the issues were not preserved for appeal. *Miller*, 926 So. 2d at 1261. While the Florida Supreme Court reiterated that it did not condone the comments made by the prosecutor, it concluded that the prosecutorial comments cited did not rise to the level of fundamental error. *Id*.

The state court's determination was contrary to and an unreasonable application of clearly established federal law and involved an unreasonable determination of the facts. In Florida, fundamental error "reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error." *Card v. State*, 803 So. 3d 613, 622 (Fla. 2001). Here, the cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991). *See also Donnelly v. DeChristoforo*, 416 U.S. 647 (1974); *United States v. Eyster*,

948 F.2d 1196, 1206 (11th Cir. 1991). The prosecutor intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response. Because the constitutional violations which occurred during Miller's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Miller's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987).

In light of the serious reversible errors that appellate counsel never raised combined with the fact that the jury recommended a sentence of death by the slimmest of margins, 7-5, "there [is] more than a reasonable probability that the outcome of the appeal would have been different." *Id*. at 1439; *see also Eagle*, 268 F.3d at 1322.

IV. *CALDWELL v. MISSISSIPPI*

Throughout Miller's capital trial the jury was repeatedly told they were simply recommending an advisory sentence to the trial judge (T. 5, 126, 127, 968, 985-90). As the jurors left the courtroom to deliberate about whether to recommend that Miller be sentenced to death, they were instructed that the final decision on the sentence rested with the trial judge (T.

984). The instructions provided prior to deliberating did not inform the jury that their recommendation was entitled to great weight (T. 984-85).

At the time of Miller's 1998 trial, what the jury was told may have been consistent with the procedure then set forth in Florida law. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988). But, it was clearly inaccurate and unconstitutional. It was recognized by the Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). *Caldwell* held: "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id*. at 328-29.

While *Caldwell* was the law before Miller's death sentence

became final, it was ruled to be inapplicable to Florida capital proceedings. *See Darden v. State*, 475 So. 2d 217, 221 (Fla. 1985). In *Darden*, the Florida Supreme Court held that under Florida's sentencing scheme, the jury was not responsible for the sentence and thus *Caldwell* was not applicable to jury instructions in Florida telling the jury that its role was advisory. *Id*.[3]

Given that *Darden* is no longer the law in light of *Hurst v. Florida*, 136 S.Ct. 616, 620 (2016) and *Hurst v. State*, 202 So. 3d 20 (Fla. 2016) (See Ground VI), Miller submits that the comments, argument and instructions heard by Miller's jury referring to the advisory nature of its sentencing recommendation, clearly and repeatedly diminished the jury's sense of responsibility in violation of *Caldwell* and the United States Constitution.

V. STATE COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES

A capital sentencer must consider and give effect to the mitigation presented. *Penry v. Lynaugh*, 492 U.S. 302; *Eddings*

[3] In Miller's post-conviction appeal, in addition to finding Miller's claim to be procedurally barred, the Florida Supreme Court found it to be without merit, as the court had "repeatedly rejected this claim." *Miller*, 926 So. 2d at 1256-57.

v. Oklahoma, 455 U.S. 104 (1982). Relying on *Lockett v. Ohio*, 438 U.S. 586 (1978), in which the Supreme Court established that a state statute may not restrict the sentencing court's consideration of mitigation, the Court in *Eddings* made clear that mitigation does not have to negate legal responsibility for the crime as the trial court in that case believed. 455 U.S. at 116. ("Nor do we suggest an absence of legal responsibility where crime is committed by a minor.").

In sentencing Miller to death, the trial court failed to consider and weigh mitigating evidence related to Miller's abusive childhood as well as his drug and alcohol abuse (R. 369-71). With regard to the former, the Florida Supreme Court found no error on direct appeal. According to the court, Miller's father administered corporal punishment to the children once every six-to-eight months; Miller did not present evidence of injuries or hospitalization resulting from the punishments; and the punishments ceased when Miller was thirteen years old. *Miller*, 770 So. 2d at 1149. The Florida Supreme Court concluded that the trial court did not abuse its discretion in declining to find this mitigating circumstance. *Id.* at 1150.

The Florida Supreme Court's determination was contrary to

and an unreasonable application of federal law and involved an unreasonable determination of the facts. As the United States Supreme Court explained in *Eddings*, 455 U.S. at 114-15:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, **neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence** . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. **But they may not give it no weight by excluding such evidence from their consideration.**

(Emphasis added). Evidence of childhood abuse is a recognized mitigating factor. It cannot be dismissed simply because the child was not hospitalized, it did not occur as much as the court would like, or it happened many years earlier. In *Porter*, 558 U.S. at 43, the Florida Supreme Court similarly discounted the evidence of Porter's abusive childhood because he was 54 years old at the time of the crime. The United States Supreme Court found this analysis to be unreasonable. *Id.*; *see also Smith v. Texas*, 543 U.S. 37, 45 (2004) (holding that petitioner's evidence of a troubled childhood "was relevant for mitigation purposes" notwithstanding the petitioner's failure to establish a nexus between his background and his crime).

Further, the state court's ruling was based on an

unreasonable determination of the facts. The Florida Supreme Court minimized the abuse by equating it to corporal punishment. However, the penalty phase testimony paints a far different picture. Miller's father was described as an emotionally uninvolved alcoholic who was physically abusive to his wife and children (T. 839-41; 864-65). He would severely discipline the children by beating them with a belt, and he also beat them with an electrical cord (T. 841, 866). He hit one child with a soda bottle causing an injury requiring stitches (T. 840). And he strapped another child to a door and whipped her with an electrical cord (T. 927). Miller's mother, after being choked by his father, had to shoot a firearm to hold him at bay (T. 865).

Contrary to the Florida Supreme Court's determination, the trial court erroneously failed to consider valid mitigation and, as a result, the sentencing process was skewed and Miller's death sentence is unconstitutional. *Eddings v. Oklahoma*, 455 U.S. 104; *Lockett v. Ohio*, 438 U.S. 586.

With regard to Miller's drug and alcohol abuse, the Florida Supreme Court determined that the trial court erred in failing to find this mitigating factor, as it was uncontested. *Miller*, 770 So. 2d at 1150. However, the Florida Supreme

Court found the error to be harmless given the weighty aggravating factors present as well as testimony that Miller rejected his family's help for his substance abuse. *Id*.

The Florida Supreme Court erred in its determination. In accordance with *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), the appropriate standard is to determine whether the errors had a "substantial and injurious effect or influence in determining the jury's verdict." If, reviewing the facts as a whole, the Court is able to determine with fair assurance that the judgment was not substantially swayed by the errors, it may conclude that the errors were harmless. *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). Otherwise, the Court must conclude that the petitioner's rights were substantially and injuriously affected. *Id*.

Here, the Florida Supreme Court's determination ignores the fact that Miller was only one vote shy of a life recommendation, to which the trial court was required to give great weight. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). Moreover, as discussed *supra*, the trial court and the Florida Supreme Court erroneously failed to consider Miller's abusive childhood as a mitigating circumstance. This omission, in conjunction with the trial court's rejection of Miller's

alcohol and substance abuse as mitigating, had a substantial and injurious effect or influence in determining Miller's sentence. *Brecht*, 507 U.S. at 623.

VI. *HURST V. FLORIDA*

The penalty phase of Miller's trial occurred in 1998. At that time, Florida's capital sentencing scheme provided for an "advisory" jury during the penalty phase. The judge would make the required statutory findings. *See Hurst v. Florida*, 136 S.Ct. at 620.

Miller's death sentence became final on January 22, 2001. The following year, the United States Supreme Court ruled in *Ring v. Arizona*, 536 U.S. 584, 591 (2002), that Arizona's capital sentencing statute violated the Sixth Amendment because it permitted the judge rather than a jury to find the facts necessary for a death sentence under state law.

In *Hurst*, the United States Supreme Court held that Florida's statute was unconstitutional in light of *Ring*. Florida's statute violated the Sixth Amendment because, like the Arizona scheme at issue in *Ring*, it permitted the judge rather than a jury to find the three facts – the aggravating factors, their sufficiency, and their weight relative to mitigation – required for a death sentence under state law.

Hurst, 136 S.Ct. at 621-24.

After *Hurst*, the Florida Supreme Court blamed the United States Supreme Court for the "fourteen-year delay in applying *Ring* to Florida." *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). The Florida Supreme Court explained that it would therefore apply *Hurst* retroactively on collateral review as a matter of state law, but only to prisoners whose death sentences became final after June 24, 2002 — the date *Ring* was decided. *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016); *Mosley*, 209 So. 3d at 1274. Under the Florida Supreme Court's state-law analysis, the date of *Ring* would serve as the cutoff for collateral retroactivity because *Ring* was the point at which the United States Supreme Court should have informed Florida's courts that Florida's statutory scheme was unconstitutional. *See Mosley*, 209 So. 3d at 1279-81.

The Florida Supreme Court's retroactivity cutoff for *Hurst* claims divided Florida's death row roughly in half, making dozens of prisoners eligible for automatic resentencing, while preventing dozens of others from bringing claims based on the same Sixth Amendment violation involving the same statute.

On June 28, 2017, Miller filed a petition for writ of

habeas corpus in the Florida Supreme Court addressing *Hurst v. Florida*, and *Hurst v. State*, 202 So. 3d 20. Miller's appeal was one of dozens of similar "pre-*Ring*" appeals and state habeas petitions pending in the Florida Supreme Court in 2017. After staying many of those cases, the Florida Supreme Court denied relief to approximately 80 prisoners, including Miller, during a two-week period beginning in January 2018. The court's summary opinions were not individualized; they all cited *Hitchcock* and the state-law retroactivity cutoff, without addressing federal constitutional law.[4]

Miller submits that this Court should review the constitutionality of the Florida Supreme Court's *Hurst* retroactivity cutoff *de novo*. The application of § 2254(d)(1)'s more deferential standards is dependent on the state court having adjudicated the prisoner's claims "on the merits." There is no merits review if the state court disregards a prisoner's federal claim. Here, the Florida Supreme Court denied Miller *Hurst* relief based on its

[4] In Miller's case, the Florida Supreme Court stated that his death sentence became final in 2001, and therefore *Hurst* did not apply retroactively. *Miller v. Jones*, 237 So. 3d 921 (Fla. 2018).

state-law retroactivity cutoff, but did not address any of his Eighth and Fourteenth Amendment challenges to the cutoff itself.

Alternatively, this Court should grant habeas relief because the Florida Supreme Court's decision was contrary to or involved an unreasonable application of clearly established federal law. Although the United States Supreme Court has clearly articulated the relevant Eighth and Fourteenth Amendment standards, the Florida Supreme Court has contravened or, at a minimum unreasonably applied, those standards with respect to its *Hurst* retroactivity cutoff. This is particularly harmful in Miller's case because his death sentence became final shortly before the cutoff drawn by the Florida Supreme Court at *Ring*, and after *Apprendi v. New Jersey*, 523 U.S. 224 (1998), which was the foundation for both *Ring* and *Hurst*.

There is no dispute that Miller was sentenced to death in violation of the Sixth Amendment for the reasons described in *Hurst*. Miller was sentenced pursuant to the same unconstitutional Florida statute as the more than 100 other Florida prisoners who have been granted relief under *Hurst*. Like those defendants, Miller's sentence was imposed after a

judge, not a jury, made the findings of fact required for the death penalty under state law. *See Hurst*, 136 S.Ct. at 621-24.

The issue is whether the Florida Supreme Court's extension of *Hurst* retroactivity on collateral review to roughly half of Florida's death row, while barring the other half from seeking the same relief for the same constitutional error, is itself an Eighth and Fourteenth Amendment violation of the rights of pre-*Ring* defendants like Miller. Because the state court's retroactivity rule violated Miller's federal constitutional rights, this Court should grant relief under § 2254.

The United States Supreme Court's modern approach to assessing retroactivity is premised on the assumption that the date of the new constitutional ruling itself is the relevant date for retroactivity analysis. *See, e.g.*, *Danforth v. Minnesota*, 552 U.S. 264 (2006); *Montgomery v. Louisiana*, 136 S.Ct. 718, 725 (2016). The Florida Supreme Court's *Hurst* retroactivity cutoff, on the other hand, is based not on the date of *Hurst*, but on the date of *Ring*, a decision about a different state's capital sentencing scheme, rendered fourteen years before *Hurst*.

The Florida Supreme Court's *Hurst* retroactivity cutoff

has allowed for the arbitrary and capricious application of Florida's death penalty, in violation of the Eighth Amendment, and denied pre-*Ring* prisoners like Miller the equal protection of the laws, in violation of the Fourteenth Amendment. The cutoff treats death-sentenced prisoners in the same posture differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

VII. COMPETENCY TO STAND TRIAL

Miller's right to substantive due process was violated because he was, in fact, tried while incompetent. See *James v. Singletary*, 957 F.2d 1562, 1569-70 (11th Cir. 1992) (citing *Pate v. Robinson*, 383 U.S. 375, 384-86 (1966)). The test for determining competency to stand trial is "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).

Miller's prior failure to present the state courts with the issue of his substantive incompetency does not constitute default. *See Medina v. Secretary*, 59 F.3d 1095, 1111 (11th

Cir. 1995) (finding petitioner's substantive competency claim was "not subject to procedural default and must be considered on the merits."); *see also Coleman v. Thompson*, 501 U.S. 722 (1991); *Nelson v. Sec'y, Dep't. of Corrs.*, 2012 WL 834130, *32 (M.D. Fla. March 13, 2012) (stating that "Eleventh Circuit precedent holds that a substantive competency claim generally cannot be procedurally defaulted.").

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL-COMPETENCY TO STAND TRIAL

The issue of trial counsel's ineffectiveness for failing to challenge Miller's competency is cognizable under the cause and prejudice exception to the procedural default doctrine, due to post-conviction counsel's ineffectiveness. *See Martinez*, 566 U.S. 1. Under *Martinez* and *Trevino*, this is Miller's first opportunity to present the underlying ineffectiveness claim; thus, there is no state proceeding to defer to. Indeed, "*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state [post-conviction] counsel's ineffectiveness had been in state [post-conviction] proceedings where the same ineffective counsel represented him. *Detrich*, 740 F.3d at 1247. The same is true for the record establishing the

underlying trial counsel ineffectiveness. *Id.* Accordingly, this Court should allow development of a record sufficient for determining the underlying ineffectiveness claim. *Id.*

Here, post-conviction counsel's performance was objectively unreasonable, constituting cause to excuse default of this claim. In Miller's post-conviction proceedings, "[t]he essential question was whether trial counsel's performance fell outside the wide range of professionally competent assistance. And to answer that question, [post-conviction counsel] had to determine what trial counsel knew and why he chose to present the defense he presented." *See Sullivan v. Sec'y, Fla. Dep't of Corrs.*, 837 F.3d 1195, 1206 (11th Cir. 2016); *see also ibid.* (post-conviction counsel had an obligation to "investigate[] to determine whether counsel's decision to present [their] defense was reasonable in light of all the circumstances") (internal quotations omitted).

As is clear from the face of the record, post-conviction counsel believed Miller's mental health was a critical issue in this case. However, post-conviction counsel conducted no investigation of Miller's competency throughout his proceedings, and raised no claim regarding trial counsel's dereliction of duty in failing to investigate and challenge

Miller's competency. As a result, post-conviction counsel failed in their duty to "raise and preserve **every** arguably meritorious issue." ABA Guidelines 10.15.1(C) (emphasis added).

Prejudice exists to excuse default because the omitted ineffective assistance claim is substantial. Failure to raise a defendant's potential incompetency can form the basis for a claim of ineffective assistance of counsel. *Coker v. State*, 978 So. 2d 809, 810 (Fla. 1st DCA 2008).

Trial counsel performed deficiently by ignoring significant red flags that Miller was not competent before and during his trial due to altered mental status characterized by delusions, religious preoccupations, and auditory hallucinations impacting his capacity to understand consequences of his and others' actions. Obvious red flags included Miller's refusal to actively participate in his own defense (PCT. 1548) and a history of competency concerns documented in Miller's previous murder charge. Counsel had a duty to investigate red flags of Miller's incompetency and to inform the court of "reasonable doubt" as to Miller's competency to proceed. *Kibert v. Peyton*, 383 F.2d 566, 569 (4th Cir. 1967).

Trial counsel abdicated this duty by relying solely on an initial, cursory competency assessment ordered by prior counsel Chipperfield, and conducting no further competency investigation whatsoever (PCT. 1492-93). Yet, any finding that Miller was competent prior to trial counsel's assumption of representation from former counsel Chipperfield does not excuse trial counsel's negligence in failing to investigate Miller's competency closer to the time of trial. *Drope v. Missouri*, 420 U.S. 162, 181 (1975) ("Even when a defendant is competent at the commencement of his trial, [one] must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence"); *Bishop v. United States*, 350 U.S. 961 (1956) (even where defendant had no mental disorder a month prior to trial, signs of incompetence at the time of trial warranted a hearing).

Trial counsel's deficient performance prejudiced Miller because there exists "at least a reasonable probability that a psychological evaluation would have revealed that [Miller] was incompetent to stand trial." *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989); *Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988) (same). As Miller's habeas petition

presents, Miller suffers from numerous mental health disorders, including features of schizoid personality disorder and brain damage. Most significantly, Miller has paranoid schizophrenia with a history of pervasive hallucinations and delusions dating back to at least the 1980s. He cannot take in relevant information, creating a detachment from reality and reversion into a world of fantasy. As is typical in schizophrenia and schizotypal disorders, Miller suffers from a language disorder and often does not want to communicate. When forced to do so, he cannot effectively communicate, is prone to misunderstandings, inappropriate conclusions, and significant distortion in his responses. He likely acquiesced to whatever his attorneys pushed him to do, simply to end the interaction and return to solitude. This tendency is particularly pronounced under stress, as are his impairments in thinking, perception, and analytic skills. These symptoms would have made effective communication virtually impossible between Miller and his defense counsel, and prevented him from rationally participating in his own defense. Because the underlying claim is "substantial," *Martinez*, 566 U.S. at 14, post-conviction counsel's unreasonable failure to fully raise and present the claim constitutes cause and prejudice to

excuse any default.

IX. CUMULATIVE ERROR

The cumulative effect of the state court's federal constitutional errors undermines the reliability of Miller's conviction and sentence, violating the Eighth Amendment. When evaluating errors, "piecemeal review of each incident does not end [the] inquiry." *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004) (citations omitted). Under the cumulative error doctrine, "aggregation of non-reversible errors can yield a denial of the constitutional right to a fair trial, which calls for reversal." *Napolitano v. Sec'y, Fla. Dep't of Corrs.*, 2017 WL 7341482, at *5 (11th Cir. Oct. 30, 2017); *see also United States v. Ramirez*, 426 F.3d 1344 (11th Cir. 2005); *United States v. Adams*, 74 F.3d 1093 (11th Cir. 1996). This analysis takes all errors into account. *See, e.g., Masse v. Sec'y, Fla. Dep't of Corrs.*, 700 F. App'x 890, 895 (11th Cir. 2017) (cumulative error claims considered on the merits). When deciding a cumulative error claim, the reviewing court must look at the trial holistically and determine whether it was fundamentally fair. *United States v. Lopez*, 590 F.3d 1238 (11th Cir. 2009); *see also United States v. Calderon*, 127 F.3d 1314, 1333 (11th Cir. 1997). In Miller's case, for the

reasons described above, the trial was unfair and requires reversal.

CONCLUSION

Based on the habeas petition and the legal framework discussed in this memorandum, Miller submits habeas relief should issue.

Respectfully submitted,

/s/ TERRI L. BACKHUS
TERRI L. BACKHUS
KATHERINE A. BLAIR
SEAN T. GUNN
Office of the Federal
Public Defender
Northern District of Florida
Capital Habeas Unit
227 N. Bronough St., Ste. 4200
Tallahassee, Florida 32301-1300
(850) 942-8818
Terri_backhus@fd.org

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that this memorandum contains 12,436 words, in compliance with this Court's February 8, 2019, scheduling order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 8, 2019, this filing was served on all parties through the CM/ECF system, in compliance with this Court's electronic filing rules.

/s/ TERRI L. BACKHUS
TERRI L. BACKHUS

APPENDIX A-11

April 9, 2019, Respondents' Motion to Dismiss Petition as Untimely

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v.

CASE NO. 3:17-cv-932-J-39JBT
CAPITAL CASE

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

MOTION TO DISMISS PETITION AS UNTIMELY

COMES NOW, Respondents, Secretary, Department of Corrections, et al., by and through the undersigned counsel, and hereby moves to dismiss the petition for writ of habeas corpus as time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the statute of limitations, Miller's habeas petition was due on June 16, 2006, but it was not filed until January 30, 2019.

Under 28 U.S.C. §2244(d)(1), a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." The statute of limitations begins to run on "the date on which the judgment became final by the conclusion of direct review or the

expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The statute of limitations is tolled for state post-conviction proceedings. 28 U.S.C. §2244(d)(2).

The timeline of pertinent events in this case is as follows: On November 29, 2000, Petitioner's judgment became final,[1] which started the clock on AEDPA's 1-year statute of limitations. As is often seen in capital litigation in Florida, 302 days were used of the 365 allotted by the statute of limitations before the post-conviction motion was filed in state court. On September 27, 2001, Petitioner's "shell" post-conviction motion was filed,[2] which tolled statute of limitations with 63 days remaining to timely file a federal habeas petition. On April 13, 2006, the post-conviction litigation was completed,[3] which marked the end of tolling of the statute of limitations. June 15, 2006, was the last day to timely file the Petition.

---

[1] Since no writ of certiorari was filed, chuthe judgment became final 90 days after *Miller v. State*, 770 So. 2d 1144 (2000), was decided on August 31, 2000, per Supreme Court Rule 13.

[2] *Miller v. State*, 926 So. 2d 1243, 1248 (Fla. 2006).

[3] Date on which the Florida Supreme Court issued its mandate in *Miller*, 926 So. 2d at 1261, which can be found on the online docket for the Florida Supreme Court here: http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=892&CaseYear=2004

After the statute of limitations expired, over 11 years passed (4088 days) without any action in federal court. On August 24, 2017, the Federal Public Defender for the Norther District of Florida, Capital Habeas Unit (CHU-North) was appointed to represent Petitioner[4] in federal court. (Doc 3). On January 31, 2018, 160 days after CHU-North was appointed in federal court, successive post-conviction litigation in state court completed.[5] On January 30, 2019, 524 days after

[4] Respondents do not agree that the date of appointment is the date at which CHU-North's responsibility for time begins, but for purposes of this Motion, to provide a clear demarcation, and viewing the issue in a light most favorable to CHU-North, this date will be used. In the wake of *Lugo*, the CHU-North was created in order to prevent the untimely filing of petitions. *Lugo v. Sec'y, Fla. Dep't of Corr*., 750 F.3d 1198, 1225 (11th Cir. 2014). Miller's case was specifically listed in *Lugo* as one of the problematic cases. After the April 24, 2014, decision in *Lugo*, the CHU-North was created in late 2014/early 2015. Perhaps even earlier, but by May 2015, CHU-North was up and running as evidenced by the filing of a motion for appointment in the Northern District of Florida, *Guardado v. Sec'y, Fla. Dep't. of Corr*., #4:15-cv-256 (Doc 1). Certainly, *Lugo* provided notice to the newly formed CHU-North that no federal habeas petition had ever been filed in this case. This case, like the other cases listed in *Lugo*, should have been CHU-North's top priority. Instead, CHU-North waited over two years to be appointed in this case. Thus, CHU-North's responsibility for continued untimeliness in this case started in 2015, rather than from the time of their request for appointment in 2017.

[5] The successive post-conviction litigation was filed on June 28, 2017, as a state habeas petition in the Florida Supreme Court. *Miller v. Jones*, 237 So. 3d 921 (Fla. 2018). Again, Respondents do not agree that the time during which Petitioner had a pending state habeas petition would necessarily toll the statute of limitations since the statute had already previously run, but for purposes of this Motion and viewing the issue in a light most favorable to CHU-North, this date will be used.

CHU-North was appointed and 364 days after the Florida Supreme Court's decision, the Petition was filed.[6]

Equitable tolling is an "extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1221 (11th Cir. 2017) (quoting *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009)). When seeking equitable tolling, a petitioner has the burden of establishing "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" *Holland v. Florida*, 560 U.S. 631, 655 (2010) (Alito, J., concurring in part and concurring in the judgment) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Diligence and extraordinary circumstances "are separate elements, both of which must be met before there can be any equitable tolling." *Cadet*, 853 F.3d at 1225 (citation omitted).

In both the Petition and the Memorandum of Law in Support of the Petition, CHU-North argues that Miller's significant mental health issues, specifically schizophrenia, constitute extraordinary circumstances which justify equitable

[6] It is curious that the Petition was filed exactly one year after completion of the state habeas petition, as counsel in other capital cases, and specifically in this jurisdiction, have purposely missed the AEDPA deadline in order to argue that newly appointed habeas counsel should have one year to investigate and prepare

tolling. (Docs 15 at 9-12 and 24 at 6-8). Certainly, if a petitioner is *pro se*, his mental health issues can constitute extraordinary circumstances which justify equitable tolling. Because "mental impairment is not *per se* a reason to toll a statute of limitations," a petitioner must demonstrate "a causal connection between his mental incapacity and his ability to file a timely" petition. *Hunter*, 587 F.3d at 1308-09 (remanding for an evidentiary hearing to determine if petitioner's "substantial mental retardation prevented him from filing *pro se* his § 2254 petition within the AEDPA's one-year limitations period"); *see also Lawrence v. Florida*, 421 F.3d 1221, 1226-27 (11th Cir. 2005) (mental impairments alone are not "extraordinary circumstances"), *cert. denied*, 549 U.S. 327, 337 (2007) (questioning whether the "mental incapacity" argument could even be "legally credited"); *Spears v. Warden*, 605 Fed. App'x 900, 904 (11th Cir. 2015) (*pro se* litigant's "allegations of mental incapacity are insufficient to show a causal connection to his untimely filing"). Miller, who was represented by counsel, cannot demonstrate a causal connection between his mental incapacity and his ability to file a timely petition. Though Miller's alleged mental illness could impair his ability to act with due diligence, it does not constitute an extraordinary

---

federal claims. *See Thomas v. Att'y Gen. of Fla.*, no. 3:03-cv-237, 2018 WL 733631 (M.D. Fla. Feb. 6, 2018).

circumstance because his attorney could have filed a timely petition despite Miller's alleged mental illness.

Tellingly, CHU-North only cites to out of circuit cases which, like *Hunter*, involved claims of equitable tolling due to mental health issues for *pro se* petitioners. (Docs 15 at 11 and 24 at 7); *Bolarinwa v. Williams*, 593 F.3d 226, 231-32 (2d Cir. 2010) (remanding for an evidentiary hearing to determine if petitioner's "alleged mental illness excuses the untimely filing of her" *pro se* habeas petition); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) ("because Nara originally filed his habeas petition *pro se*, and because he has presented evidence of ongoing, if not consecutive, periods of mental incompetency, an evidentiary hearing is warranted"); *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999) (declining to implement equitable tolling for the 17 days *pro se* petitioner was in a psychiatric ward because it occurred over six months prior to the running of the statute of limitations); *McSwain v. Davis*, 287 Fed. App'x. 450, 457 (6th Cir. 2008) (no "evidence to support a causal connection between her mental illness and her ability to file a timely federal habeas petition" when she wrongly believed the filing was timely because of a miscalculation); *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003) ("a *pro se* inmate's actual mental incompetence may" constitute extraordinary circumstances warranting equitable tolling).

In this case, Miller cannot demonstrate a causal connection between his mental incapacity and the untimely filing of the petition because he was represented by counsel. There is no statutory right to competence for federal habeas proceedings. *Ryan v. Gonzales*, 568 U.S. 57, 71, 73 (2013). Because of "the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence." *Id*. at 68. Under this reasoning, even an incompetent petitioner cannot demonstrate a causal link between his mental illness and the untimely filing of a habeas petition when represented by counsel. In order to demonstrate equitable tolling when represented by counsel, severance of the agency relationship must be proven, such as abandonment of the client by the attorney. *Cadet*, 853 F.3d at 1228-29. Whether the petitioner is competent or not is generally not relevant to the determination of extraordinary circumstances if the petitioner is represented by counsel.

Next, CHU-North argues that previous "counsel inexplicably failed to file a habeas petition or do any further work on Miller's case after state post-conviction relief was denied." (Doc 24 at 7-8). This statement is insufficient to invoke an evidentiary hearing on this issue. *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318-19 (11th Cir. 2016) ("the burden is on the petitioner to establish the

need for an evidentiary hearing" and is not entitled to an evidentiary hearing when claims are merely conclusory and unsupported by specifics).

Even if equitable tolling does apply to Petitioner based on previous counsel's (state post-conviction counsel) conduct in failing to file a timely Petition in 2006, CHU-North would have had 63 days to file the Petition. Instead of immediately filing a Petition, CHU-North waited 160 days for the litigation in state court to complete. Then, CHU-North waited another year to file the Petition. Any argument by Petitioner regarding equitable tolling would also have to apply to the time in which CHU-North was representing Petitioner. Additionally, almost all of the Petition's nine grounds for relief mirror what was raised in post-conviction. *Miller v. State*, 926 So. 2d 1243, 1248-49 (Fla. 2006). This necessarily puts CHU-North's own conduct at issue and creates a conflict of interest with that office regarding equitable tolling.

"[L]ower courts have the responsibility to ensure that § 2254 petitioners have conflict-free counsel." *Stewart v. Sec'y, Fla. Dept. of Corr.*, 635 Fed. App'x 711, 715 (11th Cir. 2015) (citing *Martel v. Clair*, 565 U.S. 648 (2012); *Christeson v. Roper*, 135 S.Ct. 891 (2015)); *see also Brown v. Sec'y, Dep't of Corr.*, no. 17-10027, 2018 WL 4932715 (11th Cir. Oct. 11, 2018). The United States Supreme Court has explicitly stated that counsel cannot be expected to explain their own

failure to meet the statute of limitations "as any argument for equitable tolling would be premised on their own malfeasance in failing to file timely the habeas petition." *Christeson*, 135 S.Ct. 891, 892-93. "Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for 'serious instances of attorney misconduct.'" *Id*. at 894 (quoting *Holland v. Florida*, 560 U.S. 631, 651-52 (2010)). In *Christeson*, the Court noted that the district "court's principal error was its failure to acknowledge [current counsel's] conflict of interest." *Id*. Here, this Court must acknowledge that CHU-North has a conflict of interest in representing Petitioner.

This is an un-waivable conflict of interest. After CHU-North failed to file the Petition within the 63 days that could potentially be credited by equitable tolling to Petitioner after his post-conviction proceedings were concluded, CHU-North developed an actual conflict of interest. *Stewart*, 635 Fed. App'x at 717. Under the current law, even if Petitioner could waive CHU-North's conflict, this Court would be compelled to dismiss the Petition as untimely based on CHU-North's failure to timely file the Petition, even if equitable tolling applied from the completion of the original post-conviction proceedings in 2006 until the end of the successive post-conviction proceedings in 2018.

Although the cases, including *Christeson*, involved situations where Petitioner was requesting new counsel, and not the State requesting new counsel for the Petitioner, it is a distinction without a difference. It is this Court's responsibility to ensure that Petitioner has conflict-free counsel as required by the statute. *Christeson*, 135 S.Ct. at 895 ("a district court would be compelled 'to appoint new counsel if the first lawyer developed a conflict'") (quoting *Clair*, 565 U.S. at 661). Though this Court's order indicated that Petitioner must raise the issue and request new counsel, certainly this Court does not expect Petitioner to understand the intricacies of equitable tolling law. *See Thomas v. Att'y Gen. of Fla.*, no. 3:03-cv-237, 2018 WL 733631, *19 ("'If capital petitioners were able to navigate the shoals of federal habeas litigation without assistance, there would be no need to appoint counsel in the first place.'").

Further, though this Court might be of a mind to let this issue play out, this Court has a duty to protect "against abusive delay" in the "interest of justice." *Clair*, 565 U.S. at 662. Allowing CHU-North to litigate this case is akin to Petitioner having no counsel on the issue of equitability tolling any time after

CHU-North was appointed. Further, CHU-Middle is just as qualified as CHU-North to represent Petitioner in these proceedings.[7]

As Judge Corrigan noted, the CHU-Middle was established effective October 1, 2018. *Thomas*, 2018 WL 733631 at *22. Given that the CHU-Middle was created for the specific purpose of litigating capital cases that arise in the Middle District, especially those capital cases involving a missed deadline, such as this one, the CHU-Middle should be appointed as substitute conflict-free habeas counsel in this case. Accordingly, this Court should reconsider its Orders, and appoint CHU-Middle as substitute conflict-free federal habeas counsel to litigate the equitable tolling issue. (Docs 20, 23).

Since this is a motion for summary judgment and/or to dismiss, pursuant to local rule 3.01(g), counsel for Respondents is not required to confer with counsel for Petitioner.

[7] Cases from the Fourth judicial circuit of Florida, which includes Duval and Clay counties, fall under the guise of Florida's First District Court of Appeal. CHU-North had assumed many of these cases even though they fall under the federal district court for Middle District of Florida instead of the district court for the Northern District of Florida. However, CHU-Middle has been granted as substituted counsel for CHU-North in many of these cases. *See, e.g., Bradley v. Sec'y, Fla. Dept. of Corr.*, no. 3:03-cv-1078; *Damren v. Florida*, no. 3:03-cv-397.

Conclusion

WHEREFORE, this Court dismiss the Petition as untimely. Should this Court determine that an evidentiary hearing is necessary on the issue of equitable tolling, new conflict-free counsel should be appointed.

Respectfully submitted,

ASHLEY MOODY
Attorney General

/s/ Jennifer A. Donahue
JENNIFER A. DONAHUE
Assistant Attorney General
Florida Bar No.: 50639
PL-01, The Capitol
Tallahassee, FL 32399-1050
jennifer.donahue@myfloridalegal.com
capapp@myfloridalegal.com
Phone: (850) 414-3580
Fax: (850) 487-0997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic filing to Terri Backhus, terri_backhus@fd.org and Sean Gunn, sean_gunn@fd.org, Attorneys for Petitioner, this 9th day of April, 2019.

/s/ Jennifer A. Donahue
JENNIFER A. DONAHUE

APPENDIX A-12

July 8, 2019, Respondents' Response Brief to Petition for Writ of Habeas Corpus

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v.

CASE NO. 3:17-CV-932-J-39JBT
CAPITAL CASE

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

RESPONDENTS' RESPONSE BRIEF TO PETITION FOR WRIT OF HABEAS CORPUS

ASHLEY MOODY
ATTORNEY GENERAL

JENNIFER A. DONAHUE
Assistant Attorney General
Florida Bar No.: 50639
PL-01, The Capitol
Tallahassee, FL 32399-1050
capapp@myfloridalegal.com
jennifer.donahue@myfloridalegal.com
Phone: (850) 414-3580
Fax: (850) 487-0997
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STANDARD OF REVIEW 1

TIMELINESS 3

STATUTE OF LIMITATIONS TIMING 5

CONFLICT OF INTEREST 7

EQUITABLE TOLLING 10

STATEMENT OF THE CASE 23

State Trial Proceedings 23

State Direct Appeal Proceedings 30

State Post-Conviction Proceedings 32

State Post-Conviction Appeal Proceedings 39

ARGUMENT 40

GROUND I: INEFFECTIVE ASSISTANCE OF COUNSEL-PENALTY PHASE 40

GROUND II: INEFFECTIVE ASSISTANCE OF COUNSEL-THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR 51

GROUND III: INEFFECTIVE ASSISTANCE OF COUNSEL-FAILURE TO OBJECT 54

GROUND IV: *CALDWELL V. MISSISSIPPI* 61

GROUND V: STATE COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES 64

GROUND VI: *HURST V. FLORIDA* 70

GROUND VII: COMPETENCY TO STAND TRIAL 76

GROUND VIII: INEFFECTIVE ASSISTANCE OF COUNSEL-COMPETENCY TO STAND TRIAL 78

GROUND IX: CUMULATIVE ERROR 80

CONCLUSION.....82

CERTIFICATE OF COMPLIANCE 83

CERTIFICATE OF SERVICE 83

TABLE OF AUTHORITIES

CASES

Alexander v. Dugger, 841 F.2d 371 (11thCir.1988).....79
Almendarez-Torres v. United States, 523 U.S. 224 (1998).....71
Bailey v. TitleMax of Ga., Inc., 776 F.3d 797 (11thCir.2015).....21
Barwick v. Sec'y, Fla. Dep't of Corr., 794 F.3d 1239 (11thCir.2015)..... 46, 49, 69
Beck v. Deloitte & Touche, 144 F.3d 732 (11thCir.1998).....18
Bevel v. State, 221 So.3d 1168 (Fla.2017).....50
Bolarinwa v. Williams, 593 F.3d 226 (2dCir.2010).....14
Branch v. State, 236 So.3d 981 (Fla.2018).....20
Brecht v. Abrahamson, 507 U.S. 619 (1993).....69
Brown v. Sec'y, Dep't of Corr., 750 F.App'x 915 (11thCir.2018).....8, 16
Brown v. State, 124 So.2d 481 (Fla.1960).....60
Bryan v. Dugger, 641 So.2d 61 (Fla.1994).....45
Burger v. Kemp, 483 U.S. 776 (1987).....44
Cadet v. Fla. Dep't of Corr., 853 F.3d 1216 (11thCir.2017)..... 4, 11, 15, 16, 17, 18
Caldwell v. Mississippi, 472 U.S. 320 (1985)..... 61, 62
Campbell v. State, 571 So.2d 415 (Fla.1990).....66
Cenco Inc. v. Seidman & Seidman, 686 F.2d 449 (7thCir.1982).....17
Chavez v. Sec'y, Fla. Dep't of Corr., 647 F.3d 1057 (11thCir.2011).....4
Christeson v. Roper, 135 S.Ct. 891 (2015)..... 8, 9, 10
Clay v. United States, 537 U.S. 522 (2003).....32
Danforth v. Minnesota, 552 U.S. 264 (2008).....74
Davis v. Singletary, 119 F.3d 1471 (11thCir.1997).....63
Deparvine v. State, 146 So.3d 1071 (Fla.2014).....2
Dickson v. Wainwright, 683 F.2d 348 (11thCir.1982).....4
Doherty v. Teamsters Pension Trust Fund of Phila. & Vicinity, 16 F.3d 1386 (3dCir.1994).....17
Drake v. Kemp, 762 F.2d 1449 (11thCir.1985)..... 60, 61
Eberhart v. State, 47 Ga. 598 (1873).....60
Eddings v. Oklahoma, 455 U.S. 104 (1982).....66
Eisenstadt v. Baird, 405 U.S. 438 (1972).....75
Evans v. Sec'y, Dep't of Corr., 703 F.3d 1316 (11thCir.2013).....46
F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).....75
Fisher v. Johnson, 174 F.3d 710 (5thCir.1999).....14
Freeman v. Att'y Gen., 536 F.3d 1225 (11thCir.2008).....20
Freeman v. McCollum, 555 U.S. 1110 (2009).....20

Futch v. Dugger, 874 F.2d 1483 (11thCir.1989) 79
Gonzalez v. Thaler, 565 U.S. 134 (2012) 5
Griffith v. Kentucky, 479 U.S. 314 (1987) 73
Hannon v. State, 228 So.3d 505 (Fla.2017) 20
Harrington v. Richter, 562 U.S. 86 (2011) 1, 41, 42, 57
Henderson v. Campbell, 353 F.3d 880 (11thCir.2003) 3
Henry v. State, 862 So.2d 679 (Fla.2003) 44
Hildwin v. Dugger, 654 So.2d 107 (Fla.1995) 44
Hitchcock v. State, 226 So.3d 216 (Fla.2017) 73
Holland v. Florida, 560 U.S. 631 (2010) 8, 11, 12, 16
Hunter v. Ferrell, 587 F.3d 1304 (11thCir.2009) 11
Hurst v. Florida, 136 S.Ct. 616 (2016) 70
Hurst v. State, 202 So.3d 40 (Fla.2016) 70
James v. Singletary, 957 F.2d 1562 (11thCir.1992) 77
Jenkins v. Hutton, 137 S.Ct. 1769 (2017) 72
Jimenez v. Quarterman, 555 U.S. 113 (2009) 32
Jimenez v. State, 265 So.3d 462 (Fla.2018) 20
Johnson v. New Jersey, 384 U.S. 719 (1966) 74
Jones v. Sec'y, Fla. Dep't of Corr., 834 F.3d 1299 (11thCir.2016) 4
Judd v. Haley, 250 F.3d 1308 (11thCir.2001) 2, 62
Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240 (1933) 21
Kibert v. Peyton, 383 F.2d 566 (4thCir.1967) 79
Kotteakos v. United States, 328 U.S. 750 (1946) 69
Lambrix v. Sec'y, Dep't of Corr., 872 F.3d 1170 (11thCir.2017) 72
Lawrence v. Florida, 421 F.3d 1221 (11thCir.2005) 9, 13
Lawrence v. Florida, 549 U.S. 327 (2007) 7, 8, 10, 16, 21
Laws v. Lamarque, 351 F.3d 919 (9thCir.2003) 14
Linkletter v. Walker, 381 U.S. 618 (1965) 75
Lugo v. Sec'y, Fla. Dep't of Corr., 750 F.3d 1198 (11thCir.2014) 6
Mahn v. State, 714 So.2d 391 (Fla.1998) 68
Maples v. Thomas, 565 U.S. 266 (2012) 15, 16
Martinez v. Ryan, 566 U.S. 1 (2012) 3, 47, 80
Mashburn v. Comm'r, Ala. Dep't of Corr., 713 F.App'x 832 (11thCir.2017) 12
McSwain v. Davis, 287 F.App'x 450 (6thCir.2008) 14
Medina v. Singletary, 59 F.3d 1095 (11thCir.1995) 77
Miller v. Jones, 139 S.Ct. 152 (2018) 40
Miller v. Jones, 237 So.3d 921 (Fla.2018) 6, 40, 72

Miller v. State, 770 So.2d 1144 (Fla.2000)..... 5, 23, 24, 30, 31, 59, 64, 66, 68, 69
Miller v. State, 926 So.2d 1243 (Fla.2006) 32, 33, 40, 41, 44, 45, 51, 52, 53, 55, 57, 58, 59, 60, 61, 62, 71, 77, 78, 79
Muhammad v. Sec'y, Dep't of Corr., 554 F.3d 949 (11thCir.2009).....2
Nara v. Frank, 264 F.3d 310 (3dCir.2001).....14
Pace v. DiGuglielmo, 544 U.S. 408 (2005).....11
Pace v. McNeil, 556 F.3d 1211 (11thCir.2009)..... 45, 69
Pietri v. State, 644 So.2d 1347 (Fla.1994).....68
Pittman v. Sec'y, Fla. Dep't of Corr., 871 F.3d 1231 (11thCir.2017) 1
Potts v. Zant, 734 F.2d 526 (11thCir.1984).....60
Reed v. McNeil, 131 S.Ct. 177 (2010) 20
Reed v. Sec'y, Fla. Dep't of Corr., 593 F.3d 1217 (11thCir.2010) 20
Reese v. Sec'y, Fla. Dep't of Corr., 675 F.3d 1277 (11thCir.2012).....56
Reynolds v. Florida, 139 S.Ct. 27 (2018) 63
Ring v. Arizona, 536 U.S. 584 (2002).....71
Romano v. Oklahoma, 512 U.S. 1 (1994)..... 62, 63
Rompilla v. Beard, 545 U.S. 374 (2005) 44, 52
Rose v. State, 675 So.2d 567 (Fla.1996).....44
Ryan v. Gonzales, 568 U.S. 57 (2013).....15
Schriro v. Summerlin, 542 U.S. 348 (2004).....71
Sochor v. State, 619 So.2d 285 (Fla.1993) 66
Spears v. Warden, 605 F.App'x 900 (11thCir.2015).....13
Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170 (11thCir.2010)..... 2, 3, 62
State v. Morrison, 236 So.3d 204 (Fla.2017).....49
Stewart v. Sec'y, Dep't of Corr., 476 F.3d 1193 (11thCir.2007) 1, 2
Stewart v. Sec'y, Fla. Dep't of Corr., 635 F.App'x 711 (11thCir.2015).....8, 9
Stovall v. Denno, 388 U.S. 293 (1967) 75
Strickland v. Washington, 466 U.S. 668 (1984) 41, 42, 44, 47, 54, 59
Teague v. Lane, 489 U.S. 288 (1989) 74
Thomas v. Att'y Gen. of Fla., 2018 WL 733631 (M.D. Fla. Feb. 6, 2018) 10
Towery v. Ryan, 673 F.3d 933 (9thCir.2012) 16
United States v. Baker, 432 F.3d 1189 (11thCir.2005) 81
United States v. Hasting, 461 U.S. 499 (1983).....21
United States v. Margarita Garcia, 906 F.3d 1255 (11thCir.2018).....81
United States v. Wynn, 292 F.3d 226 (5thCir.2002).....17
Ward v. Hall, 592 F.3d 1144 (11thCir.2010).....41
Wickham v. State, 124 So.3d 841 (Fla.2013).....2

Wiggins v. Smith, 539 U.S. 510 (2003).....44
Wight v. BankAmerica Corp., 219 F.3d 79 (2dCir.2000).....18
Willacy v. Sec'y, Fla. Dep't of Corr., 703 F.App'x 744 (11thCir.2017).....45
Wilson v. Kemp, 777 F.2d 621 (11thCir.1985)..... 60, 61
Witt v. State, 387 So.2d 922 (Fla.1980).....74

OTHER AUTHORITIES

28 U.S.C. § 2244.....5
28 U.S.C. § 2254..... 1, 55, 61, 64, 70, 71, 76
Death Penalty Information Center, Florida Death-Penalty Appeals Decided in Light of *Hurst*, available at https://deathpenaltyinfo.org/node/6790.....76
Fla. R. Crim. P. 3.851 5
Fla. Stat. § 922.052 19
Supreme Court Rule 13.....32

STANDARD OF REVIEW

Review of a final state judgment under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is "'greatly circumscribed and highly deferential to the state courts.'" *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1208 (11thCir.2007) (citation omitted). A "determination of a factual issue made by a State court shall be presumed to be correct" and the burden is on the Petitioner to rebut this "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1245 (11thCir.2017) (quoting *Harrington v. Richter*, 562 U.S. 86, 99 (2011)). When a claim has been adjudicated on the merits in state court proceedings, a petitioner will not be granted habeas relief unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1),(2). "[C]learly established Federal law" means only the holdings, not dicta, of the United States Supreme Court at the time of the relevant state court decision.

Stewart, 476 F.3d at 1208 (citations omitted).

"A state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Judd v. Haley*, 250 F.3d 1308, 1313 (11thCir.2001). "There is no doubt that, under Florida law, a claim is procedurally barred from being raised on collateral review if it could have been, but was not raised on direct appeal." *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1179 (11thCir.2010). Similarly, under Florida law, there is no doubt that if a claim is not raised in a state post-conviction motion, an appellant is procedurally barred from raising the claim for the first time on appeal. *Deparvine v. State*, 146 So.3d 1071, 1094 (Fla.2014) (citing *Wickham v. State*, 124 So.3d 841, 853 (Fla.2013)).

A procedural bar can only be overcome if a petitioner "demonstrates both cause for the failure to raise the claims on direct appeal and actual prejudice" or demonstrates that failing to consider the claims "will result in a fundamental miscarriage of justice." *Spencer*, 609 F.3d at 1179-80 (citing *Muhammad v. Sec'y, Dep't of Corr.*, 554 F.3d 949, 957 (11thCir.2009)). To demonstrate cause for the default, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Id*. at 1180 (citing *Henderson v. Campbell*, 353

F.3d 880, 892 (11thCir.2003)). To demonstrate prejudice, a petitioner must show a "'reasonable probability that the result'" would have been different. *Id*. (citation omitted). A fundamental miscarriage of justice only occurs in "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." *Id*. (citation omitted). "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). This is a "narrow exception" that allows an ineffective assistance of trial counsel claim to be raised for the first time during federal habeas review. *Id*.

TIMELINESS

This case should be dismissed because it is untimely. The AEDPA statute of limitations expired June 15, 2006. A federal habeas Petition was not filed in this case until January 20, 2019, over 12 1/2 years after the expiration of the AEDPA's statute of limitations. In order for Miller's Petition to be considered timely, he must demonstrate that equitable tolling is appropriate for time which he was represented by four separate counsel.

Petitioner has already asserted that he will rely on equitable tolling to argue that his Petition should not be dismissed. (Petition:9-12;Memo:6-8). Generally, an evidentiary hearing is appropriate to determine whether

equitable tolling will apply. Petitioner uses conclusory statements to raise the issue, such as "egregious failures of Miller's post-conviction counsel" in failing to file a habeas petition. (Memo:7). Attorney negligence is generally attributable to the Petitioner for purposes of equitable tolling. *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1234 (11thCir.2017) ("the reason the filing deadline was missed must be because of abandonment or some other extraordinary circumstance, not negligence alone, even gross negligence"). Petitioner has not alleged facts sufficient to meet the requirements in order to qualify for equitable tolling and should not be granted an evidentiary hearing until sufficient facts are alleged. *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318 (11thCir.2016) ("the burden is on the petitioner to establish the need for an evidentiary hearing") (citing *Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11thCir.2011); *Dickson v. Wainwright*, 683 F.2d 348, 351 (11thCir.1982) (Petitioner must "allege sufficient facts to support the grant of an evidentiary hearing" and a court should 'not blindly accept speculative and inconcrete claims'") (citation omitted)).

Before this Court can litigate the issue of equitable tolling, Petitioner must be appointed conflict-free counsel to argue tolling for the time in which Miller's current counsel, the Office of the Federal Public Defender of the Northern District of Florida, Capital Habeas Unit (CHU-North), represented

Petitioner.

STATUTE OF LIMITATIONS TIMING

Event	**Date of Event**	**Factual or Legal Basis**
Florida Supreme Court (FSC) affirmed judgment and sentence on direct appeal	August 31, 2000	*Miller v. State*, 770 So.2d 1144 (Fla.2000)
AEDPA statute of limitations starts as the judgment and sentence became final when the 90 days for seeking certiorari review in the United States Supreme Court expired	November 29, 2000	*Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) Fla. R. Crim. P. 3.851(d)(1)(A) Supreme Court Rule 13
AEDPA statue tolled with 63 days remaining when Petitioner filed motion for post-conviction relief	September 27, 2001	28 U.S.C. § 2244(d)(2) 302 days from November 29, 2000, up to but not including September 27, 2001
Robert Norgard, Esq., files notice of appearance as co-counsel with Heidi Brewer, Esq., state post-conviction counsel	September 30, 2003	PCR:759
Post-conviction Mandate issued, tolling of statute of limitations ends	April 13, 2006	FSC's online docket: http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=892&CaseYear=2004
Statute of limitations expires	June 15, 2006	63 days from April 13, 2006 up to but not including June 15, 2006
Norgard withdraws from representation; Frank Tassone, Esq., is	September 24, 2013	

appointed as state post-conviction counsel		
Miller's name appears on the Timely Justice Act Certification list	October 4, 2013	https://www.floridasupremecourt.org/content/download/243381/2145128/ScottTJACertification100413.pdf
Tassone withdraws from representation; Christopher Anderson, Esq., is appointed as state post-conviction counsel	December 9, 2014	
Miller is mentioned as one of three defendants who have not timely filed a federal habeas petition in the case which spurred the creation of CHU	April 24, 2014	*Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1225 (11thCir.2014)
CHU-North begins filing notices of appearance in federal district court	May 12, 2015	*See Guardado v. Sec'y Fla. Dep't of Corr.*, 4:14-cv-256, Northern District of Florida, Tallahassee
Miller initiated successive post-conviction litigation by filing a state habeas petition in the FSC	June 28, 2017	http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=1211&CaseYear=2017
CHU-North files an unopposed motion for appointment in federal court	August 15, 2017	Doc.1
CHU-North is appointed as counsel	August 24, 2017	Doc.3
The FSC denies the state habeas petition	January 31, 2018	*Miller v. Jones*, 237 So.3d 921 (Fla.2018)
"Publish full" date of FSC opinion	March 22, 2018	http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=1211&CaseYear=2017

Date of denial of petition for writ of certiorari, which is time that is not tolled under the AEDPA	October 1, 2018	*Lawrence v. Florida*, 549 U.S. 327, 332 (2007) (no tolling "during the pendency of a petition for certiorari")
Miller's federal habeas Petition is filed	January 30, 2019	Doc.15

CONFLICT OF INTEREST

Even under the best-case scenario for Miller, he must argue for equitable tolling for the time in which CHU-North represented him in order to make his Petition timely. This creates an un-waivable conflict of interest and new counsel must be appointed to represent Miller to argue equitable tolling for the time in which CHU-North represented Miller.

The best-case scenario involves assuming, arguendo, that Miller receives equitable tolling for the time in which Miller was represented by three different attorneys, Norgard, Tassone, and Anderson from April 13, 2006, the date of issuance of the Mandate for the original state post-conviction proceedings until CHU-North was appointed August 24, 2017. It also assumes that Miller receives statutory tolling for the time from when Miller's successive post-conviction state habeas was pending until the publish full date of March 22, 2018. Using these two assumptions, the time from April 13, 2006, until March 22, 2018, would not count for timing purposes. Under this scenario, the Petition would have been due 63 days from March 22, 2018,

which was May 24, 2018. The Petition filed January 20, 2019, was still untimely. Even if the time for filing a petition for certiorari on the successive state post-conviction motion counted, which under United States Supreme Court precedent it would not,[1] the Petition still would have been late as it would have been due 63 days after the Supreme Court denied certiorari on October 1, 2018, which was December 3, 2018.

"[L]ower courts have the responsibility to ensure that § 2254 petitioners have conflict-free counsel." *Stewart v. Sec'y, Fla. Dep't of Corr.*, 635 F.App'x 711, 715 (11thCir.2015) (citing *Martel v. Clair*, 565 U.S. 648 (2012); *Christeson v. Roper*, 135 S.Ct. 891 (2015)); *see also Brown v. Sec'y, Dep't of Corr.*, 750 F.App'x 915 (11thCir.2018). The United States Supreme Court has explicitly stated that counsel cannot be expected to explain their own failure to meet the statute of limitations "as any argument for equitable tolling

[1] This Court suggested that Respondents procedural history in support of the Motion to Dismiss as Untimely was "inaccurate or incomplete" because "Respondents have failed to take into account that Petitioner filed a petition for writ of certiorari. . . ." (Doc.28:n.1). However, the time for filing of a petition for writ of certiorari is **never** statutorily tolled. *See Lawrence*, 549 U.S. at 332 ("§ 2244(d)(2) does not toll the 1-year limitations period during the pendency of a petition for certiorari"); *Holland v. Florida*, 560 U.S. 631, 666 (2010 (Scalia, J., dissenting) (Holland's attorney "made exactly the same mistake as the attorney in *Lawrence- i.e.*, he assumed incorrectly that the pendency of a petition for certiorari in this Court seeking review of the denial of Holland's state habeas petition would toll the AEDPA's time bar under § 2244(d)(2)").

would be premised on their own malfeasance in failing to file timely the habeas petition." *Christeson*, 135 S.Ct. at 892-93. In *Christeson*, the Court noted that the district "court's principal error was its failure to acknowledge [current counsel's] conflict of interest." *Id*. at 894. Here, this Court must acknowledge that CHU-North has a conflict of interest in representing Petitioner to argue equitable tolling for their own conduct.

This is an un-waivable conflict of interest. After CHU-North failed to file the Petition within the 63 days that could potentially be credited by equitable tolling to Petitioner after his post-conviction proceedings were concluded, CHU-North developed an actual conflict of interest. *Stewart*, 635 F.App'x at 717. Even if Petitioner could waive CHU-North's conflict, this Court would be compelled to dismiss the Petition as untimely based on CHU-North's failure to timely file the Petition. Though CHU-North may wish to attempt to raise the issue of equitable tolling based on Petitioner's "significant mental health issues," the Petitioner must demonstrate both extraordinary circumstances and due diligence. Though a mental impairment of the Petitioner might cause the diligence prong to be met, it alone would not meet the extraordinary circumstances prong, especially as Petitioner was represented by counsel during the entire period in question. *See Lawrence v. Florida*, 421 F.3d 1221, 1226-27 (11thCir.2005) (mental impairments alone

are not "extraordinary circumstances"), *cert. denied*, 549 U.S. 327, 337 (2007) (questioning whether the "mental incapacity" argument could even be "legally credited" as extraordinary circumstances when a petitioner is represented by counsel).

Although the cases, including *Christeson*, involved situations where Petitioner was requesting new counsel, and not the State requesting new counsel for the Petitioner, it is a distinction without a difference. It is this Court's responsibility to ensure that Petitioner has conflict-free counsel as required by the statute. *Christeson*, 135 S.Ct. at 895 ("a district court would be compelled 'to appoint new counsel if the first lawyer developed a conflict'") (quoting *Clair*, 565 U.S. at 661). Though this Court's order indicated that Petitioner must raise the issue and request new counsel, certainly this Court does not expect Petitioner to understand the intricacies of equitable tolling law. *See Thomas v. Att'y Gen. of Fla.*, no. 3:03-cv-237, 2018 WL 733631, *19 (M.D. Fla. Feb. 6, 2018) ("If capital petitioners were able to navigate the shoals of federal habeas litigation without assistance, there would be no need to appoint counsel in the first place.").

EQUITABLE TOLLING

Because Miller has not demonstrated both that he diligently pursued his federal habeas rights **and** extraordinary circumstances prevented his timely

filing of a federal habeas petition, this Court should not grant equitable tolling in this case and dismiss Miller's federal habeas petition with prejudice as untimely.

Equitable tolling is an "extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" *Cadet*, 853 F.3d at 1221 (quoting *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11thCir.2009)). When seeking equitable tolling, a petitioner has the burden of establishing "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Holland v. Florida*, 560 U.S. 631, 655 (2010) (Alito, J., concurring in part and concurring in the judgment) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Diligence and extraordinary circumstances "are separate elements, both of which must be met before there can be any equitable tolling." *Cadet*, 853 F.3d at 1225 (citation omitted).

In *Holland*, the Supreme Court found that the petitioner met the reasonable diligence requirement because he wrote his attorney "numerous letters seeking crucial information and providing direction," repeatedly contacted the state courts and the Florida Bar in order to have his attorney, "the central impediment to the pursuit of his legal remedy," removed, and "the *very day*" he discovered that the AEDPA clock had expired, prepared his own

pro se petition and promptly filed it in the district court. *Holland*, 560 U.S. at 653 (emphasis in original); *see also Mashburn v. Comm'r, Ala. Dep't of Corr.*, 713 F.App'x 832, 840 (11thCir.2017) (finding diligence where Petitioner "acted quickly to seek an out-of-time appeal" as soon as he became aware of the dismissal).

It appears that Petitioner is alleging that the diligence prong should be waived due to his mental health conditions. Miller provides no supporting facts or explanation as to the length and severity of any mental health conditions and no demonstration that such conditions made Petitioner unable to diligently pursue his rights. Miller has alleged no facts that demonstrate either that he was diligently pursuing his rights or unable to do so for the entire period between when the FSC issued the post-conviction Mandate on April 13, 2006, and when the Petition was finally filed on January 30, 2019. Because the allegation is conclusory and speculative, Miller has not demonstrated sufficient facts to support the granting of an evidentiary hearing. Since Miller has not demonstrated diligence, this Petition should be dismissed as untimely.

In addition to failing to prove due diligence, Miller also fails to allege extraordinary circumstances which prevented him from timely filing. A combination of "significant mental health issues" and "abandonment and

attorney misconduct" could constitute extraordinary circumstances which warrant equitable tolling, but merely invoking these words is an insufficient factual basis by which to determine if further factual development at an evidentiary hearing is warranted. (Petition:10-11). Certainly, if a petitioner is *pro se*, his mental health issues can constitute extraordinary circumstances which justify equitable tolling. Because "mental impairment is not *per se* a reason to toll a statute of limitations," a petitioner must demonstrate "a causal connection between his mental incapacity and his ability to file a timely" petition. *Hunter*, 587 F.3d at 1308-09 (remanding for an evidentiary hearing to determine if petitioner's "substantial mental retardation prevented him from filing *pro se* his § 2254 petition within the AEDPA's one-year limitations period"); *see also Lawrence*, 421 F.3d at 1226-27 (mental impairments alone are not "extraordinary circumstances"); *Spears v. Warden*, 605 F.App'x 900, 904 (11thCir.2015) (*pro se* litigant's "allegations of mental incapacity are insufficient to show a causal connection to his untimely filing"). Miller, who was represented by counsel, cannot demonstrate a causal connection between his mental incapacity and his ability to file a timely petition. Though Miller's alleged mental illness could impair his ability to act with due diligence, it does not constitute an extraordinary circumstance because his attorney could have filed a timely petition despite Miller's alleged mental illness.

Tellingly, CHU-North cites to out of circuit cases which, like *Hunter*, involved claims of equitable tolling due to mental health issues for *pro se* petitioners. (Docs15:11, 24:7); *Bolarinwa v. Williams*, 593 F.3d 226, 231-32 (2dCir.2010) (remanding for an evidentiary hearing to determine if petitioner's "alleged mental illness excuses the untimely filing of her" *pro se* habeas petition); *Nara v. Frank*, 264 F.3d 310, 320 (3dCir.2001) ("because Nara originally filed his habeas petition *pro se*, and because he has presented evidence of ongoing, if not consecutive, periods of mental incompetency, an evidentiary hearing is warranted"); *Fisher v. Johnson*, 174 F.3d 710, 715 (5thCir.1999) (declining to implement equitable tolling for the 17 days *pro se* petitioner was in a psychiatric ward because it occurred over six months prior to the running of the statute of limitations); *McSwain v. Davis*, 287 F.App'x 450, 457 (6thCir.2008) (no "evidence to support a causal connection between her mental illness and her ability to file a timely federal habeas petition" when she wrongly believed the filing was timely because of a miscalculation); *Laws v. Lamarque*, 351 F.3d 919, 923 (9thCir.2003) ("a *pro se* inmate's actual mental incompetence may" constitute extraordinary circumstances warranting equitable tolling). There is a very distinct difference in the analysis of a case where a petitioner is *pro se* and where a petitioner, like Miller, is represented by counsel.

In this case, Miller cannot demonstrate a causal connection between his mental incapacity and the untimely filing of the petition because he was represented by counsel. There is no statutory right to competence for federal habeas proceedings. *Ryan v. Gonzales*, 568 U.S. 57, 71, 73 (2013). Because of "the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence." *Id*. at 68. Under this reasoning, even an incompetent petitioner cannot demonstrate a causal link between his mental illness and the untimely filing of a habeas petition when represented by counsel. In order to demonstrate equitable tolling when represented by counsel, severance of the agency relationship must be proven, such as abandonment of the client by the attorney. *Cadet*, 853 F.3d at 1228-29. Whether the petitioner is competent or not is generally not relevant to the determination of extraordinary circumstances if the petitioner is represented by counsel.

Agency law provides "the principles that govern a client's accountability for his attorney's errors" with respect to whether equitable tolling will apply to an untimely federal habeas petition. *Cadet*, 853 F.3d at 1229; *see Maples v. Thomas*, 565 U.S. 266, 283 (2012). "[A]ttorney negligence is not an extraordinary circumstance warranting equitable tolling."

Holland, 560 U.S. at 655 (Alito, J., concurring in part and concurring in the judgment) (citing *Lawrence*, 549 U.S. at 336). Nor is "failing to raise a colorable claim" an extraordinary circumstance. *Cadet*, 853 F.3d at 1230. To qualify as an extraordinary circumstance which entitles a petitioner to equitable tolling, a petitioner must demonstrate "abandonment or . . . a breach of the duty of loyalty that severed the agency relationship and prevented the client from being bound by the attorney's actions or inactions." *Id*. (citing *Towery v. Ryan*, 673 F.3d 933, 941-44 (9thCir.2012)). Only actions which amount to "a breach of loyalty" to the client can sever the "attorney-client agency relationship." *Id*. "[W]hile a petitioner is bound by his attorney's negligent mistakes, he is not bound by the actions or inactions of an attorney occurring after the attorney has severed the principle-agent relationship by abandoning his client." *Id*. at 1227 (citing *Maples*, 565 U.S. at 280-81).

"Abandonment—illustrated by not keeping a client updated on essential developments, not responding to a client's questions or concerns, and severing communication with a client—can" qualify as an extraordinary circumstance. *Brown*, 750 F.App'x at 929 (citing *Cadet*, 853 F.3d at 1234). In addition, bad faith, mental impairment, dishonesty, and divided loyalty can constitute serious attorney misconduct which can qualify as an extraordinary circumstance warranting equitable tolling. *Id*. (citing *Cadet*, 853 F.3d at

1236). These circumstances must also act to sever the agency relationship in order to warrant equitable tolling. For example, a principal can be constructively abandoned if his attorney is mentally impaired to the extent that he can no longer effectuate decisions in a case. *See Doherty v. Teamsters Pension Trust Fund of Phila. & Vicinity*, 16 F.3d 1386 (3dCir.1994) (tolling might be warranted based on the severe illness and death of the petitioner's attorney). Bad faith and dishonesty must be against the principal, not on the principal's behalf. *See Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 456 (7thCir.1982) ("Fraud on behalf of a corporation is not the same thing as fraud against it. . . . [T]he stockholders of a corporation whose officers commit fraud for the benefit of the corporation are beneficiaries of the fraud . . . [and] should not be allowed to escape all responsibility for such a fraud. . . ."); *United States v. Wynn*, 292 F.3d 226, 229 (5thCir.2002) (extraordinary circumstances to warrant equitable tolling might occur when an attorney deliberately deceives the client about a petition having been filed when it was not filed).

> An agent
>
> > is not deemed to have acted adversely to his principal's interests simply because he blundered and made an unwise, negligent, or grossly negligent mistake that harmed those interests. Instead, an agent is deemed to have acted adversely to his principal's interests only when he acts, or fails to act, for the purpose of advancing his own interests or those of a third party.

Cadet, 853 F.3d at 1229. This very narrow adverse interest exception is solely

intended to apply when the agent "is really committing a fraud for his own benefit" and applies "only where an agent wholly disregards the principal's interests in favor of his own interests or the interests of a third party." *Id*. at 1230-31 (quoting *Wight v. BankAmerica Corp*., 219 F.3d 79, 87 (2dCir.2000)). "[A]n agent's actions must be 'entirely adverse' to the principal's interests, meaning that 'his actions must neither be intended to benefit the [principal] nor actually cause short- or long-term benefit to the [principal].'" *Id*. at 1231 (quoting *Beck v. Deloitte & Touche*, 144 F.3d 732, 736 (11thCir.1998)).

Respondents believe that Petitioner's original state post-conviction counsel, Mr. Robert Norgard, Esq., intentionally missed the federal habeas deadline in this case and others in order to avoid his clients' inclusion on the list of defendants eligible for a death warrant. *See, e.g., Jones v. Sec'y, Fla. Dep't of Corr*., no 3:17-cv-932, Middle District of Florida, Doc.5. In Florida, before a Governor can sign a warrant of execution, a defendant must undergo executive clemency. Generally, the clemency investigation by the Commission on Offender Review starts "immediately after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals." Rules of

Executive Clemency 15(C).[2]

Prior to 2013, a defendant who had not completed federal habeas review generally would not have been considered eligible for executive clemency review, and thus not eligible for issuance of a warrant. In 2013, the Timely Justice Act was passed and the statute regarding issuance of a warrant of execution was amended to require the clerk of the FSC to inform the Governor in writing[3] of defendants who had either completed federal habeas review or "[a]llowed the time permitted for filing a habeas corpus petition in federal court to expire." Fla. Stat. § 922.052(2)(a).[4]

Starting in 2013, Miller appeared on the list, but with the caveat that he had not been through federal habeas review. Though the AEDPA expired over 12 years ago, executive clemency likely has not occurred in this case, nor would Miller be considered "eligible" for a warrant, unlike defendants who timely filed federal habeas petitions. *See, e.g., Hannon v. State*, 228 So.3d

---

[2] Rules of Executive Clemency can be found here: https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (last visited Mar. 21, 2019).

[3] Timely Justice Act Certifications can be found here: https://www.floridasupremecourt.org/Case-Information/Timely-Justice-Act-Certifications (last visited Mar. 21, 2019).

[4] Chapter 2013-216 amendments can be found here: http://laws.flrules.org/2013/216 (last visited Mar. 21, 2019).

505 (Fla.2017) (after approximately three years of pending federal habeas litigation from 2006-2009, Hannon was executed in 2017); *Branch v. State*, 236 So.3d 981 (Fla.2018) (after approximately four years of federal habeas litigation from 2007-2011, Branch was executed in 2018); *Jimenez v. State*, 265 So.3d 462 (Fla.2018) (after approximately three years of federal habeas litigation from 2004-2007, Jimenez was executed in 2018). This tactic has created an extreme amount of delay which directly benefit Petitioner and had no personal benefit to Norgard. A normal course of federal habeas review in this division lasts approximately four to five years. *See Freeman v. Att'y Gen.*, 536 F.3d 1225, 1230 (11thCir.2008), *cert. denied*, *Freeman v. McCollum*, 555 U.S. 1110 (2009) (petition filed on December 29, 2004, federal habeas review was completed in 2008); *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217 (11thCir.2010), *cert. denied*, *Reed v. McNeil*, 131 S.Ct. 177 (2010) (petition filed on July 5, 2005, federal habeas review completed in 2010). Here, had Miller timely filed his Petition in 2006, his federal habeas review would likely have been completed by 2011, if not earlier. Instead, almost 13 years later, Miller's federal habeas review is now just starting. Norgard furthered Miller's interest by creating this delay and therefore remained his agent.

Allowing equitable tolling for purposefully missing a statutory deadline goes against the fundamental principle of equity that he "who comes into

equity must come with clean hands." *Bailey v. TitleMax of Ga., Inc.*, 776 F.3d 797, 801 (11thCir.2015) (quoting *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 241 (1933)). Allowing equitable tolling for situations where an attorney purposefully missed the deadline for a strategic purpose would also encourage more attorneys to purposefully miss the deadline to gain extra time to investigate and develop claims without harming their client's federal habeas review. The client would essentially remain ineligible for a warrant during a prolonged litigation period. This would make equitable tolling the rule rather than the exception, rendering the statute of limitations meaningless. *Lawrence*, 549 U.S. at 336 ("this argument would essentially equitably toll limitations periods for every person whose attorney missed a deadline"). It hardly makes sense to deny equitable tolling to a petitioner whose attorney merely miscalculated the deadline but to allow equitable tolling for an attorney who accurately calculated the deadline but purposefully missed the deadline. Equitable tolling is not an appropriate remedy for correcting lawyer misconduct. *See United States v. Hasting*, 461 U.S. 499, 506 (1983) (deterring objectionable prosecutorial conduct is an inappropriate basis for reversal of a conviction).

In addition to proving equitable tolling is appropriate for the time in which Norgard represented him, Miller must also prove equitable tolling is

appropriate for the time in which subsequent counsel represented him. In order to be eligible for equitable tolling, Miller must prove due diligence for the entire period from the issuance of the Mandate for state post-conviction on April 13, 2006, until the Petition was ultimately filed on January 30, 2019. Miller must prove extraordinary circumstances for the time which he was represented by Norgard (April 13, 2006- September 24, 2013), Tassone (September 24, 2013-December 9, 2014), Anderson (December 9, 2014-August 24, 2017)[5], and CHU-North (August 24, 2017-January 30, 2019). In order to gain enough equitability tolled time to make the Petition timely, Miller must demonstrate that four sets of attorneys all individually abandoned their agency relationship to Miller.

Miller has not alleged any specific facts which demonstrate that a break in the agency relationship occurred with any of his attorneys. Norgard only could have intended that Miller benefit from intentionally missing the AEDPA deadline and Norgard's strategy did not cause abandonment of Miller's interests to act for his own or a third party's interests as it furthered Miller's interest in not being eligible for a death warrant. There is no factual demonstration of due diligence or extraordinary circumstances necessary to

[5] Though Anderson still currently represents Miller in state proceedings, since CHU-North was appointed in federal court specifically as counsel for federal habeas purposes, this shifts the responsibility to CHU-North.

receive equitable tolling. This petition should be dismissed with prejudice as untimely.

STATEMENT OF THE CASE

Petitioner is a prisoner currently held in the custody of the State of Florida.

State Trial Proceedings

Miller was convicted of first-degree murder and aggravated battery and sentenced to death by a jury vote of seven-to-five. *Miller v. State*, 770 So.2d 1144, 1146 (Fla.2000). Jury selection occurred on June 22, 1998, the guilt phase occurred on June 23-25, 1998, and the penalty phase occurred on July 7, 1998. The testimony at trial revealed the following:

> On March 5, 1997, Linda Fullwood and the victim, Albert Floyd, went to sleep on the floor of a covered doorway of a Jacksonville church. Floyd slept toward the outside and Fullwood closer to the building. Fullwood awoke to a man beating Floyd with a pipe or stick and screamed. The assailant then started hitting Fullwood.
>
> Jimmy Hall testified that he was walking along Duval Street at the time in question when he heard someone yelling. Hall ran behind the church and saw a man beating two people with a pipe. Hall stated that the pipe was four or five feet long with a bent end, the assailant used both hands to swing it, and that blood flung off the pipe onto the ceiling and walls. Hall yelled at the assailant to stop, the assailant turned and started toward Hall, but then fled.
>
> Consequent to the attack, the victim died from three blows to the

> head. The victim's autopsy revealed three head lacerations that fractured the skull and penetrated into the brain. The injury was consistent with blows from a pipe, any one of which could have resulted in unconsciousness and death.
>
> Two and one-half months later, appellant told a police officer in Louisiana that he killed someone in Jacksonville. Miller met with a detective at the police station, was advised of his rights, and told the detective that he had beaten a man to death while attempting a robbery. Appellant stated that the victim was sleeping, that he intended to knock him unconscious with a five-to-six-foot pipe that was curved at the end, that a woman woke up and started screaming, and that he struck her too. A fourth person then appeared, told appellant to stop, and appellant fled. Miller further stated that he turned himself in because he thought the victim's family was looking for him, his conscience bothered him, he knew that what he did was wrong, and that he wanted to apologize to the victim's family.
>
> Appellant also told detectives that on the night in question he drank three or four quarts of beer, smoked a $10 rock of crack, and then went looking for more money and alcohol. He found a dented six-foot pipe in a park and walked behind a building where he saw a man sleeping under a blanket on a covered concrete porch. Appellant decided to strike the victim to disable him and avoid a struggle before robbing him, although he did not intend to kill him.
>
> In Jacksonville, another detective interviewed appellant and appellant showed him the crime scene. Appellant repeated his story and walked detectives through the crime. He explained that he struck the victim to avoid resistance because he knew that homeless people carry knives and guns, and he did not want to get injured.

Id. at 1146-47.

Against the advice of trial defense counsel Refik Eler, Esq.[6], Miller testified on his own behalf. (Trial Record (TR):560-64,573-85,648-56). Miller testified that on the day of the murder, after he got off work, he smoked "about a dime's worth" of crack cocaine and drank 40 ounces of malt liquor beer. (TR:575-76,649). Miller testified that he did not intend to kill the victim, but that something was "affecting" his "judgment." (TR:577). Miller stressed that "from the very beginning when I turned myself in, I have never denied that I was guilty." (TR:577). The prosecutor asked if Miller could have snuck up on and robbed the victim without waking him, and Miller's response was: "My mental capacities weren't working in that type of fashion." (TR:652).

Miller also insisted, against the advice of counsel, on playing his recorded confession to Detective Reddish. (TR:566-67,585-624,630-48). Miller's testimony and the tape were the only evidence presented by the defense during the guilt phase.

At sentencing, the State entered the judgment for the aggravated battery against Ms. Fullwood, entered records for the second-degree murder conviction in 1986 in Forsyth County, North Carolina, and presented the

[6] Respondents are unaware of any involvement in this case in state court by United States District Court Judge Brian Davis or Magistrate Judge Joel Toomey.

testimony of the victim's wife, Gwendolyn Floyd, into evidence. (TR:825-29). Miller called four witnesses and testified on his own behalf. (TR:829-938).

Yvonne Jordan, Miller's mother, testified that her deceased daughter "Valnese" was "sick with schizophrenic [sic]." (TR:831-32). The deaths of Valnese and of Miller's best friend both affected him and he was in prison in North Carolina at the time of both of their deaths. (TR:834-35,855). Miller's father was an alcoholic and abusive. (TR:838-41). The father would abuse all four children the same amount, usually just disciplining them, but would "whip them with a belt most of the time," never to the point of hospitalization. (TR:851-52). Miller's younger sister, Sharon is a police officer and Miller's younger brother is an engineer, neither with criminal records. (TR:852). Jordan and Miller's father were divorced around when Miller was 13 years old and they moved to Jordan's parents' farm. (TR:841,853). Jordan noticed that after Miller returned from two years of service in the Navy, he was different, that he had been drinking and using drugs. (TR:846-47). The major change that Jordan noticed when Miller had been drinking was that he became much more talkative. (TR:857). Jordan never knew Miller to be violent. (TR:861). Because of Miller's drinking, Jordan asked him to move out. (TR:848-49).

Sharon Barringer, Miller's younger sister, described her father's drinking, abuse of their mother, and beating of the kids with an electrical cord as a form of discipline every six to eight months. (TR:863-65,884-86). Barringer thinks that her sister, Valnese, "got involved in some type of drugs" and that caused her suicide. (TR:868). Barringer believes that the drinking and drugs made Miller more aggressive. (TR:873).

Leonard Miller, Miller's younger brother, testified that his father whipped the children with an electrical cord and had alcohol problems. (TR:924,926-27). He noticed that Petitioner was more aggressive due to alcohol, after being discharged from the Navy. (TR:930).

Dr. Harry Krop, a clinical psychologist, testified:

> I had some records prior to seeing Mr. Miller, and then I also received some records subsequent to seeing Mr. Miller, prior to the actual evaluation.
>
> I received from his attorney his school records, his military records, numerous psychiatric records from three or four different facilities. I had records from a prior incident in which he was incarcerated. I also had his prison medical records from that incarceration. I had other prison records, as well as his V.A. psychiatric records.
>
> I had records relating to this homicide and police reports from Louisiana related to his giving himself up and his statement, and I also had the medical examiner report.
>
> After the evaluation I received some additional materials, which included the actual tape of his confession in Louisiana. I also have received and reviewed about nine or ten depositions of the

> police officers and various other relevant witnesses and have interviewed three family members. I interviewed Sharon Barringer, his sister, Yvonne Jordan, his mother, and Leonard Miller, his brother.

(TR:894-96). On October 29, 1997, Krop met with Miller in his office and conducted a "fairly lengthy clinical interview in which I obtained history, and then I also administered a battery of psychological tests." (TR:896). Part of a "forensic evaluation is to determine whether the person is competent to proceed" with trial and Krop found Mr. Miller to be competent to proceed. (TR:903). Krop also determined that Miller was "sane at the time of the offense. He clearly knew right from wrong." (TR:903). Consistent with prior diagnoses, Krop diagnosed Miller with depression, alcohol abuse and a "mixed personality disorder," with avoidant, schizoid, and paranoid features. (TR:898,900). Krop opined that Miller has never been diagnosed with and does not meet the criteria for anti-social personality disorder. (TR:903). On November 26, 1997, Krop did "a neuro psychosocial evaluation." (TR:896). Krop determined that Miller had impairment in frontal lobe functions, which controls impulses. (TR:907). Krop described that Miller gets treatment when incarcerated or hospitalized, but when he is back in the community, he is homeless and does not follow up with treatment for the personality disorder or alcohol abuse. (TR:908). Alcohol affects impulse control and judgment and combined with Miller's schizoid and paranoid traits as well as the frontal

lobe disfunction, makes behavior control more difficult and "you have a pretty seriously disturbed individual when all of those are combined." (TR:909). When asked by the prosecutor if he believed Miller to be mentally competent, Krop replied "[y]es, very much." (TR:919). Krop relayed that during the examination, Miller was not delusional, was well oriented in time, place and situation, had at least average intelligence, and Krop did not find evidence of any major mental illness. (TR:920).

Miller testified on his own behalf at sentencing. (TR:935-38). Miller believed that the thing that affected him most was that he "never heard the word love from either" parent but nothing that happened in his childhood is "an excuse." (TR:936). Miller then apologized to Fullwood's and Floyd's families. (TR:937-38).

> In support of the death sentence, the trial court found the following aggravating circumstances: (1) prior violent felony conviction [(great weight)]; and (2) the homicide was committed during an attempted robbery and for pecuniary gain (merged) [(considerable weight)]. The trial court did not find any statutory mitigators, but found the following nonstatutory factors: (1) the victim was rendered unconscious immediately and did not suffer-very little weight; (2) the alternate sentence for murder is life without possible release-very little weight; (3) appellant turned himself in-slight weight; (4) exhibited remorse and apologized to the victim's family-some weight; (5) did not resist and cooperated with the police investigation-some weight; (6) suffered emotional distress over the death of his sister and a close cousin-little weight; (7) has a frontal lobe deficiency that affects inhibition and impulse control-modest weight; (8) would likely adapt well to long-term incarceration-very little weight; (9) was

> loved by his family and had performed good deeds-slight weight; and (10) had adjusted well while incarcerated-slight weight. The trial court considered but rejected the following nonstatutory mitigators, including that appellant: (1) did not intend to kill the victim; (2) suffered an abusive childhood and his father was an alcoholic; (3) suffered his own alcohol and drug problem as an adult, and (4) supported himself by working through labor pools.

Miller, 770 So.2d at 1146 n.1; (TR:VII:365-66). The trial court imposed the death sentence in line with the jury's 7-5 vote in favor of death. *Id*. at 1146.

State Direct Appeal Proceedings

On direct appeal, Miller raised three claims: (1) the trial court erred in denying the motion for judgment of acquittal (JOA) on premeditation (Direct Appeal Initial Brief (DAIB):21-25); (2) the trial court erred in declining to find certain non-statutory mitigating circumstances (DAIB:26-34)(Ground V); and (3) proportionality of the sentence (DAIB:35-42). *Miller*, 770 So.2d at 1147-50.

Regarding premeditation, the FSC determined that

> viewing the facts in a light most favorable to the State supports finding premeditation and refutes appellant's hypothesis of innocence-that he merely intended to knock out the victim. Viewing the evidence in support of the verdict reveals that (1) the weapon (metal pipe) was not inherently dangerous, but used in the manner appellant chose, it became a weapon likely to cause death or at least significant bodily injury; (2) the victim was sleeping and did not provoke a reactive killing; (3) there were no prior difficulties between the parties; (4) appellant swung the metal pipe, with both hands, at full force, focusing on the victim's stationary head, with repeated blows, any one of which could have caused death; (5) the force of the blows fractured the

> victim's skull and exposed his brain; (6) appellant had sufficient time to be conscious of the deed he committed because he picked up the pipe to use in a robbery, walked around the building looking for a victim, and stood over the victim a short while before he decided to repeatedly strike him in the head; and (7) the probable result of such an attack to the victim would be death or, at a minimum, significant trauma to the head. Because the State's evidence of unprovoked, focused lethal force is inconsistent with appellant's claim that he merely desired to knock the victim out, the trial court properly denied appellant's JOA.

Miller, 770 So.2d at 1148-49.

Regarding the findings on mitigation, the FSC held that "the trial court did not commit reversible error in declining to find three proposed mitigating circumstances: (1) lack of intent to kill, (2) an abusive childhood, and (3) long-term alcohol and drug abuse." *Miller*, 770 So.2d at 1149. The lack of intent to kill was "rebutted by substantial evidence that appellant used lethal force that was likely to result in death." *Id*. The abusive childhood was rebutted by the testimony of Miller's mother and sister that the father used corporal punishment once or twice a year, that no evidence of injuries or hospitalizations was submitted, and that the father left the family when appellant was 13. *Id*. Though the FSC held that the trial court did abuse its discretion in failing to find that Miller suffered long-term alcohol and drug abuse, it was harmless "given the weighty aggravating factors present." *Id*. at 1150.

Since Miller did not file a petition for writ of certiorari in the United States Supreme Court, his judgment and sentence became final when "'the time for filing a certiorari petition expires.'" *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009) (quoting *Clay v. United States*, 537 U.S. 522, 527 (2003)). The time for filing a certiorari petition expired 90 days from the FSC's August 31, 2000, decision, which was November 29, 2000. *Clay*, 537 U.S. at 525; Supreme Court Rule 13(1),(3) (A petition for a writ of certiorari is due "90 days after entry of the order denying discretionary review," not from "the issuance date of the mandate.").

State Post-Conviction Proceedings

On September 27, 2001, Miller filed a "shell motion" for post-conviction relief in State court in order to toll the AEDPA statute of limitations. (Post-Conviction Record (PCR):52-81). *Miller v. State*, 926 So.2d 1243, 1249 (Fla.2006). In the amended motion, Miller raised sixteen claims for relief:

> (1) the unconstitutionality of the public records exemption and accompanying prejudice arising from the deadline for the filing of the motion prior to receipt of all public records [(PCR:175-82)]; (2) ineffective assistance of trial counsel in failing to investigate and utilize available evidence, to challenge the State's case, to properly object, to request jury instructions, to present mitigation where Miller's mental state was at issue, and to properly present a voluntary intoxication defense [(PCR:182-208)]; (3) ineffective assistance of trial counsel in failing to

> object to improper and inflammatory closing arguments of the prosecutor in both guilt and penalty phase [(PCR:209-215A)]; (4) ineffective assistance of counsel in failing to obtain an adequate mental health evaluation and failing to provide necessary materials to a mental health consultant in order to ensure that a proper evaluation was conducted [(PCR:215A-218)]; (5) the unconstitutionality of the death penalty due to the use of unconstitutional aggravating factors and accompanying jury instructions including prior violent felony and pecuniary gain [(PCR:219-21)]; (6) the unconstitutionality of the death sentence due to repeated instructions which denigrate the significance of the jury sentencing recommendation [(PCR:221-24)]; (7) unconstitutional shifting of the burden of proof to the defendant as to the appropriateness of the death penalty and as to the demonstration of mitigating factors and aggravating circumstances [(PCR:224-26)]; (8) there were unconstitutional limitations on counsel conducting juror interviews [(PCR:226-29)]; (9) execution by lethal injection or electrocution is cruel and unusual punishment [(PCR:229-31)]; (10) execution of the incompetent is cruel and unusual [(PCR 231-32)]; (11) the unconstitutionality of the death penalty due to arbitrary and capricious imposition [(PCR 232)]; (12) denial of adequate direct appellate review due to a deficient record on appeal [(PCR:232-35)]; (13) the jury relied upon misinformation in sentencing Miller [(PCR:235-37)]; (14) ineffective assistance of counsel in failing to adequately investigate and present mitigating factors present in the prior convictions of Miller [(PCR:237-38)]; (15) unconstitutional use of the contemporaneous felony convictions to satisfy the prior violent felony aggravating circumstance [(PCR:238-43)]; (16) the unconstitutionality of the nonunanimous sentencing recommendation for death [(PCR:244-45)].

Id. at 1248 n.1.

An evidentiary hearing[7] was held on November 4 and 5, 2003, where

[7] The transcript of these proceedings is being filed with the record.

defense counsel called Refik Eler, Esq., trial counsel, Debra Lee, Dr. Jospeh Wu, and Dr. Harry Krop as witnesses and the State called Dr. Lawrence Holder. (PCR:1481-1574,1586-1623,1623-79,1763-68,1690-1728,1730-62). After Mr. Eler testified, Miller waived his presence for the remainder of the evidentiary hearing. (PCR:1528-29,1544-45,1574-84,1681-82). Post-conviction counsel did not feel that competency was at issue. (PCR:1580).

Trial defense counsel Refik Eler, Esq., testified that he was an Assistant State Attorney from 1986 until 1989, when he worked in private practice as a criminal defense attorney and tried over 100 cases. (PCR:1482-85). In addition to being second-chair on first-degree murder cases, Eler was first-chair on 15 murder cases, half of which were death penalty cases. (PCR:1485). Eler stated that the he received the case "pretty much almost ready to try" from the public defender, Allan Chipperfield, Esq., but he and his investigator followed up on information. (PCR:1491). Eler stated that he always gets "a confidential psychiatric exam to determine competency and other mental health issues" and that he "pretty much defer[s] to the mental health expert at that point for follow-up." (PCR:1491). Eler believed there "was a lot of good and bad in the records" from the VA and other hospitals. (PCR:1509-10). For example, Miller "showed aggressive behavior in a confined environment" which would negate the argument that Miller should

be given a life sentence because he adapts well to institutionalized settings. (PCR:1514). Eler stated that he strategically asked some of the questions only of the family members rather than of Krop because it would "not allow the State to cross-examine an expert on bad things" from the medical records. (PCR:1521-22).

Regarding the aggravating factor, Eler believed that the fact that Miller pled guilty to the second-degree murder was mitigating. (PCR:1523). He was also concerned that the State might call witnesses to the crime in rebuttal to any attack on the conviction. (PCR:1524). The facts were somewhat similar to this crime and Eler did not "want a jury to say, hum, he did this two years ago the same kind of way and he got out. You know, no, I wouldn't say that's mitigation at that point." (PCR:1556). Eler also did not want to dwell on the negative, he wanted to "get off of it on to something good." (PCR:1524). "We were trying to minimize it and one of the ways that I consider reasonable in minimizing something is to gloss over and also not allow them to present more evidence on it and I thought that's what I was doing." (PCR:1524). Eler also used the absence of facts surrounding the conviction in rebuttal during closing arguments. (TR:972-73;PCR:1553).

Regarding objections to the prosecution's argument, Eler testified that he "felt as though in this particular case the prosecutor was – was losing

ground with the jury on his arguments in those effects and I felt more rope. . . ." (TR:1530). Generally,

> there's a lot of factors besides the actual verbiage or comments and reasons why I may or may not object, one of which may be to use that argument against the State in my closing or not to infer that I'm trying to hide things from the jury or things of that nature. . . .

(PCR:1559). Eler thought that the comments regarding Fullwood might have constituted reasonable inferences from the evidence, but "that they weren't significant enough at the time to object to them." (PCR:1532-33). Regarding invoking victim sympathy, Eler did not believe some of the comments were improper because "I think he's commenting on the fact that we're asking for mercy," but for the others, "what I will do is I will turn that around and use that in mitigation in my closing argument against them. . . ." (PCR:1535-36).

Regarding Dr. Krop's testimony, Eler stated:

> I don't usually recommend to the mental health experts. I say this is an issue that I'm looking at. There's alcohol, drug abuse, there's family members problems, you're my expert, you help me get some mitigation to the jury. And that's when Dr. Krop would say, okay, give me all the reports, give me the records, let me look at them, let me test, and then we would regroup and he would suggest issues that he thought were significant, such as in this case a frontal lobe.

(PCR:1551).

Ms. Debra Lee, a social worker and substance abuse counselor at a VA Medical Center in North Carolina, testified. (PCR:1586-1623). In 1994, Lee

was an "an out-reach worker in the homeless chronically mentally ill program." (PCR:1587). Miller was given out-patient treatment "because they were kind of concerned about his level of motivation." (PCR:1590). After having "a problem with maintaining sobriety," Miller was sent to in-patient treatment. (PCR:1590-91). She knew details about the second-degree murder. (PCR:1612).

Dr. Joseph Wu, a board-certified psychiatrist, testified. (PCR:1623-79,1763-68). A PET scan of Miller was done in October 2002. (PCR:1641). Wu opined that Miller's PET scan "showed a patter of an abnormal decrease in frontal lobe activity, especially in the orbital frontal lobe area and in the relative pattern of activity of the frontal lobe relative to the occipital lobe." (PCR:1639). This is commonly seen in patients who have schizophrenia or a schizophrenia spectrum disorder. (PCR:1640). Schizophrenic spectrum disorder generally has symptoms "such as being withdrawn, odd types of behavior, poor social functioning." (PCR:1644). Miller reported having "occasional hallucinations of hearing his name being called" and "was often paranoid," which are consistent with schizophrenic spectrum disorder. (PCR:1645). Wu agreed that Krop testified at the penalty phase about the frontal lobe defect and the schizoid and paranoid personality traits which are consistent with schizophrenic spectrum disorder. (PCR:1650-51). Wu opined

that the PET scan offered "corroborative evidence" to Krop's testimony rather than additional diagnoses. (PCR:1653). Wu opined that Miller "has a frontal lobe deficit and frontal lobe deficits are associated with impaired ability to regulate aggression. . . ." (PCR:1655). Alcohol or drug abuse could exacerbate the condition. (PCR:1655).

Dr. Harry Krop testified. (PCR:1690-1728). Krop was specifically asked to evaluate Miller for competency and sanity and also to do "an analysis of his drug use or intoxication as well as mental health problems on the day of the crime" and to explore remorse, family situation, and prison records. (PCR:1694). Before the examination, Krop had a "chronology, school records, military records, records from various psychiatric facilities, court file related to the 1986 murder case, his prison medical records, his prison classification records, VA, psychiatric records," a police report from Louisiana and the medical examiner's report. (PCR:1695). Later, Krop was sent school records, a tape of the confession, and several depositions. (PCR:1695). Looking at billing records, Krop spoke with Miller again just prior to testifying. (PCR:1698). After the preliminary evaluation, Krop believed Miller was competent and sane and did not have any major mental illnesses. (PCR:1699). Krop's diagnosis remains the same and Wu's PET scan results merely corroborate his original findings. (PCR:1716). Regarding

the prior violent felony, Miller relayed to Krop that someone threatened him, Miller found a rifle and went back to shoot the man. (PCR:1724).

Dr. Lawrence Holder, board certified in diagnostic radiology and nuclear medicine, testified for the State that he reviewed Miller's PET scans. and opined there was not an abnormality in the frontal lobe area. (PCR:1740,45).

Ultimately, the state post-conviction court denied the claims and Miller appealed. (PCR:841-73).

State Post-Conviction Appeal Proceedings

On appeal to the FSC of the post-conviction court's denial of his claims, Miller raised seven claims:

> (1) trial counsel was ineffective for failing to present sufficient mitigation evidence and mental health testimony to the jury during the penalty phase [(Ground I)]; (2) trial counsel was ineffective in failing to offer evidence to minimize the aggravating factor of a prior violent felony arising from defendant's prior second-degree murder conviction [(Ground II)]; (3) trial counsel was ineffective for failing to object to the State's closing argument [(Ground III)]; (4) Florida's death penalty statute is unconstitutional due to numerous jury instructions which fail to ensure that death is not imposed arbitrarily [(Ground IV)]; (5) the death penalty is inappropriate in this case; (6) Florida's sentencing procedure is unconstitutional under *Ring* [(Ground VI)]; (7) Florida's sentencing statute is unconstitutional on its face and as applied because it violates the Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 9, 16, and 17 of the Florida Constitution.

Miller, 926 So.2d at 1248-49. The FSC affirmed the post-conviction court's denial of the claims. *Id*. at 1261.

Miller filed a petition for writ of habeas corpus along with his appeal of the post-conviction court's denial of his claims and alleged ineffective assistance of appellate counsel for "failing to raise instances of prosecutorial misconduct on direct appeal even though no objection was raised at trial [(Ground III)]." *Miller*, 926 So.2d at 1261. The FSC did "not condone the comments made by the prosecutor" but held that they failed to raise to the level of fundamental error, and thus appellate counsel was not ineffective for failing to raise the claims on direct appeal. *Id*.

Miller filed a successive post-conviction state habeas petition seeking the retroactive application of *Hurst v. Florida* and *Hurst v. State* to his case, which was denied because *Hurst* is not retroactive to him (Ground VI). *Miller v. Jones*, 237 So.3d 921 (Fla.2018), *cert. denied*, 139 S.Ct. 152 (2018).

ARGUMENT

GROUND I: INEFFECTIVE ASSISTANCE OF COUNSEL-PENALTY PHASE

Miller raises a claim that his trial counsel was ineffective for failing to investigate and present mitigation evidence, specifically that he failed to obtain an adequate mental health evaluation, failed to interview Debra Lee,

and failed to elicit adequate mitigating evidence from Dr. Krop. (Petition:62-96;Memo:10-11). This was raised as Claim II in post-conviction and raised as Issue I on appeal. (PCR:182-208); *Miller*, 926 So.2d at 1248. The FSC's denial of these claims was not contrary to or an unreasonable application of *Strickland*. This Court should deny this claim.

A petitioner who claims that he was denied effective assistance of counsel must demonstrate that counsel performed deficiently, and that counsel's deficient performance prejudiced the petitioner. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both parts of the *Strickland* test must be met and "a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice- versa." *Ward v. Hall*, 592 F.3d 1144, 1163 (11thCir.2010). In order to prove deficient performance, a petitioner must show that the errors were so serious that "counsel was not functioning as the 'counsel' guaranteed" by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Counsel is given "wide latitude" when "making tactical decisions." *Id*. at 689. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690). When challenging a death sentence, the question is "whether there is a reasonable

probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Further, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. . . . The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

The post-conviction court found that "counsel provided the necessary background information concerning Defendant to Dr. Krop and that an adequate mental health evaluation was conducted by Dr. Krop." (PCR: 864). Regarding the claim that Eler failed to elicit sufficient mitigation from Krop, the post-conviction court found that

> it was within the wide range of professional judgment for Mr. Eler to make a tactical decision to have certain aspects of Defendant's background to come out a trial through family members and not through Dr. Krop. This Court finds that Mr. Eler made a tactical decision to not admit Defendant VA hospital records at trial because they contained in his opinion information detrimental to the defense.

(PCR:845).

On appeal of the denial of his post-conviction motion, the FSC analyzed the claims as follows:

> First, Miller argues that trial counsel Refik Eler performed a deficient investigation because he failed to obtain an adequate

mental health evaluation from the health consultant, Dr. Harry Krop. Dr. Krop testified at the evidentiary hearing that his initial communication had been with original counsel, Alan Chipperfield. Eler testified that his task in investigating the case was made easier by the extensive groundwork laid by Assistant Public Defender Chipperfield, who initially had the case, and had prepared it "almost ready to try." Dr. Krop's time records showed that he had talked with an attorney just before trial and Dr. Krop testified that, given the time frame, this attorney must have been Eler. Dr. Krop also testified that he talked to an attorney after he had interviewed Miller's family and administered neuropsychological testing on Miller, but Dr. Krop did not remember which attorney this had been. Eler had a specific recollection of having discussed the case with Dr. Krop and recalled that Dr. Krop had emphasized Miller's frontal lobe deficit and alcohol abuse.

The record also reflects, in part from the response to the State's request for production dated February 10, 2003, that Eler had access to extensive materials, including a mental evaluation of December 1997, a letter from Chipperfield to Dr. Krop, Miller's school records, Miller's Navy service record, Forsyth-Stokes Mental Health Center records, Dorothea Dix Hospital medical records, and Miller's North Carolina Department of Corrections records. Further, Dr. Krop relied on these materials provided to him by defense counsel in making his diagnosis.

Miller also claims that trial counsel was deficient by failing to interview Ms. Debra Lee, a social worker from the Veterans Administration (VA) hospital where Miller received treatment. However, it is clear from the record that trial counsel was aware of her potential testimony. Eler did not contact Lee directly because Chipperfield had already done so. Moreover, Eler was aware of her role with regard to the 1996 VA in-patient treatment that Miller had received. As Miller's response to the State's request for production reveals, the VA records were actually in Eler's file. Trial counsel testified at the evidentiary hearing that he decided not to present Lee as a witness because she was a social worker and not a mental health expert. Furthermore, she did not counsel, treat, or test Miller.

> We conclude that the trial court did not err in rejecting Miller's argument that trial counsel Eler did not perform a proper investigation since the record supports a conclusion that Eler researched all reasonable areas of mitigation, including the work and research of prior defense counsel. The record reflects that this is clearly not a case in which trial counsel "never attempted to meaningfully investigate mitigation," *Rose v. State*, 675 So.2d 567, 572 (Fla.1996), or where counsel's investigation was "woefully inadequate." *Hildwin v. Dugger*, 654 So.2d 107, 109 (Fla.1995). Here, the record demonstrates that counsel was aware of Miller's childhood, his substance abuse problems, and his mental health issues. Under these circumstances we find no error in the trial court's essential conclusion that trial counsel performed a reasonably diligent investigation. *See Rompilla v. Beard*, 545 U.S. 374, [383] (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.") (citing *Wiggins v. Smith*, 539 U.S. 510, 525, [] (2003); *Strickland*, 466 U.S. at 699, 104 S.Ct. 2052; *Burger v. Kemp*, 483 U.S. 776, 794, [] (1987)).

Miller, 926 So.2d at 1249-50. Regarding the claim that Eler did not elicit adequate mitigating evidence from Krop, after a very detailed analysis of the evidence presented at trial and the evidentiary hearing, the FSC held:

> We conclude that the trial court did not err in finding counsel's strategy as to how much information to secure from Dr. Krop and from family members to be reasonable. Furthermore, we also agree with the trial court's finding that counsel's conduct was reasonable in concluding that presenting the mental records could have been a two-edged sword. *See Henry v. State*, 862 So.2d 679, 685-86 (Fla.2003) (finding reasonable trial counsel's decision not to put on mental mitigation that was a "two-edged sword"). Moreover, these strategic decisions are supported by counsel's other choices, including Dr. Krop's testimony, whereby trial counsel presented significant mitigating evidence regarding

> Miller's long-term mental health and emotional illness, drug and alcohol dependencies, impairment of frontal lobe functions, and Miller's remorse. Trial counsel also thought mitigating evidence would be best presented through the emotional and sympathetic testimony of his own family members, including Miller's mother, sister, and brother, which he felt would "humanize" Miller. *See Bryan v. Dugger*, 641 So.2d 61, 64 (Fla.1994) (finding counsel not ineffective for choosing a mitigation strategy of humanization and not calling a mental health expert). The trial court concluded that trial counsel made strategic decisions regarding which witnesses to call and what evidence to present to the jury. We conclude that the trial court did not err in concluding that trial counsel's strategy in the presentation of mitigating evidence was not deficient.

Id. at 1251-52.

The FSC's conclusions are not contrary to or an unreasonable application of *Strickland*. The Eleventh Circuit has acknowledged that

> presenting evidence of a defendant's drug addiction to a jury is often a "two-edged sword": while providing a mitigating factor, such details may alienate the jury and offer little reason to lessen the sentence. For example, in *Housel v. Head*, 238 F.3d 1289, 1296 (11thCir.2001), we held that an attorney's strategy to show a "family-friendly side of [defendant], rather than dwelling on the evidence of [his extensive drug use and drinking with a sociopathic biker crowd" was reasonable because the jury would likely not consider alcohol and drug use to be mitigating.

Pace v. McNeil, 556 F.3d 1211, 1224-25 (11thCir.2009); *see also Willacy v. Sec'y, Fla. Dep't of Corr.*, 703 F.App'x 744, 753 (11thCir.2017) (recognizing antisocial personality disorder, behavior problems in school, and drug addiction as a double-edged sword); *Evans v. Sec'y, Dep't of Corr*., 703 F.3d 1316, 1327-29 (11thCir.2013) (recognizing that mitigation evidence that

could have "opened the door to powerful rebuttal evidence" is a double-edged sword). Because Miller's mental health issues and drug abuse are intimately intertwined, like in *Pace*, presentation of this evidence was a "two-edged sword." Additionally, presenting mental health records which demonstrate that Miller consistently failed to rehabilitate, and that he was violent while involuntarily committed, all undermine Eler's argument that Miller operates better in an institutionalized situation and is thus deserving of a life sentence. (TR:983;PCR:1514).

There was also no new evidence regarding Miller's mental health that was presented at the post-conviction evidentiary hearing that was not already presented at trial. Dr. Wu's findings merely corroborated Dr. Krop's findings that Miller had frontal lobe dysfunction. (PCR:1653). Even if Wu had presented additional information regarding Miller's mental health, "[w]hen mental health is at issue, counsel does not offer ineffective assistance when it later becomes apparent that an expert who would have testified more favorably than the expert who was actually called may have existed." *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1244 (11thCir.2015). Wu's testimony was also impeached by Dr. Holder's conclusion that he did not believe that Miller had abnormal frontal lobe activity. (PCR:1740,45). Counsel was not deficient in his investigation and presentation of mitigation

evidence.

Nor was Miller prejudiced by this presentation. Almost all of the evidence presented at the evidentiary hearing was cumulative to evidence that was presented at trial and none would have been evidence to support a statutory mitigating circumstance. Additionally, the prior conviction for second-degree murder and contemporaneous aggravated battery of Fullwood, were weighty aggravating factors given great weight which were fully supported by the evidence. These would not have been outweighed by any evidence from the post-conviction proceedings that was not cumulative. Miller failed to prove he was prejudiced by counsel's actions. There is no prejudice because any deficiency in failing to present additional evidence regarding Miller's background would not have altered the balance of aggravating factors and mitigating circumstances. *Strickland*, 466 U.S. at 695.

Miller invokes *Martinez* to argue that post-conviction counsel failed "to develop a sufficient record" regarding this claim. (Petition:82); *Martinez*, 566 U.S. at 1. To overcome the procedural default of an ineffective assistance of trial counsel claim, Miller must demonstrate that the claim was "substantial" in that "the claim has some merit." *Id*. at 14. However, Respondents are not invoking a procedural bar because, even assuming the evidence detailed in the

Petition and Memo had been presented during the post-conviction proceedings, the outcome would have been the same. All of the evidence that Miller claims should have been presented was either known by counsel at the time of trial and strategically not presented, was cumulative of what was presented at trial, or is directly refuted by evidence that was presented.

Miller identifies five specific categories which he argues should have been explored at the evidentiary hearing. The first category, family history, both Miller's sister and mother testified about the mental health issues of Miller's other sister, Valnese. (Memo:83-4;TR:832,868). Dr. Krop interviewed Miller's family for family history and would have discovered this information and used it in making his diagnosis. The second category, Dr. Golden, prepared a report that was consistent with Dr. Krop's testimony that Miller exhibits symptoms consistent with schizoid and schizophrenic disorders. (Memo:84-87). In the third category, Dr. Herkov, Miller provides no details as to the substance of his theoretical testimony. (Memo:87-88). The fourth category, Dr. Satterfield, Miller claims "would likely have diagnosed" him with "full-blown schizophrenia" had he known about the family history. (Memo:88). However, this would have been inconsistent with Krop's diagnosis and testimony at trial. (TR:900). In the fifth category, Dr. Regnier, Miller discusses a multitude of aspects which he would have

discussed with Dr. Krop like a diagnosis of and the family history of schizophrenia, which was already covered in the testimony by his family and by Dr. Krop; adverse childhood experiences which were likely self-reported and not corroborated by testimony of his family members; that he committed the murder in a blackout state, which was directly refuted by Miller's own trial testimony; long term substance abuse history which was admitted by Miller and his family members; "religious delusions and hallucinations" which were likely newly self-reported as Dr. Krop only testified to "occasional hallucinations of hearing his name being called." (Memo:88-94; PCR:1645). Even if Drs. Herkov, Satterfield, and Regnier were to testify more favorably regarding Miller's mental health conditions, "counsel does not offer ineffective assistance when it later becomes apparent that an expert who would have testified more favorably than the expert who was actually called may have existed." *Barwick*, 794 F.3d at 1244.

Miller next argues that because the FSC has found Eler's performance to be deficient in other cases, Eler should have been found deficient in this case. (Memo:15-19). Eler's other cases are distinguishable from this case. *State v. Morrison*, 236 So.3d 204, 220 (Fla.2017) (Dr. Krop was not contacted until 9 days before trial, failed to provide Krop with information he requested, Chipperfield's involvement was "minimal"); *Bevel v. State*, 221 So.3d 1168,

1179-83 (Fla.2017) ("breadth of the undiscovered mitigation evidence" was significant); *Douglas v. State*, 141 So.3d 107, 117 (Fla.2012) (deficient performance for not having a strategic basis for not presenting school records which showed defendant had an IQ of 75 as evidence); *Shellito v. State*, 121 So.3d 445, 456 (Fla.2013) ("deficient in failing to follow up with the indications of Shellito's mental health issues" which included organic brain damage and bipolar disorder). Here, Dr. Krop was consulted and had the records he needed, Krop testified that Miller had schizoid tendencies, there was no evidence presented at the evidentiary hearing that was not cumulative to what was presented at trial, family members filled in additional information without the risk of strong cross-examination, among other differences. Though Eler might have been deficient in other cases, he was not deficient in this case, nor was there any prejudice to Miller's case as nothing presented in post-conviction would have undermined the findings of guilt or sentence of death.

Since Miller did not demonstrate that Eler was deficient and did not demonstrate that he was prejudiced by any deficiencies, the FSC's denial of this ineffective assistance of counsel claim was not contrary to or involved an unreasonable application of *Strickland*. This claim should be denied.

GROUND II: INEFFECTIVE ASSISTANCE OF COUNSEL-THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR

Miller raises a claim of ineffective assistance of counsel for failing to investigate the underlying facts of the prior violent felony, a second-degree murder, which, along with a contemporaneous aggravated battery, served as the basis for an aggravating factor in this case. (Petition:96-103;Memo:31-36). This was raised in the post-conviction motion as Claims II and XIII, and on appeal as Issue 2. (PCR:197,235-37); *Miller*, 926 So.2d at 1248. The FSC's denial of this claim was not contrary to or an unreasonable application of *Strickland*. This claim should be denied.

The post-conviction court found that "Mr. Eler made a tactical decision to minimize that amount and depth of information concerning Defendant's North Carolina murder conviction presented to the jury. Such a decision by counsel does not amount to ineffective assistance of counsel." (PCR:845).

After reviewing the testimony presented at trial and the evidentiary hearing, the FSC analyzed this claim as follows:

> Trial counsel testified at the evidentiary hearing that he did not want the jury to focus on the prior murder conviction. He stated that he believed it was better to let the State put it in and then move on to mitigation. Although we acknowledge that reasonable counsel could differ on such a strategy, we find no error in the trial court concluding that it is not outside of the realm of providing competent counsel. Moreover, we note that trial

> counsel engaged in an overall strategy that actually resulted in five votes by the jury against the death penalty in a case that involved a brutal beating death by a defendant who admittedly killed before. Therefore, we conclude that counsel's decision not to go into the details of the prior second-degree murder conviction in the face of the State's similar choice does not constitute deficient performance as a matter of law.
>
> Finally, we conclude that the United States Supreme Court's decision in *Rompilla* does not require a different conclusion because the facts of this case are clearly distinguishable from those in *Rompilla.* As previously discussed, trial counsel reviewed all of the materials that were in his possession in preparation for Miller's penalty phase. Moreover, unlike *Rompilla,* there is no indication in this case that there was material that trial counsel was aware the State was going to use in aggravation that was not obtained and reviewed by trial counsel prior to the penalty phase. Here, trial counsel was fully aware of and had all relevant information regarding Miller's 1986 second-degree murder conviction. Because this case, unlike *Rompilla,* involves an informed attorney making an informed and strategic decision, *Rompilla* is inapplicable here.

Miller, 926 So.2d at 1253; *Rompilla,* 545 U.S. at 374. The FSC also noted that Eler did not want the State to present additional facts in rebuttal because the crime was similar in nature and Miller only served a fraction of his prior sentence. *Miller*, 926 So.2d at 1252 (“I don’t think we ignored it. We were aware of it. We were trying to minimize it and one of the ways that I consider reasonable in minimizing something is to gloss over and also not allow them to present more evidence on it and I thought that’s what I was doing.”); (PCR:1526). Eler believed the fact that Miller pled guilty to the second-degree murder was the most mitigating aspect. (PCR:1525). Additionally,

Eler used the lack of facts surrounding the murder as rebuttal in his closing argument. *Id*. ("but remember we don't know the circumstances. There wasn't any evidence presented by the State of the circumstances of that case.")(TR:972). The FSC's conclusions are not contrary to or an unreasonable application of *Strickland*.

Even if Eler was deficient, Miller has not demonstrated that he was prejudiced. The prior violent felony aggravating factor was given great weight and was supported by both the second-degree murder and the contemporaneous aggravated battery of Fullwood. (TR:VII:365). The contemporaneous aggravated battery was significant. (TR:278-79). Despite whether the second-degree murder was mitigated by Miller's mental health issues, this aggravating factor is significant in that he was released after serving 7 years of a 25-year sentence, and then committed another murder, a fact which Eler acknowledged. (TR:858;PCR:1556). Additionally, the robbery/pecuniary gain aggravating factor was assigned considerable weight, there were no statutory mitigating factors, and the 10 non-statutory mitigating factors which were proven were assigned only slight, very little, little or some weight. (TR:VII:365-66). There is no prejudice because any deficiency in failing to present the underlying facts of the second-degree murder would not have altered the balance of aggravating factors and mitigating circumstances.

Strickland, 466 U.S. at 695.

The FSC's decision that Eler was not deficient was not contrary to or involved an unreasonable application of *Strickland*. Eler was not deficient as he had tactical explanations for his conduct. Even if this Court determines Eler was deficient, Miller was not prejudiced by any deficiency because this aggravating factor would have been weighty even with the additional information. This claim should be denied.

GROUND III: INEFFECTIVE ASSISTANCE OF COUNSEL-FAILURE TO OBJECT

Miller raises a claim of ineffective assistance of counsel for failing to object to "clearly erroneous, improper, and prejudicial closing argument by the State." (Petition:103-07;Memo:36-43). Miller alleges that the prosecutor made the following improper arguments: "that this case would have been a double-homicide because Miller would have killed Fullwood but for the actions of a third-party," "improperly vouched for the credibility of his witness, Jimmy Hall," and encouraged the jury to reject "positive family relationships" as a mitigating factor. (Petition:103-106). This issue was raised in the post-conviction motion as Claim III, raised in the post-conviction appeal as Issue 3, and raised in the state petition for writ of habeas corpus as ineffective assistance of appellate counsel for not raising this issue on direct

appeal. *Miller*, 926 So.2d at 1253-56, 1261;(PCR:209-15A). The FSC's denial of this claim was not "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings. 28 U.S.C. § 2254(d)(1),(2). This claim should be denied.

In denying this claim, the post-conviction court viewed the entirety of Claim III, which included other claims of ineffective assistance of counsel that were not raised in this Petition, and found they were all "within the wide range of professional judgment for Mr. Eler to make a tactical decision not to object to the State's closing arguments during both the guilty and penalty phases of Defendant's trial. Such a decision by counsel does not amount to ineffective assistance of counsel." (PCR:847-60).

On appeal, the FSC held:

> First, Miller claims that trial counsel was ineffective for failing to object during closing arguments when the prosecutor suggested that there would have been a second death but for the intervention of Jimmy Hall in the instant case. . . . We find the claim here clearly distinguishable from *Ruiz* [which included numerous instances of prosecutorial misconduct]. Moreover, trial counsel did object to the State's attempt to imply that Miller would have committed a second homicide. Trial counsel also testified at the evidentiary hearing that the facts before the jury somewhat supported the State's statements and he preferred not to make more of the issue once his objections were overruled. Because of this evidence before the trial judge, we find no error

> by the trial judge in rejecting this claim.
>
> Second, Miller contends that the prosecutor improperly vouched for the credibility of Jimmy Hall. . . . We find no error by the trial court in rejecting this claim and concluding that the prosecutor was arguing, based on the facts surrounding the witness's testimony, that the witness was worthy of belief. We also find no error in the trial court's further conclusion that trial counsel was not ineffective for failing to object to this argument.
>
> Third, Miller claims that his counsel rendered deficient performance by not objecting to an argument made by the prosecutor during penalty-phase closing argument. . . . We agree with Miller that this argument comes dangerously close to using victim impact evidence as a nonstatutory aggravator.
>
> However, in the instant case, the prosecutor did not ask the jury to give the same mercy and sympathy that the defendant showed the victim. Moreover, the prosecutor did not make a "golden rule" argument by asking the jurors to place themselves in the victim's position of terror or imagine how they would feel if the victim were a relative. . . . Furthermore, although trial counsel did not object to this argument, consistent with his professional judgment he decided to challenge it during his penalty-phase closing argument. While we acknowledge again that reasonable counsel could differ, and we find the prosecutor's arguments objectionable, we find no error in the trial court's determination that trial counsel was not ineffective for strategically deciding not to object to this argument made by the prosecutor.

Miller, 926 So. 2d at 1253-56 (footnotes omitted).

"[T]he Supreme Court has never held that a prosecutor's closing arguments were so unfair as to violate the right of a defendant to due process." *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287-88 (11thCir.2012). Without a finding that the prosecutor's comments violated Miller's right to a

fair trial, there can be no prejudice under *Strickland*. Since under the AEDPA the "question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard," this Court cannot say that the FSC unreasonably applied federal law in rejecting the underlying claim of prosecutorial misconduct. *Harrington*, 562 U.S. at 105.

Further, the FSC's holdings are not contrary to or an unreasonable application of *Strickland*. Regarding the claim that counsel should have objected to improper argument regarding Miller would have killed Fullwood but for Jimmy Hall, counsel did in fact object, so he cannot be deficient for failing to do so. (TR:703-04). Additionally, the statement is a fair inference from the fact that Miller ran away only when confronted by Hall. *Miller*, 926 So.2d at 1254. Further, Eler rebutted the argument with his own argument. (TR730).

Regarding the claim that counsel should have objected to improper vouching for Jimmy Hall, Eler was not deficient because the "prosecutor was arguing, based on the facts surrounding the witness's testimony." *Miller*, 926 So.2d at 1255. Additionally, Miller's own testimony did not contest Hall's testimony, so Hall's credibility was not an issue in the case.

Regarding the claim that counsel should have objected to what Miller classifies as the prosecutor's urging the jury to reject as a mitigating factor his

positive family relationships, Eler was not deficient because he rebutted the comments in his own penalty-phase closing argument. *Miller*, 926 So.2d at 1256 n.5.

Miller has failed to prove that he was prejudiced by any deficiencies of counsel. Here, the prosecutor's closing argument spanned 33 pages of the record, yet Miller only complains about portions which would not even span 1 page of the record in total. (TR:694-727). Further, Miller confessed and testified consistent with his confession. Miller was not contesting guilt, but merely challenging the degree of murder. However, as the FSC noted in the direct appeal, the first-degree murder conviction was supported by the following:

> (1) the weapon (metal pipe) was not inherently dangerous, but used in the manner appellant chose, it became a weapon likely to cause death or at least significant bodily injury; (2) the victim was sleeping and did not provoke a reactive killing; (3) there were no prior difficulties between the parties; (4) appellant swung the metal pipe, with both hands, at full force, focusing on the victim's stationary head, with repeated blows, any one of which could have caused death; (5) the force of the blows fractured the victim's skull and exposed his brain; (6) appellant had sufficient time to be conscious of the deed he committed because he picked up the pipe to use in a robbery, walked around the building looking for a victim, and stood over the victim a short while before he decided to repeatedly strike him in the head; and (7) the probable result of such an attack to the victim would be death or, at a minimum, significant trauma to the head. Because the State's evidence of unprovoked, focused lethal force is inconsistent with appellant's claim that he merely desired to knock the victim out, the trial court properly denied

appellant's JOA.

Miller, 770 So.2d at 1148-49

Miller was convicted based on the evidence presented to the jury, not based on a few comments made by the prosecutor in closing. Thus, there is no "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

There was no prejudice from the comments during the penalty-phase closing argument because it is clear from the record that the sentence of death was based on the weighty aggravating factors, the lack of statutory mitigating factors or strong non-statutory mitigating factors, not based on a few short comments by the prosecutor, and any deficiency in failing to present the underlying facts of the second-degree murder would not have altered the balance of aggravating factors and mitigating circumstances. *Strickland*, 466 U.S. at 695.

Regarding the claim that appellate counsel was ineffective for not raising the prosecutorial misconduct on direct appeal, the FSC held

> As we previously discussed in our denial of Miller's appeal for postconviction relief, we do not condone the comments made by the prosecutor. However, we conclude that the prosecutorial comments cited do not rise to the level of fundamental error. Therefore, we hold that appellate counsel was not ineffective for failing to raise these claims on direct appeal.

Miller, 926 So.2d at 1261. As the FSC noted, "[i]n order for an error to be

fundamental and justify reversal in the absence of a timely objection, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *Id*. (quoting *Brown v. State*, 124 So.2d 481, 484 (Fla.1960)). This appropriately dovetails with the fact that the Supreme Court has "never held that a prosecutor's closing arguments were so unfair as to violate the right of a defendant to due process." *Reese*, 675 F.3d at 1287-88.

Miller cites to *Wilson*, *Drake*, and *Potts* for the premise that improper comments by the prosecutor can "mislead the jury about the proper scope of its deliberations" and raise "core Eighth Amendment concerns. . . ." (Memo:41); *Wilson v. Kemp*, 777 F.2d 621, 626-27 (11thCir.1985); *Drake v. Kemp*, 762 F.2d 1449 (11thCir.1985) (en banc); *Potts v. Zant*, 734 F.2d 526, 535-36 (11thCir.1984). In all three cases, "the prosecutor read a passage from a 19th Century Georgia case, *Eberhart v. State*, 47 Ga. 598, 609-10 (1873)." *Wilson*, 777 F.2d at 623. In *Wilson*, the Eleventh Circuit held "that use of the *Eberhart* quote was indeed highly prejudicial to Wilson because the clear import of the language used is that a juror should not be motivated by mercy in deciding whether to impose the death penalty." *Id*. at 626. The *Eberhart* language is "'fundamentally opposed to current death penalty jurisprudence,' and we concluded that the prosecutor's use of the passage struck at 'the core

of the jury's role in capital sentencing.'" *Id*. at 627 (citing *Drake*, 762 F.2d at 1460). Miller's case is a far cry from *Wilson*, *Potts*, and *Drake*.

The FSC's decision was not contrary to or involved an unreasonable application of *Strickland* or any other applicable federal law. This claim should be denied.

GROUND IV: *CALDWELL V. MISSISSIPPI*

Miller raises a claim that the penalty phase jury instructions violated *Caldwell*. *Caldwell v. Mississippi*, 472 U.S. 320 (1985); (Petition:107-110;Memo:43-45). This claim was raised in post-conviction as Claim 6 "the unconstitutionality of the death sentence due to repeated instructions which denigrate the significance of the jury sentencing recommendation" and raised in the post-conviction appeal as Issue 2. *Miller*, 926 So.2d at 1248 n.1, 1256-57; (PCR:221-24). This claim was procedurally barred because it should have been raised at trial and on direct appeal. *Id*. at 1257. The FSC's decision was not "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings. 28 U.S.C. § 2254(d)(1),(2). This claim should be denied.

The FSC regularly recognizes procedural bars for claims that should

have been raised at trial and on direct appeal, but were instead raised for the first time in post-conviction. *Spencer*, 609 F.3d at 1179 (recognizing "[t]here is no doubt that, under Florida law, a claim is procedurally barred from being raised on collateral review if it could have been, but was not raised on direct appeal"). "A state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Judd*, 250 F.3d at 1313. This claim should be denied.

It is clear that there was not a *Caldwell* violation as Petitioner's jury was properly instructed under local law and the instructions did not diminish the jury's sense of responsibility. *Miller*, 926 So.2d at 1257. In order to establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury "improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (citation omitted). In *Caldwell*, the prosecutor made "focused, unambiguous, and strong" remarks which misled the jury into believing the responsibility for sentencing lay elsewhere. *Caldwell*, 472 U.S. at 340. The comments included "your decision is not the final decision" and "[y]our job is reviewable" and that defense was "insinuating that your decision is the final decision." *Id*. at 325-26. The problem with the argument by the prosecutor in *Caldwell* was

that it presented "an intolerable danger that the jury will in fact choose to minimize the importance of its role" and thus be in contravention of the requirements of the Eighth Amendment. *Id*. at 333. "'The infirmity identified in *Caldwell* is simply absent' in a case where 'the jury was not affirmatively misled regarding its role in the sentencing process.'" *Davis v. Singletary*, 119 F.3d 1471, 1482 (11thCir.1997) (quoting *Romano*, 512 U.S. at 9).

In Petitioner's case, the jury was not affirmatively misled. The jury was instructed of its role as assigned by local law. *Davis*, 119 F.3d at 1482; *see Reynolds v. Florida*, 139 S.Ct. 27 (2018). The jury was told that its role was advisory in nature. (R:832,985,987-90,992). Since under Florida law, the judge remains the final sentencing authority, a jury's recommendation of death is in fact "advisory." Characterizing the jury's recommendation as "advisory" is an accurate description of the role assigned to the jury by Florida law. Petitioner's jury was specifically instructed about the "gravity" of its decision and that "human life is at stake." (TR:988-89). Since the jury was properly instructed regarding their role under Florida law, there was no *Caldwell* violation.

Petitioner's jury was properly instructed of its role under Florida law. The instructions in Petitioner's case in no way diminished the jury's actual responsibilities in the sentencing process. Because Petitioner's jury was

properly instructed of its role in sentencing according to Florida law, the jury instructions in Petitioner's case did not violate *Caldwell*. The FSC's denial of this claim was not "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings. 28 U.S.C. § 2254(d)(1),(2). This claim should be denied.

GROUND V: STATE COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES

Miller claims that the FSC erred in failing to find two non-statutory mitigating circumstances, abusive childhood and long-term alcohol and drug abuse, which were established by the evidence. (Petition:110-14;Memo:45-50). This claim was raised on direct appeal as Issue II. *Miller*, 770 So.2d at 1149; (DAIB:26-34). The FSC's denial of this claim was not "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings. 28 U.S.C. § 2254(d)(1),(2). This claim should be denied.

In the sentencing order, the trial court gave great weight to the prior violent felony aggravator based on Miller's conviction of second-degree

murder in North Carolina and aggravated battery on Linda Fullwood. (TR:VII:365). The trial court merged the two aggravators regarding the theft, that the murder was committed while engaged in an attempt to commit robbery and that the murder was committed for pecuniary gain and assigned considerable weight. (TR:VII:365-66).

The trial court found no statutory mitigating factors, a point which both the prosecution and defense agreed. (TR:VII:367).

Regarding the abusive childhood mitigator, the trial court stated:

> Defendant's mother, brother and sister all testified regarding defendant's early childhood when the father was still in the home. The father apparently did abuse alcohol and on a few occasions he was abusive primarily to defendant's mother and sometimes to the children including defendant. The father was out of the home by the time defendant reached his thirteenth birthday. The defendant was raised in the home of his maternal grandparents. Their home was apparently filled with much love and support. However, defendant's brother and sister have been law abiding citizens and have earned professional careers even though they were raised in the same environment as the defendant. Defendant's sister is a law enforcement officer with the city of Durham, North Carolina. Defendant's mother indicated the defendant was bright and creative and that he was regularly taken to church and Sunday school. In fact, the witnesses described a very close, loving and supportive family. Although there is some aspects of the defendant's family background that may provide slight mitigation, the totality of the defendant's family background is not mitigating, thus the court has not considered it as such and given it no weight in determining the sentence to be imposed.

(TR:VII:370).

On appeal, the FSC held:

> the trial court did not abuse its discretion in declining to find the proposed mitigator of an abusive childhood. Miller's mother and sister testified that his father administered corporal punishment to the children once every six-to-eight months. Appellant did not present evidence of injuries or hospitalization resultant from the punishments. Moreover, the punishments ceased when appellant was thirteen years old, when his father ceased living with the family. *See Sochor v. State*, 619 So.2d 285, 293 (Fla.1993). *Compare Campbell* [*v. State*, 571 So.2d 415, 419 (Fla.1990)] (concluding that the trial court wrongly rejected defendant's proposed child abuse mitigator because record revealed "extreme abuse" such as defendant's requiring hospitalization after being hit with a telephone, that he was covered with bruises, and that he was subject to such mistreatment that he was declared dependent). On this record, we cannot say that the trial court abused its discretion in declining to find this mitigating circumstance.

Miller, 770 So.2d at 1149-50.

A trial court "may not give [relevant mitigating evidence] no weight by excluding such evidence from their consideration." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). It is clear that the trial court here did consider this mitigating factor. The trial court compared the testimony in support of abuse with the rest of the testimony regarding Miller's childhood and found that the evidence of abuse was not mitigating when considering the totality of the defendant's childhood. The FSC's finding is not contrary to or an unreasonable application of federal law because the trial court did consider the relevant mitigating evidence and decided that the evidence was not, in fact,

mitigating.

Even if the trial court abused its discretion in assigning no weight to this mitigating factor, it was harmless given the totality of the evidence regarding Miller's childhood, which was mostly positive, and in comparison, to the weighty aggravating factors in this case. As the trial court's analysis demonstrates, any weight given to this mitigating circumstance would have been very low as the evidence of abuse was scant and greatly overcome by the positive aspects of his childhood after Miller's father was removed from the situation.

Regarding the long-term alcohol and drug abuse mitigator, the trial court stated:

> It was shown that defendant did abuse alcohol and drugs during the course of his adult life. His family tried to offer defendant assistance. He was asked to leave his mother's home because of his unwillingness to seek help and give up his use of alcohol and drugs. However, while the defendant admitted to using drugs and alcohol on the night of this homicide, there is no convincing evidence that defendant was intoxicated or under the influence of drugs or alcohol at the time of this attempted robbery and murder. It is apparent that the defendant, notwithstanding the offer of help from his family, intentionally chose his life on the street, including the use of drugs and alcohol. Therefore, the court does not consider this as a mitigating factor and shall not give it any weight in the consideration of the sentence to be imposed.

(TR:VII:370-71).

On appeal, the FSC held:

> that the trial court abused its discretion in declining to find appellant's proposed mitigator that he suffers from long-term alcohol and substance abuse. Appellant testified that he abused alcohol and drugs throughout his adult life. His familial witnesses testified that he had a drinking problem and Dr. Krop testified that his substance abuse aggravated a frontal lobe disorder. Critically, the State concedes that appellant suffered such addictions. Because appellant's evidence of alcohol and substance abuse is uncontested, the trial court erred in declining to find this mitigating factor. *See Mahn* [*v. State*, 714 So.2d 391, 400-01 (Fla.1998)]. Nevertheless, we find this error to be harmless given the weighty aggravating factors present. *See Pietri v. State*, 644 So.2d 1347, 1354-55 (Fla.1994) (applying harmless error analysis to trial court's erroneous inclusion of aggravating factor). This conclusion is supported by testimony that appellant's substance abuse started when he was an adult, that his family tried to help him end the abuse, but that he rejected their help.

Miller, 770 So.2d at 1150.

Again, it is clear that the trial court here did consider this mitigating factor. The trial court compared the testimony in support of long-term drug and alcohol abuse with the rest of the testimony regarding evidence of his family's willingness to support Miller in efforts to seek help for these issues. The trial court found that the evidence of drug and alcohol abuse was not mitigating when considering the totality of Miller's experience.

Even if the failure of the trial court to assign weight to these mitigating factors constituted federal constitutional error, the standard for determining whether habeas relief must be granted is whether the "error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v.*

Abrahamson, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Here, because of the two weighty aggravating factors, failure to assign weight to two non-statutory mitigating factors cannot constitute a substantial and injurious effect in determining the sentence.

The FSC's finding regarding harmlessness is not contrary to or an unreasonable application of federal law because the trial court did consider the relevant mitigating evidence and decided that the evidence was not, in fact, mitigating. Failure of the trial court to give weight to this mitigating factor was harmless given the totality of the evidence regarding Miller's long-term alcohol and drug abuse and especially in comparison to the weighty aggravating factors in this case. *Barwick*, 794 F.3d at 1257 (where weighty aggravating circumstances "strongly outweigh" non-statutory mitigation, there "is nothing objectively unreasonable about the [FSC's] alternative harmless error analysis"); *see also Pace*, 556 F.3d at 1224 ("presenting evidence of a defendant's drug addiction to a jury is often a 'two-edged sword': while providing a mitigating factor, such details may alienate the jury and offer little reason to lessen the sentence").

The trial court found and gave weight to ten other non-statutory mitigating factors. *Miller*, 770 So.2d at 1146 n.1. Overall, the trial court concluded that

> every one of the aggravating factors proven, standing alone, would be sufficient to outweigh the paucity of the mitigation shown to exist.
>
> The defendant's prior conviction for murder is most appalling and has been given great weight. . . . This second murder by the defendant occurred approximately **four** years from the date of defendant's early release from prison after serving a mere seven years of his twenty-five year sentence.

(TR:VII:374).

The FSC's denial of Miller's claim that the trial court improperly failed to consider the mitigating circumstances of childhood abuse and long term drug and alcohol abuse was not "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings. 28 U.S.C. § 2254(d)(1),(2). This claim should be denied.

GROUND VI: ***HURST V. FLORIDA***

Miller raises a claim that there was error in his case because the jury did not make factual determinations necessary to impose a sentence of death and did not recommend death unanimously as now required by Florida law. (Petition:114-22;Memo:50-55). Neither *Hurst v. Florida* nor *Hurst v. State* are retroactively applicable to Miller under federal or state law. *Hurst v. Florida*, 136 S.Ct. 616 (2016); *Hurst v. State*, 202 So.3d 40 (Fla.2016). Miller

raised this claim as a *Ring* claim in post-conviction and as a *Hurst* claim in successive post-conviction. In denying Miller's two attempts to raise these claims in state court, both of the FSC's decisions were not "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings. 28 U.S.C. § 2254(d)(1),(2). This claim should be denied.

Miller raised a *Ring* claim as Issue 6 in the post-conviction appeal. *Miller*, 926 So.2d at 1259; *Ring v. Arizona*, 536 U.S. 584 (2002). The FSC denied the claim, stating that *Ring* "does not apply retroactively" and because "one of the aggravating circumstances found by the trial court in this case was a prior conviction of a violent felony (second-degree murder), a factor which, under *Ring*, need not be found by the jury." *Id*. This is not contrary to or an unreasonable application of federal law. S*ee Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (there is a narrow exception to the Sixth Amendment requirement that a jury must find any fact that increases the maximum sentence: the fact of a prior conviction). In fact, in *Summerlin*, the United States Supreme Court held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). The FSC's decision that

Ring was not applicable to Miller was correct.

Miller was found guilty of a contemporaneous felony for the aggravated battery of Fullwood, which also rendered him eligible for the death penalty without a separate jury finding. *Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty).

Miller also re-raised the *Ring* issue as *Hurst* claims in a successive post-conviction state habeas. *Miller*, 237 So.3d at 921. The FSC denied Miller's claim holding that because Miller's judgment and sentence became final in 2001, *Hurst v. State* did not apply retroactively to him. *Id*. This decision is also not contrary to, or an unreasonable application of clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court proceedings.

In *Lambrix*, the petitioner similarly argued as Miller does now that "the [FSC's] refusal . . . to apply *Hurst* retroactively to him but applying it to capital defendants sentenced after *Ring* violates the Eighth Amendment and his constitutional rights to Due Process and Equal Protection. *Lambrix v. Sec'y, Dep't of Corr*., 872 F.3d 1170, 1178 (11thCir.2017). The Eleventh

Circuit rejected Lambrix's claims and noted that no United States Supreme Court "decision holds that its *Hurst* decision is retroactively applicable" and that the "FSC's ruling – that *Hurst* is not retroactively applicable to Lambrix – is fully in accord with the U.S. Supreme Court's precedent in *Ring* and *Schriro*." *Id*. at 1182-83. The FSC's decision in this case is in line with *Lambrix*.

Hurst v. State's requirements of unanimity and jury findings regarding sufficiency of the aggravation and weighing of aggravation versus the mitigation are requirements under State law, which are not retroactive under Federal law and only retroactive under State law to cases decided after June 24, 2002. *See Hitchcock v. State*, 226 So.3d 216 (Fla.2017), *cert. denied, Hitchcock v. Florida*, 138 S.Ct. 513 (2017). This state law distinction between cases which were final pre-*Ring* versus cases which were final post-*Ring* is not violative of federal law. In the traditional sense, new rules are applied retroactively only to cases which are not yet final and are said to be still in the appellate pipeline. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Under this "pipeline" concept, *Hurst* would only apply to the cases which were not yet final on the date of the decision in *Hurst*. This type of traditional retroactivity can depend on a score of random factors having nothing to do with the offender or the offense, such as trial scheduling, docketing on appeal,

etc. Even under the "pipeline" concept, cases whose direct appeal was decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity. The Supreme Court recognizes this type of traditional retroactivity as proper and not violative of the Eighth or Fourteenth Amendment.

The only difference between this more traditional type of retroactivity and the retroactivity implemented by the FSC is that it stems from the date of the decision in *Ring* rather than from the date of the decision in *Hurst*. Since "finality of state convictions is a *state* interest, not a federal one," states are permitted to implement standards for retroactivity that grant "relief to a broader class of individuals than is required by *Teague*," which provides the federal test for retroactivity. *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008) (emphasis in original); *Teague v. Lane*, 489 U.S. 288 (1989); *see also Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) ("Of course, States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a boarder range of cases than is required by this [Court]."). In determining whether *Hurst* should be retroactively applied, the FSC conducted a *Witt* analysis, which is the state based test for retroactivity which is broader than *Teague*. *Witt v. State*, 387 So.2d 922, 926 (Fla.1980) (determining whether a new rule should be applied

retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965)). Whereas *Teague* provides no *Hurst* relief retroactively, Florida's *Witt* provides relief to a large class of individuals. In moving the line of retroactive application back to *Ring*, the FSC reasoned that since Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in *Ring*, defendants should not be penalized for time that it took for this determination to be made official in *Hurst*. Certainly, the FSC has demonstrated "some ground of difference that rationally explains the different treatment" between pre-*Ring* and post-*Ring* cases. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (To satisfy the requirements of the Fourteenth Amendment, "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."). Unquestionably, extending relief to more individuals,[8] defendants who would not receive the

[8] Approximately 150 defendants whose convictions became final post-*Ring* are being re-sentenced pursuant to *Hurst*. Death Penalty Information Center, Florida Death-Penalty Appeals Decided in Light of *Hurst*, available at

benefit of the new rule under the pipeline concept because their cases were already final when *Hurst* was decided, cannot violate the Eighth or Fourteenth Amendment. Just like the more traditional application of retroactivity, the *Ring* based cutoff for the retroactive application of *Hurst* is not in violation of the Eighth or Fourteenth Amendment.

In denying Miller's *Ring* and *Hurst* claims in state court, neither of the FSC's decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court proceedings. 28 U.S.C. § 2254(d)(1),(2). This claim should be denied.

GROUND VII: COMPETENCY TO STAND TRIAL

Miller raises a claim that he was not competent to stand trial. (Petition:122-26;Memo:55-56). Miller has not previously raised this claim. This claim should be denied.

There is direct evidence from the record that this claim lacks merit. At the penalty phase of his trial, Miller presented the testimony of Dr. Krop who

> opined that Miller was mentally competent when he committed the murder and was mentally competent to participate in the proceedings. Finally, Dr. Krop testified that at the time of the murder, he thought that Miller knew the difference between right

---

https://deathpenaltyinfo.org/node/6790 (last visited May 13, 2019).

> and wrong and had the ability to conform his behavior to the requirements of the law and to make the conscious decision to kill.

Miller, 926 So.2d at 1251.

Miller alleges that his "prior failure to present the state courts with the issue of his substantive incompetency does not constitute default" because it is a substantive competency claim. (Memo:55). In raising a substantive competency claim, Miller is "entitled to no presumption of incompetency and must demonstrate his . . . incompetency by a preponderance of the evidence." *Medina v. Singletary*, 59 F.3d 1095, 1106 (11thCir.1995) (citing *James v. Singletary*, 957 F.2d 1562, 1571 (11thCir.1992)). Here, "there is insufficient evidence to generate a substantial and legitimate doubt as to petitioner's competence to stand trial" because Dr. Krop specifically found that Miller was competent to stand trial. *Id*. Though Miller claims that Krop did not have all of the information necessary to make a competency determination, Krop reviewed a significant amount of material, including many medical records, and examined Miller in person twice. *Miller*, 926 So.2d at 1249. Krop's determination based on his interactions with Miller and the information that he was provided do not indicate that at the time of trial, Miller had "a present inability to assist counsel or understand the charges." *Medina*, 59 F.3d at 1107 (citations omitted). Miller testified on his own behalf at both the guilt and

penalty phases of his trial. (TR:573-585,935-38). Based on the record, there is no doubt that Miller was competent to stand trial.

The record in this case directly refutes Miller's claim that he was incompetent at trial. This claim should be denied.

GROUND VIII: INEFFECTIVE ASSISTANCE OF COUNSEL-COMPETENCY TO STAND TRIAL

Miller raises a claim that trial counsel was ineffective for failing to investigate and present evidence that he was incompetent at the time of trial. (Petition:126-31;Memo:56-61). Miller has not previously raised this claim. Since this claim was not raised in post-conviction or on appeal of the denial of the post-conviction motion, it is procedurally barred. Because this claim lacks merit, this procedural bar should not be lifted in order to litigate the claim. This claim is legal in nature and does not necessitate an evidentiary hearing. This claim should be denied.

There is evidence from the trial record that directly refutes this claim. Dr. Krop testified that he performed a competency evaluation and Miller was competent to proceed at trial. (TR:903); *Miller*, 926 So.2d at 1251.

Miller cites *Kibert* for the premise that trial counsel "had a duty to investigate red flags of Miller's incompetency and to inform the court of 'reasonable doubt' as to Miller's competency to proceed." (Memo:58); *Kibert*

v. Peyton, 383 F.2d 566, 569 (4thCir.1967). In *Kibert*, no competency evaluation was completed despite counsel's concerns about his client's competency. Whereas here, Krop specifically determined that Miller was competent to proceed at trial.

Miller cites *Futch* for the premise that he was prejudiced by trial counsel's deficiency because there was a "reasonable probability" that a competency exam would have revealed that Miller was incompetent to stand trial. (Memo:59); *Futch v. Dugger*, 874 F.2d 1483, 1487 (11thCir.1989) (quoting *Alexander v. Dugger*, 841 F.2d 371, 375 (11thCir.1988)). Unlike in *Futch*, Miller's trial counsel did investigate competency and Krop found Miller competent to stand trial. Krop relied on "extensive materials, including a mental evaluation of December 1997," school records, Navy service record, hospital records, and department of corrections records "in making his diagnosis." *Miller*, 926 So.2d at 1249. The vague notion that having had additional information, Krop would have had renewed "concerns that Miller was incompetent to proceed" is purely speculative, especially as Krop testified at the evidentiary hearing that his conclusions were the same as at trial. (Petition:127;PCR:1716). Miller also testified during the guilt and penalty phases, and none of the parties raised concerns about competency. (TR:573-85,935-38). It is clear from the record that Miller was competent during the

trial proceedings.

Further, post-conviction counsel cannot be ineffective in failing to raise this claim if the claim itself lacks merit. *Martinez*, 566 U.S. at 1314 ("To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.").

Because this claim was not raised previously, it is procedurally barred. This claim lacks merit because it is directly refuted by the record as Krop evaluated Miller and found him competent. This claim should be denied.

GROUND IX: CUMULATIVE ERROR

Miller raises a claim that the cumulative effect of the errors in this case undermines the reliability of the conviction and sentence. (Petition:131-35;Memo:61-62). Cumulative error has not previously been alleged by Miller. A cumulative error analysis is legal in nature and does not necessitate an evidentiary hearing. This claim lacks merit and should be denied.

Although Miller presents this claim as an independent basis for relief, a cumulative error claim cannot warrant relief unless the court finds more than one specific claim of error meritorious. Further, the "cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the

constitutional right to a fair trial, which calls for reversal." *United States v. Margarita Garcia*, 906 F.3d 1255, 1280 (11thCir.2018) (quoting *United States v. Baker*, 432 F.3d 1189, 1223 (11thCir.2005)). The cumulative effect of error at trial depends on "the nature and number of the errors committed; their interrelationship," remedial efforts, and the strength of the government's case. *Id*. at 1280-81 (citation omitted).

Here, since there are no errors, there cannot be cumulative error. Even if this Court were to find two or more errors which alone were deemed to be harmless, it is unlikely that if individually harmless, they would amount to harmful error cumulatively. This claim should be denied.

CONCLUSION

For the foregoing reasons, equitable tolling should not be found in this case and the Petition should be dismissed with prejudice as untimely filed. Should this Court reach the merits, this Court should deny the claims.

Respectfully submitted,
ASHELY MOODY
ATTORNEY GENERAL

/s/ Jennifer A. Donahue
JENNIFER A. DONAHUE
Assistant Attorney General
Florida Bar No.: 50639
PL-01, The Capitol
Tallahassee, FL 32399-1050
jennifer.donahue@myfloridalegal.com
capapp@myfloridalegal.com
Phone: (850) 414-3580
Fax: (850) 487-0997
Counsel for Respondents

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of the Order to Show Cause as this document, from Standard of Review up to but not including the signature block contains 19,141 of 20,000 words. (Doc.25). This document complies with the typeface requirements of Local Rule 1.05(a) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font.

/s/ Jennifer A. Donahue
JENNIFER A. DONAHUE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic filing to Terri Backhus, Esq., terri_backhus@fd.org, and Sean Gunn, Esq., sean_gunn@fd.org, Attorneys for Petitioner, this 8th day of July, 2019.

/s/ Jennifer A. Donahue
JENNIFER A. DONAHUE

APPENDIX A-13

October 7, 2019, Petitioner's Reply in Support of 28 U.S.C. §2254 Petition

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v. No. 3:17-cv-00932-BJD-JBT

MARK S. INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

CAPITAL CASE

Respondents.
_____/

PETITIONER'S REPLY IN SUPPORT OF 28 U.S.C. § 2254 PETITION

Terri L. Backhus
Katherine A. Blair
Sean T. Gunn
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
Tallahassee, FL 32301
(850) 942-8818
terri_backhus@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

Table of Contents i

Timeliness and Conflict of Interest 1

I. Attorney misconduct is not the only way a petitioner can establish extraordinary circumstances to warrant tolling 2

II. Miller's incompetence justifies equitable tolling 4

III. The unique procedural posture and representation history in Miller's case support granting equitable tolling 6

IV. CHU-N does not oppose appointing conflict-free counsel to pursue additional issues of equitable tolling based on attorney conduct 10

Substantive Claims 12

I. INEFFECTIVE ASSISTANCE OF COUNSEL - MITIGATION 12

a. Portion adjudicated on the merits 12

b. Portion not adjudicated on the merits 20

i. Respondents have waived procedural default arguments 20

ii. The wealth of mitigation evidence that went unpresented at trial would have made a difference 22

II. INEFFECTIVE ASSISTANCE OF COUNSEL – PRIOR VIOLENT FELONY AGGRAVATOR 23

III. INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO OBJECT 27

IV. *CALDWELL V. MISSISSIPPI* 29

V. STATE COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES 30

VI. *HURST V. FLORIDA* 32

VII. COMPETENCY TO STAND TRIAL 32

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL – COMPETENCY TO STAND TRIAL 34

IX. CUMULATIVE ERROR.....35

CERTIFICATE OF COMPLIANCE.....36

CERTIFICATE OF SERVICE.....36

Timeliness and Conflict of Interest

Respondents' response to Miller's federal habeas petition raises the affirmative defense of untimeliness under AEDPA. ECF 29 at 3. Simultaneously, Respondents also recognize AEDPA's limitations period is not jurisdictional, and Miller may still receive merits review of his § 2254 claims if this Court determines equitable tolling applies. *Id.* at 3-4. Indeed, even before Respondents filed their response to his petition, Miller described reasons equitable tolling should apply to his case and this Court should review his claims on the merits, including issues related to Miller's previously undiagnosed mental health issues and failures by prior counsel. *See, e.g.*, ECF 15 at 9-12; 24 at 6-8. Below in this section, Miller replies to some of Respondents' specific arguments against applying equitable tolling. *See* ECF 29 at 10-23.

Respondents have also raised a threshold issue of whether Miller's current counsel, CHU-N, has a conflict of interest regarding Miller's equitable tolling arguments because, in Respondents' view, such arguments necessarily implicate CHU-N's own handling of Miller's case since being appointed. *See* ECF 29 at 7-10. To the extent Respondents suggest attorney failures, including by CHU-N, are the only basis upon which Miller may be entitled to equitable tolling, this reply explains why that is

wrong. Attorney failures are not the only basis upon which this Court should decide whether equitable tolling is appropriate. Here, there are reasons independent of any issues with prior or current counsel that should serve as the basis to grant equitable tolling and review Miller's claims on the merits.

However, at this stage of proceedings, CHU-N does not object to the limited appointment of separate conflict-free counsel to argue any available equitable tolling issues related to Miller's past and current counsel. Because Respondents argue current counsel's actions as a reason to reject equitable tolling, CHU-N recognizes that Miller's own interests favor appointment of supplemental counsel at this time. Miller also agrees with Respondents' suggestion, *see* ECF 18, that the Court appoint the Capital Habeas Unit of the Federal Public Defender for the Middle District of Florida (CHU-M) to argue any counsel-based equitable tolling issues in this case.

I. Attorney misconduct is not the only way a petitioner can establish extraordinary circumstances to warrant tolling.

Equitable tolling is warranted where a litigant "shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). Attorney misconduct is just one basis—not the *only* basis—for equitable tolling. *Cadet v. Fla. Dept. of*

Corrections, 853 F.3d 1216 (11th Cir. 2017) (tolling is warranted if there exists "some extraordinary circumstance, professional misconduct *or otherwise*") (emphasis added); *Brown v. Sec., Dept. of Corr.*, 750 F. App'x 915, 929 (11th Cir. 2018) ("There is no exhaustive list of what qualifies as an extraordinary circumstance") (citing *Cadet*, 853 F.3d at 1218).

Courts have applied tolling to correct "particular injustices," *Holland*, 560 U.S. at 650, such as detrimental reliance on a district court's extension of time, *Sossa v. Diaz*, 729 F.3d 1225, 1236 (9th Cir. 2013), *Prieto v. Quarterman*, 456 F.3d 511, 513-15 (5th Cir. 2006); mental incompetence, *Trapp v. Spencer*, 479 F.3d 53, 62 (1st Cir. 2007); and substitution of counsel shortly before due date, *Calderon v. U.S. Dist. Ct. (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 2007).

Holland is clear that tolling is not confined to any particular circumstance. 560 U.S. at 649-50 (explaining that exercise of a court's equity powers "'must be made on a case-by-case basis'" in order to "meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.") (internal quotations omitted). *Holland* thus directed district courts to avoid strict adherence to mechanical rules, and to exercise flexible judgment "with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an

appropriate case." *Id*. The inquiry must be guided by the "totality of the circumstances[,]" *Bills v. Clark*, 628 F.3d 1092, 1101 (9th Cir. 2010), and take the seriousness of a capital proceeding into account, *Trapp v. Spencer*, 479 F.3d 53, 61 (1st Cir. 2007); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001).

II. Miller's incompetence justifies equitable tolling.

Respondents incorrectly assert that while mental illness may satisfy the diligence requirement for equitable tolling, it cannot constitute an extraordinary circumstance for a non-*pro se* litigant because an "attorney could have filed a timely petition despite . . . mental illness." ECF 29 at 13-15. Respondents present no legal authority for this erroneous proposition.

Respondents' attempts to distinguish Miller's cited cases are also unavailing. For instance, the thorough tolling analysis in *Bolarinwa v. Williams*, 593 F.3d 226 (2d Cir. 2010), did not rely on the litigant's *pro se* status. 593 F.3d at 231-32. Respondents' attempt to distinguish *McSwain v. Davis*, 287 F. App'x 450 (6th Cir. 2008), fares even worse because that petitioner *was* represented by counsel when the habeas deadline was blown. *Id.* at 457; *see also Ata v. Scutt*, 662 F.3d 736, 741 (6th Cir. 2011) (finding *McSwain* consistent with law in other circuits).

In *Calderon v. U.S. Dist. Ct. (Kelly)*, the en banc Ninth Circuit held that "alleged mental incompetency . . . justifies equitable tolling" for a death-sentenced prisoner represented by

counsel. 163 F.3d 530, 541 (9th Cir. 1998). The court explained that the right to counsel "contemplates effective communication between the lawyer and client[,]" *id.* (citing *Murray v. Delo*, 34 F.3d 1367, 1373 (8th Cir. 1994)), and:

> A putative habeas petitioner's mental incompetency—a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control—renders that petitioner unable to assist his attorney in the preparation of a habeas petition. Such a condition could eviscerate the statutory right to counsel.

Id. No court has questioned this decision. Rather, the Supreme Court recited without disapproval *Kelly*'s central holding "that a prisoner's incompetence is grounds for equitably tolling the [AEDPA] 1-year statute of limitations for filing habeas petitions," *Ryan v. Gonzales*, 568 U.S. 57, 67-68 (2013),[1] and lower courts have followed *Kelly*'s finding that incompetency constitutes an extraordinary circumstance. *See, e.g., Bills v. Clark*, 628 F.3d 1029, 1097 (9th Cir. 2010) (Tymkovich, J., by designation); *Smith v. Kelly*, 301 Fed. Appx. 375, 378 (5th Cir. 2008); *Trapp*, 479 F.3d at 62.

[1] Respondents' reliance on the caveat in *Gonzales* that "It is unclear how [*Kelly*]'s determination that mental incompetence is grounds for AEDPA equitable tolling could possibly control the outcome in [cases asking for stays where a habeas petition has already been filed], which had nothing to do with AEDPA's statute of limitations[,]" 568 U.S. at 67, n.6, is misplaced. Availability of incompetence as a basis for equitable tolling to excuse a late filing has no nexus, as *Gonzales* specifically says, to the availability of indefinite litigation stays regarding previously filed petitions with purely record-based claims.

In Miller's case, his mental illness satisfies both the diligence and extraordinary circumstances prongs. Miller has specifically alleged that his longstanding mental illness—characterized by delusions, religious preoccupations, and hallucinations—rendered him unable to effectively communicate with counsel or assist in pursuing his legal rights. *See, e.g.*, Regnier report ("Attachment 1") at 3-7, 14-21 (diagnosing Miller with multiple mental health disorders including schizoaffective disorder and schizotypal personality disorder, and finding he was likely incompetent for much of his legal process).

The need for thorough fact-finding is especially pressing here, where Miller's incompetence looms in conjunction with apparent abandonment by prior counsel. *See Schmid v. McCauley*, 825 F.3d 348 at 350 (7th Cir. 2016) (Easterbrook, J.) ("a prisoner's mental disability in conjunction with abandonment by counsel may justify the appointment of new counsel to explore the question whether the disability tolls the period of limitations."). To the extent Respondents dispute Miller's incompetency, an evidentiary hearing is necessary. *Downs v. McNeil*, 520 F.3d 1311, 1325 (11th Cir. 2008); *Ata*, 662 F.3d at 741.

III. The unique procedural posture and representation history in Miller's case support granting equitable tolling.

As explained in the petition, Miller's AEDPA limitations deadline lapsed in 2006, under the watch of his state-appointed

counsel. Although Miller was represented by multiple attorneys over the following decade, no federal habeas petition was ever filed. Miller's abysmal representation history (he is one of only three Florida capital inmates in this position[2]) prompted current counsel's appointment "to ascertain the status of Miller's federal habeas rights" and "pursue federal remedies that might be available"). ECF 1 at 4.

Counsel appointed to a case in such posture needs time to research substantive claims and "explore[] the contents of prior counsel's files [and] formulat[e] an explanation for [prior counsel's] delay satisfactory to the district judge." *Schmid*, 825 F.3d at 350 (Easterbrook, J.); *see also* American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1085-86 (2003) (habeas counsel has a duty to thoroughly investigate and not rely on existing record and work product). Equity warrants a reasonable amount of additional time to prepare the petition. *Calderon v. U.S. Dist. Ct. (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997) (Kozinski, J.) (replacement habeas counsel appointed shortly before the deadline and needing "more time to file" constituted extraordinary circumstance to warrant tolling); *Holland*, 560 U.S. at 651 (endorsing *Beeler* opinion that

[2] *See Lugo v. Secretary*, 750 F.3d 1198, 1225 (11th Cir. 2014)(appendix to Martin, J., concurring).

"change in representation" is an extraordinary circumstance warranting tolling).

Miller's case posture particularly supports equitable tolling because current counsel was appointed in the midst of prior counsel's state-court litigation regarding whether Miller's death sentence was unconstitutional under *Hurst v. Florida*, 136 S. Ct. 616 (2016). Miller's federal docket was stayed and closed for much of current counsel's appointment, while *Hurst* relief was pursued in the Florida Supreme Court and later the United States Supreme Court. While Respondents are correct that certiorari review does not count for *statutory* tolling, Respondents miss that it is highly relevant in certain cases for purposes of *equitable* tolling.

After current counsel's appointment, Miller requested this Court hold his case "in abeyance for the time being so that Petitioner may properly bring claims in a 28 U.S.C. § 2254 petition after exhausting state-court *Hurst* remedies," ECF 7 at 1-3; 11 at 1 (advising this Court of certiorari review and asking that the case "remain stayed pending a ruling from the United States Supreme Court"). Over Respondents' objection (solely on the basis that Miller's *Hurst* argument was "meritless"), ECF 8 at 1, and consistent with other Florida district court cases,[3] this Court

[3] *See, e.g., Trease v. Secretary*, No. 8:11-cv-233, ECF 62 (M.D. Fla. July 11, 2018) (Merryday, J.), (keeping administrative stay in place, over Respondents' objection, "because the Supreme Court's decision on certiorari may affect this action"); *Guardado*

agreed with Miller and administratively closed the case, subject to reopening on motion by either party. ECF 10, 11. Respondents never sought to lift the stay during certiorari proceedings, despite this Court having authorized them to do so. ECF 10. Only *after* certiorari review concluded did Respondents move to lift the stay. ECF 14. Miller joined that request, ECF 16, and this Court lifted the stay on February 8, 2019. ECF 20.

Respondents should not be allowed to acquiesce in a continued federal stay, only to later use the stay itself as a basis to argue for dismissal of the case. *Cf. Sossa v. Diaz*, 729 F.3d 1225, 1235 (9th Cir. 2013) (following Fifth Circuit's *Prieto* holding to reject the notion that "the State may lie in wait while a district court extends a filing deadline, and only thereafter oppose a petition as untimely once it has been filed within the time allowed by the court.").

At the very least, this issue warrants further briefing. As set forth below, CHU-N does not object to appointment of separate conflict-free counsel to make the full range of counsel-based tolling arguments for Miller, including analyzing whether CHU-N's

---

v. Secretary, No. 4:15-cv-256, ECF 38 (N.D. Fla. July 25, 2018) (Hinkle, J.) (staying proceedings in light of petitioner's *Hurst* successor "until the United States Supreme Court issues an order on the pending petition for a writ of certiorari"); *Whitton v. Jones*, No. 4:15-cv-200, ECF 53 (N.D. Fla. Sep. 4, 2018) (Hinkle, J.) (keeping stay in place pending certiorari review from *Hurst* successor).

own handling of Miller's case is relevant to equitable tolling analysis.

IV. CHU-N does not oppose appointing conflict-free counsel to pursue additional issues of equitable tolling based on attorney conduct.

Respondents suggested at several stages of these proceedings that the Court appoint separate conflict-free counsel for Miller's equitable tolling arguments because, in Respondents' view, such arguments necessarily implicate CHU-N's own handling of Miller's case. *See, e.g.*, ECF 18, 21, 26. This Court correctly rejected as premature Respondents' previous attempts to have a conflict declared and separate equitable tolling counsel appointed for Miller before a response to the petition was even filed. *See, e.g.*, ECF 20, 23, 28.

However, Respondents have now filed a response to the petition, asserted a timeliness defense, and raised the issue of CHU-N's conduct in arguing Miller is not entitled to tolling. At this stage, CHU-N does not object to the limited appointment of supplemental counsel to pursue some equitable tolling arguments. CHU-N recognizes that if Respondents' arguments are accepted by this Court, CHU-N would have a conflict, and Miller's own interests would favor appointment of separate, supplemental counsel on that issue. *See Christeson v. Roper*, 135 S. Ct. 891, 892-93 (2015). CHU-N cannot ethically litigate allegations regarding their own conduct. And because CHU-N assisted prior counsel with Miller's

Hurst litigation, prior to CHU-N's appointment as federal counsel, CHU-N may be called to provide evidence regarding prior counsel's federal habeas inaction.

Miller also agrees with Respondents, *see* ECF 18, that CHU-M would be appropriate conflict-free counsel, as this is a Middle District case and CHU-M has expertise litigating issues related to AEDPA's statute of limitations. Appointing a CHU as limited equitable tolling counsel has been permitted in other capital habeas cases in Florida. *See, e.g.*, *Brown v. Jones*, No. 3:16-cv-00099-RH, ECF 8, 10 (N.D. Fla. 2016). CHU-N has conferred with CHU-M, who consents to this limited appointment.[4] Consistent with similar orders in other cases, this Court should permit CHU-M time to investigate and leave to file a memorandum of law addressing equitable tolling issues in Miller's case. *See id.*, ECF 10.

[4] The CHUs do not agree with Respondents' prior suggestion that CHU-M be fully *substituted* as counsel. There is no reason CHU-N should be entirely replaced in this case based on Respondents' assertion of a conflict regarding equitable tolling issues. The appropriate course is for this Court to appoint CHU-M as limited equitable tolling co-counsel so it may litigate any arguments Petitioner has regarding counsel's conduct as it pertains to equitable tolling. It is appropriate for CHU-N to remain as federal counsel, and to develop equitable tolling arguments not related to attorney conduct.

Substantive Claims

GROUND I: INEFFECTIVE ASSISTANCE OF COUNSEL – MITIGATION

A. Portion adjudicated on the merits

Respondents assert that because Miller's mental health issues and drug abuse are intertwined, this evidence is a "two-edged sword." ECF 29 at 53. Respondents also claim that presenting mental health records demonstrating Miller's failure to rehabilitate, and his conduct while involuntarily committed, undermine trial counsel's argument that Miller operates better in institutionalized settings and is thus deserving of a life sentence. ECF 29 at 53. As such, according to Respondents, counsel was not deficient in investigating and presentating mitigation. ECF 29 at 53.

Respondents' arguments ignore the fact that trial counsel, Refik Eler, actually presented minimal evidence of Miller's substance abuse and mental health issues. However, because trial counsel failed to adequately investigate and prepare for the penalty phase, the jury did not hear pertinent evidence relating to Miller's mental health, mental state, and relevant events of his childhood and addictions. Trial counsel's omissions stemmed in part from the fact that, by his own admission, he relied upon Dr. Krop to tell him what should be presented in mitigation. Failing to recognize his independent duty to investigate and prepare, Eler appeared to believe that the problem in this case was not his

fault, but that of Dr. Krop. Eler maintained that Dr. Krop did not alert him to the need for detailed testimony about Miller's mental state, the effects of his background, and his previous diagnosis and treatments, so Eler did not pursue these areas of mitigation. By failing to conduct his own investigation and adequately consult with Dr. Krop, Eler improperly delegated to Dr. Krop the responsibilities of legal counsel.

If trial counsel fails to engage in reasonable investigation prior to the penalty phase, his subsequent decisions do not enjoy deference. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Indeed, "where defense counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims . . ., we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar." *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003). There was no reasonable trial strategy for counsel not to conduct an adequate investigation and present substantive mitigation in support of the aforementioned factors, which Eler acknowledged would have been important for the jury and court to hear. (PCT. 1504).

Moreover, Respondents overlook the lack of evidence presented by Miller in support of the notion that he would adapt well in prison. In its sentencing order, the trial court observed that "no

other testimony was offered by Defendant regarding his adjustment to prison life while he was in prison in North Carolina." (R. 373). And, the trial court noted that "Defendant has failed to call correctional officers or offer documentary evidence of his behavior in the Duval County Pre-Trial Detention Facility while he was awaiting trial this past year." (R. 373). Thus, any suggestion that trial counsel made a strategic decision to not present pertinent evidence in favor of an unsupported argument which garnered little or slight weight (R. 373), is not credible.

Further ignored by Respondents is that given the sparse mitigation presented, the prosecutor was able to convincingly argue to the jury: "The mitigation that has been established, I would submit to you, there has been no mitigation established. If you look at what has been presented it amounts to virtually nothing. You can't compare to these aggravating circumstances." (T. 968). And, also overlooked by Respondents is the trial court's rejection of or minimal weight given to the mitigation presented by trial counsel. For instance, the court gave no weight to Miller's family background; his alcohol and drug problems; his employment; and that he did not resist arrest (R. 369-71). The trial court also gave very little or slight weight to the mitigating circumstances that: the victim was unconscious and did not suffer for any lengthy periods of time; Miller turned himself in to police; there is no early release for first degree murder;

a life sentence is without the opportunity of parole; Miller is loved by his family and has done good deeds; he was very close with his cousin and older sister and was emotionally distraught upon their deaths; and Miller is capable of adapting well to long-term incarceration (R. 367-74).

Respondents ignore the fact that while trial counsel Eler first claimed that he did not present the mitigation at issue because it would have been detrimental to Miller, he could not offer a single negative point that Dr. Krop could have been cross-examined on if he had testified about what the alcohol and drug problems meant to Miller (PCT. 1521). Eler finally acknowledged that, "I'm not sure that would have been a bad thing" to have had Dr. Krop testify in this area (PCT. 1521). Here, similar to the Florida Supreme Court's determination, Respondents' argument resembles more of "a *post hoc* rationalization of counsel's conduct than an accurate description of [] [his] deliberations prior to sentencing." *Wiggins*, 539 U.S. at 526-27.

Additionally, Respondents' argument overlooks Eler's apparent ignorance of the significance of mental health mitigation. In Eler's opinion, that a defendant had been previously committed to a mental institution was something he would never want a jury to hear (PCT. 1515). Yet, psychiatric mitigating evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and

homicidal behavior." *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988). Prejudice is clear where the attorney failed to present evidence that the defendant spent time in a mental hospital. *Stephens v. Kemp*, 846 F.2d 642, 653 (11th Cir. 1988) ("Although trial counsel was aware well in advance of trial that appellant had spent at least a brief period of time in a mental hospital shortly before the shooting, and that for some reason a psychiatric evaluation had already been ordered, he completely ignored the possible ramifications of those facts as regards the sentencing proceeding. This omission denied appellant reasonably competent representation at the penalty phase.").

Like the state courts, Respondents advocate that this Court, in violation of *Porter v. McCollum,* 558 U.S. 30, 42 (2009), either not consider or unreasonably discount the mitigation adduced in the postconviction hearing. Ignored by Respondents is that for a fact to be mitigating it does not have to be relevant to the crime – any of "the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), that might counsel in favor of a sentence less than death, *Lockett v. Ohio*, 438 U.S. 586 (1978), are mitigating. *Williams v. Taylor*, 120 S. Ct. 1495 (2000). As the Supreme Court repeatedly stressed, "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background

. . . may be less culpable." *Porter*, 558 U.S. at 41, quoting *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989). Here, Miller's lengthy battle with drugs constitutes the "'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.' *Wiggins, supra,* at 535, 123 S. Ct. 2527." *Porter*, 558 U.S. at 41. Moreover, Miller's mental health issues constitute the type of information that must be considered for mitigation. *See e.g. Tennard v. Dretke*, 124 S. Ct. 2562, 2571 (2004); *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982).

Respondents further assert that Miller suffered no prejudice as almost all of the evidence presented in postconviction was cumulative to that presented at trial, and would not have outweighed the aggravating factors. ECF 29 at 54. This is wrong. First, significant evidence was presented at the evidentiary hearing which the jury did not hear. For instance, Dr. Krop at the evidentiary hearing explained the effects of Miller's abusive childhood, alcohol and drug addiction and the importance of the interplay between frontal lobe dysfunction suffered by Miller and these events. Moreover, the value of Dr. Krop's testimony was diminished at the penalty phase by counsel's failure to ask him questions about the effects Miller's life circumstances had upon him psychologically, and by failing to allow Dr. Krop to explain the significance of medical records, family testimony, and other

incidents that were an integral part of who Miller was. The absence of this testimony failed to provide the individualization in capital sentencing contemplated under the Constitution. *See Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991).

Miller was prejudiced by trial counsel's deficient performance. Had the aforementioned evidence been admitted, it would have demonstrated to the jury that Miller suffered lasting psychological scars from his childhood and long-term substance abuse. Complimentary to this evidence from Dr. Krop and Debra Lee was the testimony of Dr. Wu, who testified that the PET scan results confirmed Dr. Krop's diagnosis of frontal lobe dysfunction. Dr. Wu's testimony, in addition to that of Ms. Lee, would have unequivocally demonstrated to the jury that Miller's mental health and substance abuse issues were long-standing problems and not something manufactured at a convenient time to help avoid a death sentence. The postconviction evidence also provided the nexus the trial court found lacking to establish the mitigating circumstance of an abusive childhood. Further, "taken as a whole," the unpresented evidence "'might well have influenced the jury's appraisal' of [Miller's] culpability," *Wiggins*, 539 U.S., at 538 (quoting *Williams*, 529 U. S. at 398), such that the likelihood of a different result is "sufficient to undermine confidence in the outcome" at sentencing, *Strickland*, 466 U.S., at 694. Had the jury been able to place Miller's difficult life

history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. *Wiggins,* 539 U.S. at 537.

Respondents also attempt to minimize the impact of Dr. Wu's postconviction testimony by claiming he was impeached by Dr. Holder's conclusion that he did not believe Miller had abnormal frontal lobe activity. ECF 29 at 53.

While the State did attempt to impeach the testimony of Dr. Wu with that of Dr. Holder, it failed. Instead, the testimony established that Dr. Holder had far less experience and expertise than Dr. Wu in the area of PET scans (PCT. 1751, 1754, 1756), he had no specialized training in the area of psychiatry (PCT. 1755), and he had never utilized a visual vigilance test, as used by Dr. Wu (PCT. 1746). Indeed, Dr. Wu noted that the use of the visual vigilance test and his conclusions regarding its results in Miller's case were supported by peer reviewed literature (which included 50 articles he personally authored) addressing schizophrenia as compared with normal responses (PCT. 1765). And Dr. Wu noted that while Dr. Holder had many interests, he did not have any experience in PET scans of the brain involving neuropsychiatric illness (PCT. 1766).

Respondents also claim that Eler's other cases, in which he was found to have rendered deficient performance, are distinguishable from this case as Dr. Krop was consulted and had

the records he needed, there was no evidence at the evidentiary hearing that was not cumulative to what was presented at trial, and family members filled in additional information without the risk of strong cross-examination. ECF 29 at 56-57. This is also wrong.

There is no indication that Eler did anything differently here than in any of the cases mentioned in Miller's memorandum of law – *Shellito*, *Morrison*, *Douglas*, *Bevel* - or that Eler became more proficient from one case to the next. It is not as though Miller's case was the last to be tried by Eler and he had learned how to effectively represent his client by then. Rather, while Shellito's penalty phase (August, 1995) preceded Miller's (July, 1998), Eler was found to be deficient in subsequent penalty phase proceedings for the same conduct exhibited in *Shellito* and *Miller* - in *Morrison* (October, 1998), *Douglas* (April, 2002), and in *Bevel* (October, 2005). As in the aforementioned cases, Eler's performance in Miller's case fell below the level of competent representation. *See Williams v. Taylor,* 529 U.S. at 396; *Porter*, 558 U.S. at 39.

Portion not adjudicated on the merits

i. Respondents have waived procedural default arguments

Procedural default is an affirmative defense to a federal habeas claim that is subject to waiver. *Banks v. Dretke*, 540 U.S. 668, 674 (2004); *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996).

Here, Respondents expressly waived default, ECF 29 at 47 ("Respondents are not invoking a procedural bar"), and simply rest on the argument that the evidence described in Miller's petition would not alter the outcome of Miller's ineffective assistance of counsel claim. This Court need not, then, conduct a *Martinez* analysis,[5] and may evaluate the merits of Miller's underlying claim without AEDPA deference. *See, e.g.*, *Porter*, 558 U.S. at 39 (reviewing deficient performance *de novo*).

Additionally, when evaluating the prejudice aspect of an ineffective assistance of counsel claim where trial counsel failed to present mitigation evidence, the reviewing court must consider all mitigation evidence cumulatively—not piece by piece. This means that this Court must evaluate in tandem the mitigation presented at trial, mitigation not presented presented for the first time in state post-conviction proceedings, and the mitigation presented for the first time in federal habeas proceedings. *See Sears v. Upton*, 561 U.S. 945, 955-56 (2010).

In conducting the requisite holistic evaluation, this Court is not constrained by AEDPA deference to the state court's "no prejudice" finding regarding the impact of mitigation evidence developed in state post-conviction. Instead, this Court must

[5] Even if Respondents had not waived any default argument, Petitioner has already established cause and prejudice under *Martinez* to excuse default. *See* ECF 24 at 28-31.

conduct a *de novo* review of *all* of Miller's mitigation evidence, and determine whether, if it had all been heard, one additional juror may reasonably likely have voted to spare Miller's life.

ii. The wealth of mitigation evidence that went unpresented at trial would have made a difference

Respondents posit that simply because *some* information was previously presented regarding Miller's family and mental health history, any additional evidence regarding those broad topics is cumulative. *See* ECF 29 at 48. This is inaccurate. Had the jury heard the entirety of Miller's mitigation, they would have seen that Miller—like several others in his family—suffered from debilitating mental illness. Combined with Miller's history of extreme abuse at the hands of his caregivers, this illness drove Miller to isolate, self-medicate with alcohol and drugs, and live on the streets. The jury would have seen that Miller's crime was the unplanned byproduct of paranoid psychosis; that Miller was not malicious, but slipped through the cracks during his attempts to seek help, with tragic consequences. *See, e.g.*, Attachment 1 at 3-7, 14-21 (explaining that Miller's mental illness rendered him less culpable).

Additionally, the newly presented information regarding Miller's schizophrenia *is* inconsistent with Dr. Krop's trial and evidentiary hearing testimony—which is precisely why Dr. Krop has now called his prior findings into question. ECF 15 at 122. Rather

than the new findings being refuted by the record, the new findings *undermine* the prior record. Because Miller's allegations are unrefuted by the record, he should be allowed to prove them at an evidentiary hearing.

GROUND II: INEFFECTIVE ASSISTANCE OF COUNSEL – PRIOR VIOLENT FELONY AGGRAVATOR

Respondents assert that the Florida Supreme Court's denial of this claim was not contrary to or an unreasonable application of *Strickland.* ECF 29 at 60. Respondents rely on Eler's statements that Miller's guilty plea to the second-degree murder was the most mitigating aspect, and that he used the lack of facts surrounding the murder as rebuttal in his closing argument. ECF 29 at 60. Further, Respondents claim Eler was not deficient as he had tactical explanations for his conduct. ECF 29 at 61. Respondents are incorrect.

Eler's "strategic" reasons for not presenting evidence to minimize the weight of the prior murder conviction were not reasonable. *See Wiggins,* 539 U.S. at 526 ("Even assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."). *See also Hardwick,* 320 F.3d at 1163 n9 (11th Cir.

2003) ("[Counsel's] ignorance or misunderstanding of this crucial mitigating evidence cannot masquerade in the guise of strategy.").

Contrary to clearly established precedent, Eler did not think it was important to present evidence of the circumstances surrounding a prior conviction to the judge or jury (PCT. 1524). *See e.g., Rompilla v. Beard*, 545 U.S. 374, 386, n. 5 (2005); *Starr v. Lockhart*, 23 F.3d 1280, 1285 (8th Cir. 1994). Further, Eler's statement that he did not want to show Miller already had "one bite at the apple" (PCT. 1524), makes no sense as both the jury and trial court were going to be told of the conviction irrespective of whether the surrounding facts were presented. Indeed, without this context, the trial court found the "prior conviction for murder is most appalling and has been given great weight." (PCR. 374-75). And, Eler's supposed concern that VA records would show Miller pushed another patient is meritless. As Debra Lee testified, "I never witnessed any of that behavior and had no prior knowledge of that, not during the time that I knew him." (PCT. 1007). Moreover, Eler could not identify a single fact he believed the State would bring out that would be any more negative than the existence of the conviction, which itself was the strongest weapon the State had. Eler's *post-hoc* rationalizations do not change the fact that his "strategic" decision was not reasonable. *See Wiggins*, 539 U.S. at 526; *Strickland,* 466 U.S. at 691.

Respondents also assert that even if Eler was deficient, Miller has not demonstrated that he was prejudiced. ECF 29 at 60. According to Respondents, there is no prejudice because any deficiency in failing to present the underlying facts of the second-degree murder would not have altered the balance of aggravating and mitigating circumstances. ECF 29 at 60. Respondents' assertions are wrong again.

Eler's failure to explain and mitigate the prior conviction significantly prejudiced Miller. Records from Dorothea Dix Hospital, where Miller was admitted pursuant to court order, would have shed light on Miller's mental state and the circumstances of the crime (PC Ex. 1/A, Vol. II, Section 4). The records show Miller having a history of treatment and hospitalization at the Reynolds Mental Health Center and a history of one previous hospitalization to that program in 1983 (PC Ex. 1/A, Vol. II, Section 4). They reveal Miller having a history of psychiatric treatment and marks across his arms from numerous suicide attempts (PC Ex. 1/A, Vol. II, Section 4). They show that when evaluating Miller's competency, the forensic psychiatrist, Dr. Patricio Lara, diagnosed him with adjustment disorder with mixed disturbance of emotions and conduct, alcohol abuse by history, personality disorder, mixed, with avoidant schizoid paranoid and borderline features (PC Ex. 1/A, Vol. II, Section 4). They show that Dr. Lara found significant mitigation, including alcohol intoxication at the time of Miller's

offense and a history of emotional problems associated with underlying disorders. Dr. Lara believed that these two conditions combined impaired Miller's ability to appreciate the criminality of his conduct and to conform his behavior to the requirements of the law (PC Ex. 1/A, Vol. II, Section 4). Dr. Lara also recommended further psychiatric treatment before and throughout Miller's trial in order to assist him in handling this difficult situation (PC Ex. 1/A, Vol. II, Section 4).

Additionally, the records show the following profile from results of psychological testing while at Dorothea Dix Hospital: poor self-concept, labile, and dysphonic; an excessive worrier, introspective, withdrawn and hypersensitive; chronic feelings of insecurity, inadequacy and inferiority; nervousness around others and having difficulty in forming interpersonal relationships; withdrawal, isolation, and introversion; diagnoses of schizoid personality and schizophrenia; poor reality ties, introversion, and a desire to minimize environmental contact; negativism, poor impulse controls and hostile acting-out tendencies; and a tendency to withdraw from reality using fantasy to satisfy needs his environment does not meet (PC Ex. 1/A, Vol. II, Section 4).

The records also show that in its sentencing order, the court found as a mitigating circumstance that Miller was suffering from a mental condition that significantly reduced his culpability for the offense (moved into evidence at T. 818-25). Further, the court

found as a mitigating circumstance that an early stage of the criminal process, Miller voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer (*Id*.).

Miller's prior conviction was the key consideration—the "most appalling" circumstance (PCR. 374-75)—used by the trial court in sentencing him to death. The court could not "imagine a greater aggravating factor" (*Id*.). Trial counsel had evidence at his fingertips to counter this aggravator, yet failed to use it despite his obligation to do so. If counsel presented the underlying facts of the conviction, there is a reasonable probability that the outcome would have been different. This is especially so in light of the fact that death was recommended by a vote of 7-5, the slimmest of legal margins.

GROUND III: INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO OBJECT

Respondents assert that trial counsel objected to improper argument that Miller would have killed Linda Fullwood but for Jimmy Hall; thus there was no deficient performance. ECF 29 at 64.

Respondents' argument is deceptive, as trial counsel only objected once to numerous instances of similar prosecutorial comments. The first time the prosecutor invoked this argument, trial counsel did not object (*see* T. 698). Trial counsel objected to the second instance (T. 703), but after the objection was overruled, he did not ask for a continuing objection (T. 704). The

prosecutor invoked a similar argument on several more occasions, yet trial counsel stayed silent (T. 704, 709, 716-17).

Additionally, in arguing that trial counsel was not deficient, Respondents ignore the unreasonableness of his stated strategy. Eler claims to object in closing argument only when the error is fundamental (PCT. 1557). But fundamental error, by definition, is preserved without objection. See *McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999) (not requiring objection because error affects "the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Eler failed to grasp that a strategy of objecting to only fundamental error wholly fails to preserve what would otherwise be reversible error on appeal.

Eler's "tactical" decision to remain silent in the face of clear-cut impropriety was based upon his ignorance of the rule of law regarding objections, record preservation, and the concept of fundamental error. *See Hinton v. Alabama*, 571 U.S. 263 (2014) (putative decisions based on counsel's ignorance of the law is ineffective assistance). "[S]o called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." *Hardwick*, 320 F.3d at 1185-86 (citation omitted) (note omitted). *See also Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008)

(counsel's decision was "made based on a gross misunderstanding of a clear rule of Alabama criminal procedure.").

GROUND IV: *CALDWELL V. MISSISSIPPI*

According to Respondents, this claim is procedurally barred because it should have been raised at trial and on direct appeal. ECF 29 at 68. Respondents assert that in any event, there was no *Caldwell* violation as Miller's jury was properly instructed under local law and the instructions did not diminish the jury's sense of responsibility. ECF 29 at 68.

Respondents' argument ignores the fact that Miller's claim did not become viable until *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 20 (Fla. 2016), were decided. As Miller explained in his memorandum of law, *Caldwell* was ruled inapplicable to Florida capital proceedings. *See Darden v. State*, 475 So. 2d 217 (Fla. 1985). In *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986), the Florida Supreme Court concluded that due to the jury's advisory role, it was appropriate for judges and prosecutors to diminish the jury's sense of responsibility:

> It would be unreasonable to prohibit the trial court or the state from attempting to relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial. We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a "true sentencing jury.

In light of *Hurst*, a single juror voting to recommend a life sentence results in a binding life recommendation. Each juror has the power to preclude imposition of a death sentence, which is not permissible under Chapter 2017-1, Laws of Florida, without a jury's unanimous verdict in favor of death. As a result, an advisory recommendation is now unreliable under the Eighth Amendment principle upon which *Caldwell* was premised.

GROUND V: STATE COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES

Regarding the abusive childhood evidence, Respondents state that it is clear that the trial court considered this mitigating circumstance, but found that the evidence was not mitigating when considering the totality of the defendant's childhood. ECF 29 at 73.

Respondents' interpretation of the trial court's sentencing order is flawed. The trial court was required to consider *and give effect to* the mitigation presented. *Penry*, 492 U.S. 302); *Eddings*,455 U.S. 104. Here, however, the trial court refused to give any weight to the evidence by excluding it from consideration. *See Eddings*, 455 U.S. at 114-15. Contrary to clearly established federal law, the trial court relied on the fact that "defendant's brother and sister have been law abiding citizens and have earned professional careers even though they were raised in the same environment as the defendant. Defendant's sister is a law enforcement officer with the city of Durham, North Carolina." (R.

369-70). By its own explanation, the trial court refused to consider the individual characteristics of Miller contrary to Supreme Court precedent. *See Penry*, 492 U.S. at 317; *Lockett*, 438 U.S.at 604 (1978).

As to Miller's long-term alcohol and drug abuse, Respondents assert that the trial court did consider this mitigating factor. ECF 29 at 75. According to Respondents, this is shown because the trial court compared this evidence with testimony regarding evidence of Miller's family's willingness to support him in seeking help for these issues. ECF 29 at 75.

Respondents' argument ignores the Florida Supreme Court's determination that the trial court abused its discretion in declining to find this mitigating circumstance. *Miller*, 770 So. 2d at 1150. Respondents present no argument that the Florida Supreme Court's determination was objectively unreasonable.

Respondents further assert that any error is harmless in light of the weighty aggravating factors. ECF 29 at 74-76. Like the Florida Supreme Court, Respondents ignore the fact that Miller was only one vote shy of a life recommendation, to which the trial court was required to give great weight. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). Moreover, as discussed in Miller's memorandum of law, the trial court and Florida Supreme Court erroneously failed to consider Miller's abusive childhood as a mitigating circumstance. This omission, in conjunction with the trial court's

outright rejection of alcohol and substance abuse as mitigating, had a substantial and injurious effect or influence in determining Miller's sentence. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

GROUND VI: *HURST v. FLORIDA*

According to Respondents, just like the more traditional application of retroactivity, the *Ring*-based cutoff for retroactive application of *Hurst* comports with the Eighth and Fourteenth Amendments. ECF 29 at 83. However, as Miller has previously argued, although the United States Supreme Court has clearly articulated the relevant Eighth and Fourteenth Amendment standards, the Florida Supreme Court has contravened or, at minimum unreasonably applied, those standards with respect to its *Hurst* retroactivity cutoff. This is particularly harmful in Miller's case because his death sentence became final shortly before the *Ring* cutoff, and after *Apprendi v. New Jersey*, 523 U.S. 224 (1998), which was the foundation for both *Ring* and *Hurst*.

GROUND VII: COMPETENCY TO STAND TRIAL

Respondents note that Miller's substantive incompetency claim was not previously raised, but neither assert procedural default nor dispute Miller's argument that substantive incompetency claims are not subject to procedural default. Thus, this Court should perform *de novo* merits review.

Respondents are incorrect that the record conclusively refutes this claim. Most easily dispensed with is Respondents'

cursory statement that "Miller testified on his own behalf at both the guilt and penalty phases of his trial." ECF 29 at 77-78. Whether a defendant physically takes the stand and speaks has no bearing on whether that defendant is competent to do so, and the fact that Miller testified while incompetent only underscores the harm.

Secondly, Respondents fail to address Miller's allegation that Dr. Krop has called his own prior findings into question. As Miller noted in his petition and memorandum, Dr. Krop now agrees that at both the time of his trial and post-conviction evaluations and testimony, (1) he was unaware of the full range of information regarding Miller's hallucinations, religious preoccupation, and delusions, and (2) had he been aware of these facts, he would certainly have had concerns that Miller was incompetent to proceed. ECF 15 at 122. It would be absurd to conclude that Dr. Krop's reconsideration of his prior findings is refuted by those prior findings themselves.

Third, Miller has proffered evidence of incompetency that was not addressed at prior stages of Miller's litigation and cannot be directly refuted by the record. *See, e.g.*, Attachment 1 at 3-7, 14-21 (diagnosing Miller with multiple mental health disorders including schizoaffective disorder and schizotypal personality disorder, and finding he was likely incompetent for much of his legal process). *See also* ECF 15 at 122-23; ECF 24, 58-60. The State

disputes those facts but the record does not conclusively refute them. Thus, an evidentiary hearing is necessary to resolve this dispute.

GROUND VIII: INEFFECTIVE ASSISTANCE OF COUNSEL—COMPETENCY TO STAND TRIAL

Respondents assert that because this claim was not previously raised in state court, it is procedurally barred. However, as Miller explained in his memorandum of law, he can show cause and prejudice under *Martinez* to excuse default. ECF 24 at 56-61.

Respondents dispute Miller's assertion that post-conviction counsel was ineffective for failing to raise this claim in state court, but bases their argument solely on the prejudice analysis. ECF 29 at 80. Thus, the crux of Miller's "cause" argument under *Martinez*—post-conviction counsel performed deficiently by conducting no competency investigation—is unchallenged. See ECF 24 at 57-58.

Respondents incorrectly deny that Miller was prejudiced by post-conviction counsel's failure to raise the claim. The threshold for prejudice in excusing default under *Martinez* is lower than under *Strickland*. *Martinez* does not require Miller to put the cart before the horse by proving his underlying claim in order to overcome default and receive merits consideration. Miller need only show that, based on a totality of the evidence, the claim has *some* merit. *Martinez*, 566 U.S. at 14; *Strickland*, 466 U.S. at 695.

Miller has established that standard by presenting affirmative evidence both of his incompetency and of trial counsel's failure to reasonably investigate his competency despite numerous red flags before and throughout Miller's trial.

Respondents are further incorrect that this claim is solely legal in nature. As the merits of this claim revolve around the issue of ineffective assistance of counsel, this claim is a mixed question of fact and law. *See, e.g.*, *Khan v. United States*, 928 F.3d 1264 (11th Cir. 2019). Miller has presented this Court with specific facts regarding his incompetency. *See, e.g.*, Attachment 1 at 3-7, 14-21 (diagnosing Miller with multiple mental health disorders including schizoaffective disorder and schizotypal personality disorder, and finding he was likely incompetent for much of his legal process). *See also* ECF 15 at 122-23; ECF 24, 58-60. Because the State disputes those facts but the record does not refute them, an evidentiary hearing is necessary to resolve the factual dispute.

GROUND IX: CUMULATIVE ERROR

While cumulative error is a legal claim, it cannot be resolved until all individual claims of error have been assessed and the combined effect of any error determined. *See United States v. Nahani*, 696 F. App'x 457, 472 (11th Cir. 2017). Because Miller has raised multiple claims requiring factual findings, this Court should reserve evaluation of Miller's cumulative error claim until

it has held an evidentiary hearing and fully determined the nature and scope of Miller's other claims.

Respectfully submitted,

/s/ Terri L. Backhus
Terri L. Backhus
Katherine A. Blair
Sean T. Gunn
Office of the Federal
Public Defender
Northern District of Florida
Capital Habeas Unit
Tallahassee, FL 32301
(850) 942-8818
terri_backhus@fd.org

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of 8,000 specified in this Court's April 9, 2019 Order to Show Cause (ECF 25) and with the typeface requirements of Local Rule 1.05(a).

/s/ Terri L. Backhus
Terri L. Backhus

CERTIFICATE OF SERVICE

I hereby certify that this filing was served on all parties through the CM/ECF system in compliance with this Court's electronic filing rules.

/s/ Terri L. Backhus
Terri L. Backhus

Assessment and Psychotherapy Services, Inc.
2155 Main Street • Sarasota, Florida 34237 Tel: (941) 365-2962 Fax (941) 952-9705
Eddy Regnier, M.S.W., M.A., Ph.D.
Licensed Psychologist
PY4639
Wendy Jacobs, J.D., Ph.D., P.A.
Licensed Psychologist
PY6367

Confidential Forensic Psychological Evaluation
(For Professional Use Only)

Federal Public Defender
Capital Habeas Unit
Attn: Katherine Blair, Esq.
227 N. Bronough St., Ste. 4200
Tallahassee, FL 32301

Re: David Miller, Case No. 3:17-CV-932

Sex: Male
Marital Status: Single
DOB: September 6, 1959 (60 years old)
Race and Ethnicity: African-American

Evaluator: Eddy Regnier, MSW, MA, Ph.D.
Dates of Evaluations: September 28, 2018 and September 30, 2019
Date of Report: October 7, 2019

Reason for Referral:
Mr. David Miller was referred for a psychological evaluation in order to determine if he has any mental health problems which may have interfered with his ability to rationally participate in his defense at trial and, following his conviction, to file appeals in his death penalty case. Additionally, his attorney wanted to better understand if there were any mental health conditions impacting Mr. Miller prior to commission of the crime for which he is currently incarcerated that may help to explain his criminal conduct. Finally, Mr. Miller's attorney wanted to know if Mr. Miller met the legal criteria for insanity at the time of the offense pursuant to the provisions of Fla. R. Cr. P. 3.216.

The psychological evaluation was conducted at the Union Correctional Institution in Starke, Florida, where Mr. Miller is being held. Conditions were adequate to secure valid results. Mr. Miller required no special techniques in order to conduct the interview. Findings of this evaluation will be provided only to Attorney Katherine Blair.

Informed Consent and Procedures:
Mr. Miller was notified about the purpose of this evaluation and the associated limits on his confidentiality. Mr. Miller appeared to understand the limits of his confidentiality and gave a written informed consent to participate in the evaluation. Mr. Miller was seen on two separate occasions to complete this evaluation. The first meeting was performed in September 28, 2018 and occurred over a day period.

The second meeting was performed in September 30, 2019 over the course of a morning. During the first meeting Mr. Miller was socially withdrawn, guarded

and slow to participate. During this most recent meeting, he was more socially engaging and smiled frequently but he remained guarded. When probing questions resulted in disclosure of information about his mental functioning, he ended the meeting and asked that the undersigned not return in the afternoon. During the course of preparing this report, the following procedures were used:

Records Reviewed:
Referral for Mental Health Evaluation
Review of Correspondence from Katherine Blair, Esq.
Dorothea Dix Hospital in Fayetteville, North Carolina (1986)
Reynold Mental Health
Forsyth-Stokes Mental Health Center, Winston Salem, North Carolina
Wilkes Correctional Center Records
Veteran Administration Medical Records (1996)
North Carolina Division of Mental health and Substance Abuse Services
Dr. Harry Knop Ph.D. Neuropsychologist, Defense Retained Trial Psychologist
Dr. Charles Golden Ph.D. Defense retained Post Conviction Psychologist (3/20/03)
Johnny Legrand MA, Veteran Administration, Social Worker
Richard Turner MSW, Veteran's Administration Therapist
Dr. Lawrence Holder MD, State Retained Post Conviction Doctor
Dr. Joseph Wu, MD,

Clinical Examination:
Clinical History of David Miller
Psychosocial History of David Miller
Mental Status Examination of David Miller
Behavioral Observation of David Miller

Psychological Tests Administered:
Personality Assessment Inventory (PAI)
Millon Clinical Multiaxial Inventory-IV (MCMI-IV)

Mental Status Examination:
Mr. Miller presented as an age-appropriate 60-year-old African-American male attired in orange prison-issued garb. He was fully alert and oriented to time, person, and place. He was socially engaging, friendly, and tended to avoid making direct eye contact. At times, he seemed hypomanic. He reported a preference for being alone rather than being with other people and commented that he found meeting with me difficult. He said he voluntarily spends extended time periods alone and isolated in his cell. He was initially cooperative with the evaluation and later abruptly ended the evaluation. His speech was goal-directed and easy to understand. Initially, he talked in a soft voice that got louder and more animated over time. His gait and posture were normal. His thinking contained grandiose delusions of communications with God. He had a prominent preoccupation with religious themes. His attention span and concentration were average. He had no difficulty completing serial sevens. He seemed to be of average intelligence, based on his fund of general information and educational achievements. His mood was euthymic and his

affect was a bit elevated. He denied prior diagnosis of a mood disorder. He denied any current history of homicidal or suicidal ideations. He explained in the past he had thought of suicide and had made an attempt. He also admitted that he has twice been convicted of murder. He described having auditory hallucinations in the past, but was evasive about the present. He said when he was very young he frequently heard voices demeaning him stating that he is no good. He denied any history of headaches, confusion, seizures, memory problems, and syncope. His judgment ranged from poor to fair, indicating impairment.

Background Information

History of Prior Criminal Charges:

Mr. Miller said that he has spent most of his adult life in prison and at the age 60, all he knows is incarceration. He admitted to a history of prior arrests and criminal charges. He said he was first sent to prison on February 6, 1986 after he was convicted on a second degree murder charge in North Carolina when he was twenty-six years old. Records from the North Carolina case indicate that the court ordered psychiatric treatment for Mr. Miller in the time leading up to his trial, as he displayed "bizarre" behavior. According to these records, Mr. Miller had inexplicably shot the victim with little provocation and immediately turned himself in to law enforcement with no insight into why he had shot the victim.

Mr. Miller originally received a twenty-five year sentence, but he was released on probation after serving only seven and a half years in prison. He said he was out of prison for approximately four years, and was homeless for most of this time before he was re-arrested for the first degree murder charge for which he is currently incarcerated. He said that he should be punished for what he did and accepts his fate. He said that he made some early mistakes in his case and now it is too late to ask the court to review his case and correct past legal errors.

Relevant Mental Health and Substance Abuse History:

Mr. Miller was arrested in May 1997 on a charge of murder. He was convicted in 1998 in Duval County and sentenced to death. Since July 1998, Mr. Miller has been held on Death Row at Union Correctional Facility. Mr. Miller reports using multiple drugs and drinking earlier on the day of the crime. In fact, he had a substantial polysubstance problem that included abuse of valiums, Quaaludes, cocaine, and alcohol. Mr. Miller reports a "blackout" state immediately prior to committing the murder. He turned himself in to the authorities two and a half months later in Baton Rouge, Louisiana, despite not being a suspect in the case at that time. Mr. Miller turned himself in because he believed members of the victim's family to be following him, and he believed he had been fleeing them throughout the state of Florida all the way to Louisiana.

Mr. Miller said that he jumped onto moving trains in order to flee his perceived persecutors, but eventually became so paranoid that he could not outrun them, because they were part of an elaborate network causing death to following him. Although Mr. Miller had been abusing multiple drugs such as cocaine, and alcohol before and after commission of the murder, no toxicology tests were performed that could have been introduced at trial to mediate his sentence.

Mr. Miller did not self-report a history of psychiatric illness or mental health treatment despite having been asked about his mental health background. However, Mr. Miller's records indicate that he had received treatment at Dorothea Dix Hospital in Raleigh, the Salsbury Veterans' Association Hospital, the Bethesda Center in Winston-Salem, Schulbacher, Forsyth Stokes Mental Health Hospital, North Carolina Division of Mental Health, and Wilkes Correctional Center.

Over the years since his early 20s he has been described in various mental health records as carrying a number of diagnoses that include the following: Depression with suicide; Withdrawn with psychomotor retardation; Adjustment disorder with mixed disturbance of emotions and conduct; Intermittent Explosive disorder; Alcohol use disorder, Cocaine dependence, Cannabis dependence; Personality disorder with mixed avoidant and schizoid; Schizoid personality disorder; Schizophrenia; Paranoia; Passive dependent; poor reality testing; wants to minimize environmental contact; Schizophrenia spectrum disorder and Frontal lobe neuropsychological deficits and Encephalopathy secondary to frontal lobe injury that may have been inflicted when he was a child.

Records reflect that Mr. Miller has engaged in suicidal wrist-cutting behaviors, and was taken for alcohol treatment in his early to mid 20s. In September 9, 1983, he was admitted to the North Carolina Division of Mental Health and Substance Abuse Services after what appeared to be a psychotic episode that took place in his mother's home. Mr. Miller engaged in bizarre behavior including chasing his younger brother with a knife, and then nearly attempting suicide with his mother's .22 caliber gun. During this episode, Mr. Miller's mother pointed a gun at him. He said that he was not afraid as he had been when his father threatened him earlier. He felt sure that his mother would not have shot him, however after this incident he changed his views about his mother and went to live in the woods alone where he felt the most secure.

Mr. Miller admitted to a lengthy history of polysubstance abuse and alcohol dependence, beginning in his teenage years. Mr. Miller said that in the past, he has taken other people's prescription medications to get high and for their calming effects. He took Quaaludes when he could obtain them, but usually, they were financially prohibitive. When Mr. Miller was previously incarcerated, he used to ingest another inmate's Thorazine, a sedating antipsychotic agent. However, he reported that the Thorazine slowed him down too much, so he stopped self-medicating with it. Mr. Miller's prescription drug of choice was Valium, an antianxiety agent that calmed him down. During his first

hospitalization he was treated with Navane (Thiothixene) an antipsychotic medication.

Prior to Mr. Miller's crime and subsequent arrest, he abused alcohol and any sedating agents he could find. He took acid, but ultimately became too fearful of having a "bad trip" and discontinued its use. Mr. Miller has taken speed, but considered it his "opposite" because it exacerbated bad feelings in him. Instead, Mr. Miller routinely sought "downers" with calming and sedating effects. He consistently abused crack cocaine and alcohol in the time period leading up to this crime. There were days that he drank all day, and was under the influence of crack and alcohol on the night of the crime. I believe that during this period of his life Mr. Miller had experienced an acute psychotic break and was attempting to self medicate his symptoms with street drugs and alcohol.

Mr. Miller reports longstanding religious beliefs that impacted his behavior leading up to trial, and throughout his appeals. Unlike culturally appropriate religious beliefs, Mr. Miller's beliefs are bizarre, irrational, and manifestations of a mental illness. His earliest memory of the pervasive beliefs began in the mid-1980s, when he began to believe death was chasing him. Distressed, Mr. Miller isolated himself in his room at the boarding house in which he was staying, and began to pray by repeating psalms. Mr. Miller stated that Psalms 14 and 51 both say the same thing: "The fool sayeth that there is no God, but Jesus is real and our savior." After repeating these words multiple times, he fell asleep in peace. He woke up and no longer believed death to be chasing him, and attributed this lessening of anxiety to God. However, he continued to experience paranoia, and in my clinical opinion experienced a brief psychotic episode.

When Mr. Miller was in jail awaiting trial for the current offense, he reported a voice taking residence in his head. The voice possessed his body, talked to him daily, and he believed it to be the Holy Spirit. The voice told him to read the Bible, and said "I don't think you should defend yourself." Mr. Miller began to believe he was disobeying the voice of God by allowing his attorneys to defend him, which caused him feelings of guilt. His lawyers noted that Mr. Miller "seemed far away" at times. He did not want to die, but felt he needed to concentrate only on God and not his legal defense in order to follow the voice's commands. The voice led Mr. Miller to believe that if God chose to deliver him from harm, it would be done, and he should simply focus on God instead of anything related to the legal process. Mr. Miller said that he was so convinced of his spiritually that he was prepared to "die". This period of hyper-focus on spirituality and disinterest in his legal defense lasted approximately six months, and then Mr. Miller "started slacking off" and began to intermittently participate in his legal process. When asked about the change in behavior, he said the hyper religious arousal he had been experiencing simply dissipated over time and he lost the feeling that God was inside of his body. He said he thought the wicked ways of the world had corrupted him and God left.

For the past twenty-one years, Mr. Miller has continued this pattern of religious preoccupation, adherence to the commands of auditory hallucinations, and consequent disinterest in his legal proceedings. At one point after he was convicted and sentenced to death, Mr. Miller felt so confident about his spirituality that he was "ready to die." He believes there was a predetermination for him to have a bad lawyer at trial so that he would suffer a negative outcome, and that the predetermination was such that "Now even Johnny Cochran could not help me." At other points, when Mr. Miller feels less confident in his spirituality, he becomes similarly preoccupied and distressed. He reports feeling guilty about not serving God well enough in prison or being dedicated enough to God. This pattern manifests as a waxing and waning of participation in the legal process and is based on his mental status and not objective reality. Sometimes, Mr. Miller is a passive observer who tells his lawyers "Just do what you want to do, if you want to defend me, defend me" but will not assist his attorneys. At other times, when religiously preoccupied, Mr. Miller is actively opposed to his lawyers' attempts to defend him as "God is in charge".

In the early to mid-2000s, Mr. Miller was going through something with Jesus Christ and said, "I thought I was guilty and got the punishment I deserved." He believed only God could deliver him from harm, believed his legal defense was unimportant, and at any rate did not understand legal jargon. He did not wish to argue with his attorneys by actively seeking to have them dismissed, but passively refused to participate or self-advocate during the process. He continued to experience auditory hallucinations. He stated that at one point, the voice of God told him to drop his appeals, so he attempted to do so. However, he filed the motion improperly, and sent it to the wrong Court. The State Attorney asked him, "Are you serious about dropping your appeals?" Mr. Miller "gave him no answer and looked at the State Attorney like he was crazy because he should have known that I was serious, as I filed my own motions." The Court did not press Mr. Miller about the issue, and he gave up because he did not understand how to properly file his motion.

Based on Mr. Miller's religious preoccupations, he remains apathetic about exercising his legal rights. He believes "Jesus has my back and it's for real. Jesus will help me with the fear of dealing with this situation." Mr. Miller looks at his impending death only through a religious lens. He states that he has "always been easy with death" but is troubled that the death house at Florida State Prison has no religious services or chapel. Mr. Miller is aware that men on death watch can have a pastor come to visit them, but does not trust the pastor because he believes the man is a prison guard first and Chaplain second. He states that this pastor previously refused to baptize him. Based on Mr. Miller's beliefs in predetermination, he now does not believe baptism to be necessary.

Additionally, Mr. Miller continues to exhibit bizarre behaviors in prison that suggest that he continue to have brief psychotic episodes. He recalled after he learned about his mother's death, he was given a tray of food. He thought that something was wrong with the tray and did not eat. Later he changed his mind and decided to eat when an officer came to collect the tray. He said he was not

himself and refused to give up the tray resulting in his being placed in the disciplinary wing. When discussing this incident again he said that sometimes people ejaculate, and smear feces on the food. He said at the time he thought something like that had happened to his food and then changed his mind.

Family History:

Family history obtained from Mr. Miller reveals that he comes from a severely dysfunctional family characterized by his parents' severe mental health problems, substance abuse issues, and extreme violence towards their children. Both parents beat Mr. Miller and his siblings, causing severe injuries. His father frequently beat them with tree limbs for minor infractions. He believed that his father was capable of killing him on a whim. He said all his siblings were fearful of his father. His father once beat his mother with a crow bar. When his father was sick, he made them beat each other with an electric cord. Sexual assault occurred in the family. As a child, Mr. Miller witnessed the rape of his sisters by a trusted family member, and there are significant indicators that Mr. Miller was himself sexually assaulted by a family member, although he did not disclose that in our interview.

Mr. Miller's history suggests that he experienced multiple catastrophic Adverse Childhood Experiences (ACEs) that have a high correlation with the development of psychiatric illness. As a child Mr. Miller was the victim of physical beatings, his parents threatened him with guns, and forced him to beat his siblings with electric cords. He also was forced to watch his father beat his mother with a crowbar, and watched his sibling being beaten. He was exposed to their drunkenness that frequently resulted in violence against each other and the children. According to the ACE study children exposed to such severe trauma frequently develop psychiatric illnesses such as major depression, bipolar disorder, atypical psychosis and other mental heath problems.

Since Mr. Miller's childhood, multiple family members have been diagnosed with schizophrenia, including one of Mr. Miller's sisters, Valnice, who has since committed suicide. Valnice lived under delusions that people were out to kill her, and prior to her death lost custody of her son due to her symptoms. Mr. Miller's great-uncle was diagnosed with schizophrenia, and spent over two decades in the Cherry Hospital for the Criminally Insane in Goldsboro, NC after killing his three children, believing Jesus had commanded him to hide the children from Satan by drowning them in a well. Cherry Hospital was the only psychiatric hospital that accepted African American at that time. Additionally, Mr. Miller has two cousins on death row in other states. One, cousin in South Carolina, has been found incompetent to waive his appeals as a result of schizophrenia, (case number 367.S.C.389).

Mr. Miller was born to David and Yvonne Scales, and has two living siblings. Mr. Miller also had two siblings who died at birth, and an elder sister (Valnice) who took her own life. Mr. Miller's parents are both deceased. Prior to their deaths, they divorced, and Yvonne married another man who was also an alcoholic. Although Mr. Miller has come to believe that his parents loved him,

they never expressed love or affection to him. Only Willie Mae Down-Scales, a member of Mr. Miller's extended family, told him "I love you".

Mr. Miller described living with his father as extremely difficult. He stated that his father was a madman who was not afraid of anything. Reports indicate that Mr. Miller's father was pathologically religious, portrayed himself as a preacher and Biblical authority. All of the children feared their father. Mr. Miller believed his father to be capable of killing him, and lived in fear that one day it would occur. He described several incidents of abuse. One example was when their father told the children to carry a jug of water to the tobacco field where the family worked. The children carried it part of the way, then their grandfather assisted them in carrying it the rest of the way. When they arrived at the tobacco field, their father was enraged that the children had not carried the jug the full distance. He grabbed a tree limb and beat Mr. Miller, his siblings, and his paternal cousin, Cedric Crawford. As was usually the case with his father's beatings, Mr. Miller and his sister Valnice were beaten more severely than the other children.

Mr. Miller recalled that his father always beat the children "butt naked". If the children ran away, did not hold still, or refused to strip naked for the beatings, his father would beat them more savagely. When Mr. Miller was eleven years old, he witnessed the rape of his two sisters by older paternal cousins. Mr. Miller reported the rape to his father, and was beaten for reporting it.

Mr. Miller was beaten by his father at least once per week, for approximately ten minutes at a time. The beatings began so early in Mr. Miller's childhood that he grew up having no idea that such behavior from a parent toward a child was odd. His father favored tree branches and electrical cords for beatings, and Mr. Miller's mother did not intervene because if she attempted to protect her children, she would be beaten as well.

Mr. Miller's parents routinely engaged in violent acts against one another, including threatening one another with firearms. Mr. Miller recounted one instance in which Mr. Miller's mother expressed a desire to go to work, but his father would not let her leave the home. Mr. Miller's mother pulled a pistol on her husband, who ran and retrieved a shot gun to threaten his wife. Mr. Miller also recounted incidents in which his father beat his mother in the head with a crowbar, beat her with an iron poker, and numerous times with his closed fists. Reports from Mr. Miller's extended family indicate that Yvonne's two stillbirths may have been the result of beatings by her husband. When Mr. Miller recounted these episodes of familial violence, he displayed little to no affect or emotion. However, he also seemed preoccupied with these two stillbirth sibling and attempted to reconstruct why they died.

As mentioned above, Mr. Miller and his elder sister, Valnice, received the brunt of their father's violence. Valnice sometimes attempted to run away from the beatings. When she did, Mr. Miller's father would find Valnice, tie her down while naked, and beat her with a vengeance. Mr. Miller believes that the worst beatings were reserved for acts of defiance, and his father considered running

away from a beating to be an act of defiance. Mr. Miller felt very sorry for his sister, because she was seriously injured by the beatings. But Mr. Miller fared no better with their father, and sometimes was beaten to the point that he believed he would die from his injuries.

Mr. Miller was not only beaten by his father, but by other members of the family. One such beating was prompted when Mr. Miller was fourteen years old and forgot his paycheck at work. His mother forced his grandfather to beat him for his forgetfulness. Mr. Miller was particularly humiliated by this beating, and took the act to mean that his mother did not love him any longer. At another time he forgot his paycheck at work, his mother told him, "I am going to the shed to get an ax to kill you". This was the first time Mr. Miller ran away from being punished. He hid in the woods by himself for hours. Eventually, his mother sent someone to get him. When he returned home, she did not get an ax or beat him. Yet, at another time, his mother beat him on the scrotum with a belt buckle. The beatings themselves, coupled with the uncertainty over when he would be beaten and why, kept him in a constant state of distrust, fear, and wariness. Yet, Mr. Miller will not admit to being traumatized and refuses to characterize the beatings as abuse. He will only say that his feelings were hurt by the beatings because they did not represent being told "I love you". Mr. Miller's mother became increasingly abusive after her divorce from Mr. Miller's father, and coupled physical abuse with statements such as "You'll never amount to much" and "I'll send you off to a home". She forced her new husband to beat Mr. Miller.

Mr. Miller describes himself as a loner, who as a child often went into the woods so that he could be alone and away from people. He frequently played by himself, or would sit in his room and not talk to anyone for weeks at a time. Mr. Miller is more comfortable alone than with others, and has historically gone to great lengths to avoid groups of people. He avoids many routine aspects of community life; for example, he never celebrated his own birthday and does not know the birthdays of even those who are closest to him. He has never been married, has no children, and expressed that he has no desire to have a relationship with anyone or to be romantically involved. Mr. Miller stated that he simply wants to be left alone to live a solitary life. It should be noted that these signs of severe mental disorder would have gone unnoticed in this family where parent's mental illnesses, substance abuse and extreme violence were a normal part of life.

One of the few individuals Mr. Miller remains in contact with is his cousin Cedric, who is an ordained minister. Mr. Miller exchanges letters with Cedric, but does not like to do so, stating that he believes his cousin is too busy to have to read Mr. Miller's letters or write back. Prior to Cedric, Mr. Miller kept in some contact with another cousin, Boyd Howell, who killed himself while Mr. Miller was incarcerated in North Carolina.

Educational and Employment History:

Mr. Miller reports childhood attendance at multiple schools. He attended Carver Elementary School, and "failed the first grade and was expelled. After

bussing began, Mr. Miller attended Old Town School, but was spanked and expelled after pulling a prank that several other students also pulled but were not punished for. The prank involved pulling a chair out from under another student as they sat. Mr. Miller was so used to being physically assaulted and humiliated at home, physical discipline at school seemed "funny" in comparison. Next, Mr. Miller attended Skyland Elementary School, an all-black school with a poor reputation that has since closed. It appears that Mr. Miller returned to Old Town School for one year after Skyland.

After Mr. Miller's parents separated, he was moved to a fourth elementary school, Old Town, a predominantly white school. Later, he attended Northwest Junior High School for middle school. Mr. Miller self-reports that he did well academically at Northwest Junior High, likely a result of increasing maturation and better treatment by staff. He attended Mount Tarver for ninth and tenth grade, and recalled that it was easier here than in elementary school to make acceptable grades if he wanted to; however, Mr. Miller states that he was not motivated to make grades. He attended North Forsyth High School for eleventh and twelfth grades, and did just enough to get by because he had learned not to have expectations and remain under the radar.

Following high school, Mr. Miller enlisted in the U.S. Navy in order to get away from his home and was accepted due to lowered standards for McNamara's 100,000rogram. Mr. Miller was assigned the duties of a Signal-Man. He reports that his duties included visual communication, Morse Code, and light signal to communicate to other ships. Mr. Miller served for three years in the Navy, but was discharged for inability to adapt to military life. Mr. Miller was unable to articulate why he was discharged from the Navy. At the time, the US Navy had implemented Project Upgrade as a mechanism for discharging marginal performers from the Navy and to improve morale. Mr. Miller due to his undiagnosed mental illness would have likely been a high priority target for this program.

Mr. Miller struggled to find and maintain employment after his military discharge. The only positions he could obtain were those of manual labor, such as washing dishes, basic roofing, or putting rebar into concrete. He could not support himself financially through these positions, and was forced to return to live with his mother. Eventually, due to persecutorial delusions, Mr. Miller fled from North Carolina to Jacksonville, where he was transient and often lived on the streets or under the bridges. Throughout this time, Mr. Miller abstained from asking his family for money, because he believed God would provide if it was God's Will.

Medical History:

Dr. Knop, neuropsychologist diagnosed Mr. Miller with brain injury, Cognitive disorder, NOS. Dr. Lawrence Holder reviewed a PET brain scan sent to him in October 10, 2002, and concluded the images were normal PET brain scans. However Dr. Joseph Wu, MD ordered MRI/CAT Scans that revealed the presence of Encephalopathy. Encephalopathy is defined as disease or trauma that causes impairment in brain functions. Generally symptoms are varied and

depend on the cause and severity. Common symptoms may include the following: Difficulty in thinking and concentrating; Impulsive behavior; Depression or apathy; Short-term memory loss; Difficulty planning and carrying out tasks; Emotional instability; Suicidal thoughts or behavior and mental impairment. It should be noted that these symptoms have been variously described in his medical records.

Psychological Test Results

Millon Clinical Multiaxial Inventory-IV (MCMI-IV):

The Millon Clinical Multiaxial Inventory-IV (MCMI-IV) is a psychological assessment tool intended to provide information on psychopathology, including specific psychiatric disorders outlined in the DSM-IV. It is intended for adults (18 and over) with at least an 8th grade reading level that are currently seeking mental health services.

The Millon Clinical Multiaxial Inventory-IV (MCMI-IV) was administered and a report was generated with electronic means through PsychCorp. MCMI-IV reports are not normed on patients, such as Mr. Miller, who are in the early phases of assessment or psychotherapy for emotional discomfort or social difficulties. Respondents who do not fit this normative population or who have inappropriately taken the MCMI-IV for nonclinical purposes may have inaccurate reports. This is particularly so for individuals within the criminal justice system. The MCMI-IV report therefore cannot be considered definitive for diagnostic purposes. Rather, it is a helpful tool to be evaluated in conjunction with additional clinical data.

A distinct tendency toward avoiding self-disclosure is evident in Mr. Miller's response style. This nondisclosure may signify characterological evasiveness or an unwillingness to divulge matters of a personal nature, problematic or not. Also possible are broad deficits in introspectiveness and psychological mindedness, owing to emotional impoverishment or thought vagueness. Adjustments made to compensate for these response tendencies are likely to produce a valid profile, but some scores may have slipped beneath effective discriminatory range. On the basis of the test data (assuming denial is not present) it is reasonable to assume that Mr. Miller is exhibiting psychological dysfunction. Notably, Mr. Miller is likely to be underreporting the level of his dysfunction, which means his symptoms may be worse than reported.

Most characteristic of Mr. Miller's MCMI-IV profile are a self-protective aloofness, a depressive irritability, and a negativistic way of relating to others. He is behaviorally introversive and shy, but also edgy and pessimistic. He may relate to others in a colorless, constrained, and grim way that is heightened by a lack of social initiative and activity-oriented behavior. Most typically, he may display a generally flat and impoverished affect, although he may also be sulky and ill-tempered. He may experience ambivalent thoughts, especially concerning interpersonal matters. Easy fatigability and a general control over motoric expressiveness and spontaneity may also be evident.

Submerged beneath this introversive style may be anger and discontent that periodically surface openly into oppositional behavior. On rare occasions, he may be prone to abrupt, but fleeting, expressions of anger or even rage. Although he may prefer a peripheral role in social and family relationships, he has a strong, albeit conflictual, need to depend on others. His ambivalence may stem in part from a well-cloaked, if not denied, low sense of self-esteem as well as a long-term unwillingness to function in a socially responsible or competent manner. Accordingly, he will at times be self-belittling and may assume the self-image of a weak and ineffectual person. His occasional inefficiency is partly due to his restrained tempo and partly to his resentfulness toward others for what he sees as their unreasonable expectations of him.

Daily life for Mr. Miller is likely to be uneventful, with long periods of passivity and solitude often being punctuated with feelings of irritability and meaninglessness. Although he appears indifferent to his social surroundings, avoiding introspection, and generally disengaged from the subtleties of emotional life, much of this coexists with stronger, cloaked feelings. His thought processes will tend to be unfocused, especially in relation to the more intimate aspects of social and personal relations but, as noted, this may overlie deeper but guarded negative emotions. As a result, his social communications are often strained, cranky, and self-conscious. Quite possibly, his hesitation to express warmer and more positive affect may stem from some intrinsic inability to experience pleasure. This finding supports Mr. Miller's disclosure to the undersigned regarding his preference to be alone and to avoid social interactions.

Mr. Miller has a propensity to feel depressed, morose, and erratically moody and complaining. Beneath his apathetic exterior are intense feelings of discontent and anger that may periodically be displayed in passive-aggressive, petulant, and fault-finding behavior. On the other hand, he is self-deprecating, self-punitive, and disposed to constant but quiet worrying and perhaps isolated drinking.

It is likely that Mr. Miller has learned to prefer a simple, repetitive, and dependent life patter in which he can avoid self-assertion, abdicate autonomous responsibilities, and ignore normal social relationships and conventional aspirations. Disengaged from and uninterested in most rewards of an active social life, he may alternately appear apathetic and asocial, or touchy and argumentative. By significantly restricting his social and emotional involvements, he may have unintentionally perpetuated his life pattern of cheerless and fractious isolation.

By examining the elevated Grossman Facet Scale scores for the Clinical Personality Patterns and Severe Personality Pathology scales, it is possible to identify a patient's most troublesome or clinically-significant functional and structural domains (e.g., self-image, interpersonal conduct). A careful analysis of Mr. Miller's facet scale scores suggests the following characteristics are among his most prominent personality features. Most notable are his failures to constrain or postpone the expression of offensive thoughts or malevolent

actions, deficits in guilty feelings due to lack of emotional awareness, and a consequent disinclination to refashion his repugnant impulses in sublimated form. The features and dynamics of the following clinical syndromes appear worthy of description and analysis. They may arise in response to external precipitants but are likely to reflect and accentuate several of the more enduring and pervasive aspects of this man's basic personality makeup.

Mr. Miller's MCMI-IV responses suggest that he either has abused or is currently abusing prescription medications, illicit drugs, or both. Irritable, negative, and hostile, he may use drugs not only to help him unwind his tensions and undo his conflicts, but also to serve as a statement of resentful independence from the constraints of social convention and expectation. In addition to liberating his feelings of ambivalence toward himself and others, drugs remove whatever remnants of guilt he may experience over discharging his less charitable impulses and fantasies. Defiant and resentful acts of hostility such as these may often have self-destructive undertones, which may be evident during periods of heavy use when he exhibits a careless indifference to the consequences of his behavior.

Personality Assessment Inventory (PAI):

Personality Assessment Inventory (PAI), created by Leslie Morey (1991, 2007), PhD, is a self-report 344-item personality test that evaluates a respondent's personality and psychopathology. Each item is a statement about the respondent that he/she rates with a 4-point scale (1-"Not true at all, False," 2-"Slightly true," 3-"Mainly true," and 4-"Very true"). The PAI covers constructs most relevant to a broad-based assessment of mental disorders.

The Personality Assessment Inventory (PAI) was administered, hand scored, and a narrative report was generated by electronic means through Psychological Assessment Resources, Inc. (PAR). For purposes of accuracy, the PAI provides a number of validity indices that are designed to give an assessment of factors that could distort the results of testing. Such factors could include failure to complete test items properly, carelessness, reading difficulties, confusion, exaggeration, malingering, or defensiveness. For this protocol, the number of uncompleted items is within acceptable limits.

Also evaluated is the extent to which Mr. Miller attended appropriately and responded consistently to the content of test items. The respondent's scores on these scales suggest that he did attend to item content in responding to PAI items; however, there appear to be some inconsistent responses to similar items, and this inconsistency could affect test results. Thus, the interpretive hypotheses that follow in this report should be reviewed cautiously.

The degree to which response styles may have affected or distorted the report of symptomatology on the inventory is also assessed. Certain of these indicators fall outside of the normal range, suggesting that Mr. Miller may not have answered in a completely forthright manner; the nature of his responses might lead the evaluator to form a somewhat inaccurate impression of him based upon the style of responding described below. This underscores the importance

of multiple evaluations over time to generate an accurate picture of Mr. Miller's functioning, as well as to make any appropriate diagnoses.

With respect to positive impression management, Mr. Miller's pattern of responses suggests that he tends to portray himself as being relatively free of common shortcomings to which most individuals will admit, and appears reluctant to recognize minor faults in himself.[1] Given this apparent tendency to repress undesirable characteristics, the interpretive hypotheses in this report should be reviewed with caution. Although there is no evidence to suggest an effort to intentionally distort the profile, the results may underrepresent the extent and degree of any significant findings in certain areas due to his tendency to avoid negative or unpleasant aspects of himself. Put plainly, Mr. Miller may well be functioning at a lower level than this evaluation reveals.

Despite the level of defensiveness noted above, there are some areas where Mr. Miller described problems of greater intensity than is typical of defensive respondents. These areas could indicate problems that merit further inquiry. These areas include: drug abuse or dependence; poor interpersonal rapport; alcohol abuse and dependence; unsupportive family or friends; history of antisocial behavior (not the same as antisocial personality); poor control over anger; unhappiness; and feelings of helplessness. With respect to negative impression management, there is no evidence to suggest that Mr. Miller was motivated to portray himself in a more negative or pathological light than the clinical picture would warrant.

The PAI clinical profile is also marked by a significant elevation on the DRG scale, indicating that the content tapped by this scale may reflect a particular area or difficulty for Mr. Miller. He indicates that his use of drugs has been sufficient to have had negative consequences on his life. Problems associated with drug use appear to be noteworthy, including strained interpersonal relationships, vocational and/or legal problems, and possible medical complications. Mr. Miller reports that alcohol use has caused occasional problems in his life. These problems may involve difficulties in interpersonal relationships, problems on the job, and/or the use of alcohol to reduce stress.

Diagnosis: ICD-10

History of Major Depression, recurrent, Severe
Schizotypal Personality Disorder
R/O Schizoaffective Disorder, Bipolar Type
Polysubstance Dependence, in remission secondary to incarceration
Alcohol Dependence, in remission due to incarceration

---

[1] This could be due to any number of causes, including but not limited to ongoing trauma from Mr. Miller's history of childhood abuse, as he was savagely beaten and degraded by adult caretakers when he exhibited what those adults perceived as flaws. This again underscores the need for continued evaluation over time, so that this clinician may develop a rapport and trust with Mr. Miller and reach the most accurate conclusion regarding his condition.

Post Traumatic Stress Disorder
Victim of physical and emotional abuse as a child

Summary:

Mr. David Miller was referred for a psychological evaluation in order to determine if he suffered from mental health problems that likely interfered with his ability to participate with filing and pursuing appeals of his death sentence. The undersigned was also asked to determine if Mr. Miller suffered from a mental health condition that would constitute a psychotic state at the time of the crime.

Mr. Miller was arrested in May 1997 on a charge of murder, and later convicted. He had previously been convicted on a charge of murder, which appears to have taken place during a psychotic episode as he described to the undersigned and supported by mental health records. Mr. Miller was convicted of the 1997 offense in 1998 and later sentenced to death. Since July 1998, he has been held on Death Row awaiting his execution.

Since Mr. Miller's conviction and sentencing, he has failed to participate in his statutory appeals process. He indicated that he believed then and still believe now that God will deliver him in his own time and he did not need to worry about the appeals process. His explanation for his failure to file or assist with his appeals is that he was hearing voices from God (psychotic process) that offered him protection. He also describes being socially isolated, preferring to be alone than with others. At certain points, he avoided discussions about his appeals with his attorneys believing that God would protect him from harm and that any participation in the legal process would signal a distrust of God's plan and result in incurring God's disfavor. At other times, because of his preoccupation with religious themes, he believed that he deserved punishment. At the time of my first interview with Mr. Miller, because of his continued religious preoccupation and hearing voices from God, he expressed ambivalence about pursuing appeals and a stay of execution.

Mr. Miller appears to have a genetic predisposition to mental illness, which was exacerbated by a dysfunctional family environment. Seymour Kety et al, Adopted Away Studies (1968 1975 and 1994) showed that Schizophrenia is genetically linked. However, environment can mediate severity of outcome. Mr. Miller was exposed to his parents' poor mental health, his father's drinking, and their extreme violence towards him. Very good research shows that chronic exposure to Adverse Childhood Experiences (ACEs) frequently results in victims' later developing mental health problems and substance abuse issues that hinder their ability to cope with life. Such individuals, in the absence of effective treatment, frequently turn to alcohol and drugs to cope. The Adverse Childhood Experiences (ACEs) study was conducted by the U.S. health maintenance organization Kaiser Permanente (KP) and the Centers for Disease Control (CDC). The study showed that there was strong association between abuse of children and health and social problems across the lifespan.

Mr. Miller described a life of catastrophic abuse followed by mental health problems manifested by social isolation, grandiose delusions of being in communications with God, and auditory hallucinations involving being directed by God. On the day of the murder that led to his conviction, he was in a fugue state that he described as a "blackout" and is consistent with psychosis. He spontaneously turned himself in to the authorities two months later in Baton Rouge, Louisiana. At the time of the crime and the following months prior to his arrest, Mr. Miller was abusing multiple drugs such as cocaine, and alcohol continuously, but no toxicology tests were performed that could have been used at trial to mediate his sentence.

Psychological tests administered to Mr. Miller were valid but showed a tendency to underreport psychiatric symptoms, also known as "faking good". Thus, his symptoms are likely worse than reflected in this report. Despite Mr. Miller's tendency to downplay his mental impairments, his MCMI-IV and PAI were consistent with his social history, showing signs of social isolations, mood disorders, poor social support, anxiety, poor anger management, alcohol and substance abuse. As a result of observations, clinical and social history, and testing, Mr. Miller appears to fit the following clinical diagnoses that would support severe mental health problems.

Schizotypal Personality Disorder 301.22(F21)

- Diagnostic Criteria:

A. A pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationships as well as by cognitive or perceptual distortions and eccentricities of behavior, beginning by early adulthood and present in a variety of contexts, as indicated by five or more of the following:

1. Ideas of reference is generally defined as a false belief that random events in the world relates to a person personal experience. (Excluding delusions of reference).

2. Odd beliefs or magical thinking that influences behavior and is inconsistent with subcultural norms (e.g., superstitiousness, belief in clairvoyance, telepathy, or "sixth sense"; in children and adolescents, bizarre fantasies or preoccupations).

3. Unusual perceptual experiences, including bodily illusions.

4. Odd thinking and speech (e.g., vague, circumstantial, metaphorical, overelaborate, or stereotyped).

5. Suspiciousness or paranoid ideation.

6. Inappropriate or constricted affect.

7. Behavior or appearance that is odd, eccentric, or peculiar.

8. Lack of close friends or confidants other than first degree relatives.

9. Excessive social anxiety that does not diminish with familiarity and tends to be associated with paranoid fears rather than negative judgments about self.

B. Does not occur exclusively during the course of schizophrenia, a bipolar disorder or depressive disorder with psychotic features, another psychotic disorder or autism spectrum disorder.

- Diagnostic Features:

The essential feature of schizotypal personality disorder is a pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationships as well as by cognitive or perceptual distortions and eccentricities of behavior. This pattern begins by early childhood and is present in a variety of contexts.

- Additional Information:

Schizotypal personality disorder may coexist with schizophrenia and/or schizoaffective disorder a comorbid diagnosis of schizotypal personality disorder is appropriate when the behavioral criteria do not exclusively occur during the symptomatic periods of schizophrenia or schizoaffective disorder. Schizotypal personality disorder may manifest earlier than schizophrenia or schizoaffective disorder. Children with schizotypal personality disorder will typically appear solitary, odd and eccentric; have poor peer relationships, social anxiety, hypersensitivity, peculiar thoughts and language, and bizarre fantasies; underachieve in school; and attract teasing. Schizotypal personality disorder is easily misdiagnosed and requires a culturally competent evaluation to differentiate bizarre beliefs from uncommon but culturally appropriate beliefs.

Schizoaffective Disorder, Depressive 295.70(F25.1)

- Diagnostic Criteria:

A. An uninterrupted period of illness during which there is a major mood episode (major depressive or manic) concurrent with Criterion A of schizophrenia.[2] Note: The major depressive episode must include Criterion A1 (depressed mood).

---

[2] Two or more of the following, each present for a significant portion of time during a 1-month period. At least one of these must be (1), (2), or (3):

1. Delusions
2. Hallucinations
3. Disorganized speech (e.g., frequent derailment or incoherence)
4. Grossly disorganized or catatonic behavior

B. Delusions or hallucinations for two or more weeks in the absence of a major mood episode (depressive or manic) during the lifetime duration of the illness.

C. Symptoms that meet criteria for a major mood episode are present for the majority of the total duration of the active and residual portions of the illness.

D. The disturbance is not attributable to the effects of a substance (e.g., a drug of abuse or medication) or another medical condition.

- Diagnostic Features:

  The diagnosis of schizoaffective disorder involves features of schizophrenia and a mood disorder (in Mr. Miller's case, depression and hypomania). For a diagnosis of schizoaffective disorder, Criterion A for schizophrenia must be met. Criterions B[3] and F[4] may be met. In addition to meeting Criterion A for schizophrenia, there is a major mood episode. Because loss of interest or pleasure is common in schizophrenia, for a diagnosis of schizoaffective disorder, depressive type, the major depressive episode must include pervasive depressed mood not simply diminished interest or pleasure. If the mood symptoms are present for only a relatively brief period, the diagnosis is schizophrenia, not schizoaffective disorder.

  To separate schizoaffective disorder from a depressive disorder with psychotic features, delusions or hallucinations must be present for at least two weeks in the absence of the depressive episode. The symptoms must not be attributable to the effects of a substance or other medical condition.

- Additional Information:

  Schizoaffective disorder is approximately one-third as common as schizophrenia, and is defined by many of the same features, including

---

5. Negative symptoms (i.e., diminished emotional expression or avolition)

[3] For a significant portion of the time since the onset of the disturbance, level of functioning in one or more major areas, such as work, interpersonal relations, or self-care, is markedly below the level achieved prior to the onset (or when the onset is in childhood or adolescence, there is failure to achieve expected level of interpersonal, academic, or occupational functioning).

[4] If there is a history of autism spectrum disorder or a communication disorder of childhood onset, the additional diagnosis of schizophrenia is only made if prominent delusions or hallucinations, in addition to the other required symptoms of schizophrenia, are also present for at least 1 month.

hallucinations, delusions, impairments to occupational and social functioning, and anosognosia (poor insight). There is a high co-morbidity with substance abuse. Like schizophrenia, schizoaffective disorder has a high genetic correlation. The risk is increased among individuals who have a first-degree relative with schizophrenia, bipolar disorder, or schizoaffective disorder.

Onset may occur as early as adolescence, but typically occurs in young adulthood. The expression of psychotic symptoms varies across the lifespan of the illness, and diagnosis of schizoaffective disorder versus schizophrenia is based on the proportion of mood symptoms present with psychotic illness. Thus, a diagnosis of schizoaffective disorder may change to schizophrenia if an individual begins displaying fewer depressive symptoms in conjunction with psychotic symptoms (and vice versa).

Schizoaffective disorder is easily misdiagnosed, particularly when the patient and clinician do not share the same cultural and economic background.

Application of Criteria to Mr. Miller:

Posttraumatic Stress Disorder 309.81(F43.10)

- Abbreviated[5] Diagnostic Criteria:

A. Exposure to actual or threatened death, serious injury, or sexual violence.

B. Presence of one or more intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred.

C. Persistent avoidance of stimuli associated with the traumatic event(s), beginning after the traumatic event(s) occurred.

D. Negative alterations in cognitions and mood associated with the traumatic event(s), beginning or worsening after the traumatic events occurred.

E. Marked alterations in arousal and reactivity associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred.

F. Duration of the disturbance (criteria B, C, D, E) is more than one month.

[5] For brevity, subindicators of this diagnosis have been omitted; however, the undersigned noted in Mr. Miller's history the presence of all requisite diagnostic criteria.

G. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

H. The disturbance is not attributable to the physiological effects of a substance or other medical condition.

- Diagnostic Features:

  The essential feature of posttraumatic stress disorder (PTSD) is the development of characteristic symptoms following exposure to one or more traumatic events. The clinical presentation varies. In some individuals, fear-based symptoms predominate; in others, anhedonia or dysphoric mood states predominate; in others, excessive reactivity and seemingly unprovoked aggression may appear. These symptoms must not be attributable to another psychiatric diagnosis (i.e. anhedonia must be over and above what would be expected from Mr. Miller's co-morbid schizoaffective disorder or schizotypal personality disorder).

- Additional Information:

  The onset and severity of PTSD is impacted by risk factors and protective factors. These can be divided into three categories: pre-traumatic, peri-traumatic, and posttraumatic. Individuals with comorbid psychological conditions, lower socioeconomic status, who belong to a cultural minority group, and who are exposed to multiple traumas are especially at risk. Children whose trauma is perpetrated by a caregiver are also particularly at risk.

Legal Implications:

Pursuant to the provisions of Fla. R. Cr. P. 3.216, the psychological evaluation of Mr. Miller did produce data that indicates the presence of severe mental health problems that has affected his life ever since he was in his late teens. Mr. Miller reports at least two psychotic episodes that lasted for a period of six or more months during which time he experienced altered mental status. Through much of his legal proceedings he seemed to harbor under a delusion/psychosis that God would protect him. He appeared to suffer from schizoaffective disorder that at times due to his psychotic symptoms affected his decision making. As a result of observations and evaluation results the following conclusions were made to a reasonable degree of professional certainty:

1. Mr. Miller appears to have been experiencing a longstanding period of altered mental status characterized by religious preoccupations, social isolation and auditory hallucinations that has impacted his capacity to understand the consequences of his actions in not assisting counsel with pursuing his legal defense at trial and throughout the appellate process. The waxing and waning nature of Mr. Miller's mental illness created a rare and devastating situation in which it was difficult to determine if he was being passive or being uncooperative. I.e. At first he declined the

plea offer of 25-years, then apologizes and accepts the offer and then does not participate with his defense.

2. Mr. Miller appears to suffer from mental health problems. Throughout his trial and appeals process, Mr. Miller has been by reason of mental infirmity, disease or defects unable act reasonably with his defense. When Mr. Miller refused or failed to participate in his legal defense, he was likely responding to delusional ideas of religious beliefs, and was in a psychotic state that prevented him from making rational decisions with regard to his legal defense.

3. At the time of the crime for which Mr. Miller is on death row, Mr. Miller may have been unable to understand the full consequences of his behavior as a result of mental infirmity, disease, or defect. More evaluation will be necessary to explore this likelihood.

Recommendations:

Given findings from this report, it is recommended that Mr. Miller should be afforded an opportunity to pursue his appeals, as his failure in the past to attend to participate in the process appears to be the result of severe mental health problems as outlined in the report.

Thank you for this referral, and please do not hesitate to call should you have any further questions.



Eddy Regnier, MSW, MA, Ph.D.,
Licensed Psychologist
Florida License No.: PY4639

APPENDIX A-14

April 16, 2021, District Court Order Substituting CHU-N with CHU-M, Ordering Limited Evidentiary Hearing

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR,

Petitioner,

vs. Case No. 3:17-cv-932-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

I. CONFLICT

Through counsel (Capital Habeas Unit-North), Petitioner David Miller, Jr., a death row inmate, filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Petition) (Doc. 15). [1] This Court previously denied Respondents' Motion for Substitution of Capital Habeas Unit-North (CHU-N) With Capital Habeas Unit-Middle (CHU-M), noting that Petitioner may motion the Court for substitution of counsel. See Orders (Docs. 20 & 23).

[1] In this Order, the Court references the page number assigned by the electronic filing system.

Respondents, in their Response Brief to Petition for Writ of Habeas Corpus (Response) (Doc. 29), assert there is a conflict of interest as Petitioner seeks equitable tolling for the time in which CHU-N represented him in state court.[2] Response at 14-17. Respondents argue, "this Court must acknowledge that CHU-North has a conflict of interest in representing Petitioner to argue equitable tolling for their own conduct." Id. at 16. As such, Respondents ask this Court to appoint conflict-free counsel to represent Petitioner. Id. at 14.

In Petitioner's Reply in Support of 28 U.S.C. § 2254 Petition (Reply) (Doc. 33), CHU-N states it recognizes that Petitioner's own interests favor appointment of supplemental counsel at this time. Reply at 5. Petitioner agrees that the Court should appoint CHU-M to argue any counsel-based equitable tolling issues in this case. Id. At this stage of the proceedings, now that a response has been filed arguing Petitioner is not entitled to tolling, CHU-N does not object to the limited appointment of supplemental counsel to pursue some equitable tolling arguments. Id. at 13. As demonstrated by the record, Ex. 38, CHU-N assisted state court counsel with Petitioner's litigation in state court prior to CHU-N's appointment on August 24, 2017 as federal counsel (Doc. 3).

[2] The Court refers to the exhibits in the Appendix (Doc. 32) as "Ex."

Petitioner agrees with Respondents that CHU-M is appropriate conflict-free counsel. However, Petitioner suggests that CHU-M be appointed "as limited equitable tolling counsel[.]" Id. at 14. Of import, CHU-N conferred with CHU-M and noted CHU-M's consent to the limited appointment. Id. If CHU-M is appointed, Petitioner asks this Court to permit CHU-M time to investigate and file a memorandum of law addressing equitable tolling issues. Id.

Upon review, in their Response, Respondents ask this Court to dismiss the Petition as untimely. Response at 10. Thus, Respondents argue CHU-N must be substituted with conflict-free counsel because CHU-N assisted with the representation of Petitioner during a post-conviction proceeding that took place long after the one-year federal limitation period expired.[3] Respondents contend that CHU-N's conduct in filing this action outside of the federal habeas statute of limitations is an issue in this case; therefore, substitution of conflict-free counsel is necessary. Id. at 11-12, 14.

Petitioner contends that the CHU's do not agree with Respondents' suggestion that CHU-M be fully substituted as counsel. Reply at 14 n.4.

[3] Based on the record, CHU-N appeared as consulting counsel in a successive petition for writ of habeas corpus filed on June 28, 2017. Ex. 38. The Supreme Court of Florida denied the petition on January 31, 2018. Ex. 45. On October 1, 2018, the Supreme Court of the United States denied a petition for writ of certiorari. Ex. 49.

Although Petitioner avers there is no reason for CHU-N to be entirely replaced in this case based on Respondents' assertion of a conflict regarding equitable tolling issues,[4] the Court is not convinced. In this instance, CHU-N has acknowledged that there is a conflict sufficient that different counsel is required to address equitable tolling. As the Petition is untimely filed, as acknowledged by the parties, the issue of equitable tolling of the federal limitation period will be of utmost significance and is raised in the Reply.

The Court concludes that CHU-N's representation of Petitioner in this action poses a conflict of interest warranting substitution. CHU-N must be substituted with conflict-free counsel because CHU-N represented Petitioner during some portion of his state post-conviction proceedings, and CHU-N's conduct in filing this action is an issue in this case as Petitioner has raised an equitable tolling argument. At this juncture, the Court finds good cause to appoint the Capital Habeas Unit for the Federal Public Defender's Office for the Middle District of Florida (CHU-M) as counsel to represent Petitioner in this action. Christeson v. Roper, 574 U.S. 373, 379 (2015) (per curiam) (when

[4] Petitioner asserts the appointment of a different CHU as limited equitable tolling counsel has been permitted in other capital habeas cases, referencing Brown v. Jones, No. 3:16-cv-00099-RH, Docs. 8 & 10 (N.D. Fla. 2016). Reply at 14. The circumstances are quite different in Brown; the petitioner moved for appointment of co-counsel and the respondent filed no opposition to the motion (Brown, Doc. 8).

counsel is conflicted, a district court is compelled to appoint new counsel). See 18 U.S.C. § 3599. See also Stewart v. Sec'y, Fla. Dep't of Corr., 635 F. App'x 711, 715-17 (11th Cir. 2015) (development of an actual conflict of interest as to equitable issues requires appointment of conflict-free counsel); Jones v. Sec'y, Fla. Dep't of Corr., et al., No. 3:18-cv168-TJC-PDB (Docs. 17 & 26) (relieving co-counsel Robert Norgard of any further responsibility in the case with the exception of transferring the case to CHU-M due to an actual conflict of interest as to equitable issues). The Court will administratively close the case to give new counsel an opportunity to become familiar with the case, confer with Petitioner, and file a memorandum concerning equitable tolling during the period of CHU-N's representation of Petitioner.

II. TIMELINESS

Respondents assert the Petition is untimely. Response at 10. Petitioner concedes that the Petition was filed beyond the Antiterrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitations. Petition at 7.

Under AEDPA, there is a one-year period of limitation:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Pursuant to AEDPA, effective April 24, 1996, Petitioner had one-year to file a timely federal petition pursuant to 28 U.S.C. § 2254. Wilcox v. Fla. Dep't of Corr., 158 F.3d 1209, 1211 (11th Cir. 1998) (per curiam) (one-year from date of enactment is adopted for convictions that became final prior to the effective date of AEDPA), cert. denied, 531 U.S. 840 (2000); see Guenther v. Holt, 173 F.3d 1328, 1331 (11th Cir. 1999), cert. denied, 528 U.S. 1058 (2000)

(same). Review of the record shows Petitioner failed to comply with the limitation period described above.

After judgment and conviction, Petitioner appealed to the Florida Supreme Court (FSC). Ex. 20; Ex. 21; Ex. 22. On August 31, 2000, the FSC affirmed. Ex. 23. Petitioner sought rehearing and the FSC denied rehearing on October 24, 2000.[5] Miller v. State, 770 So. 2d 1144 (2000), reh'g denied (Oct. 24, 2000). The mandate issued December 1, 2000. Ex. 23. The conviction became final on January 22, 2001 (90 days after October 24, 2000) (According to rules of the Supreme Court, a petition for certiorari must be filed within 90 days of the appellate court's entry of judgment on the appeal or, if a motion for rehearing is timely filed, within 90 days of the appellate court's denial of that motion."). Petition at 7-8. The limitation period began running and ran for a period of 253 days, until Petitioner, through counsel, filed an amended Rule 3.851 motion, Ex. 25, and the circuit court deemed the amended motion "shall relate back to October 2, 2001."[6] Ex. 24 at 157. In an order

[5] Respondents omit the time period when Petitioner sought rehearing; therefore, Respondents' calculation is incorrect. See Response at 10-14.

[6] Petitioner, through counsel, filed an initial Rule 3.850 motion for post-conviction relief on September 27, 2001. Ex. 24. Apparently, the parties stipulated to an order holding that the amended motion, Ex. 25, would relate back to October 2, 2001, not September 27, 2001. See Petition at 8. Therefore, for its calculations, this Court will utilize the date stipulated by the parties and adopted by the state circuit court:

filed on April 23, 2004, the circuit court denied the amended motion. Ex. 29. Petitioner appealed the denial of his post-conviction motion. Ex. 29 at 178-79; Ex. 31; Ex. 32; Ex. 33. In a Corrected Opinion dated March 23, 2006, the FSC affirmed denial of relief. Ex. 34. The mandate issued on April 13, 2006.[7] Id. The limitation period began to run and expired 112 days later, on Thursday, August 3, 2006. See Petition at 8-9.

Petitioner did not file his federal Petition (Doc. 15) until Wednesday, January 30, 2019, well past the expiration of the one-year limitation period. Based on the history outlined above, the Petition filed on January 30, 2019 is untimely and due to be dismissed unless Petitioner can establish equitable tolling of the statute of limitations is warranted. The Court will not address the matter of equitable tolling as additional briefing is warranted as previously stated.

October 2, 2001.

[7] Meanwhile, on or about March 16, 2005, Petitioner, through counsel, filed a state petition for writ of habeas corpus. Ex. 35; Ex. 36. The FSC denied the petition in its Corrected Opinion dated March 23, 2006. Ex. 34. The mandate issued on April 13, 2006. Id.

III. EXTRAORDINARY CIRCUMSTANCES

Respondents allege they "believe" Robert Norgard, Esquire, Petitioner's original post-conviction counsel, "intentionally missed the federal habeas deadline in this case and others in order to avoid his clients' inclusion on the list of defendants eligible for a death warrant." Response at 25. Respondents provide that, in Florida, before a Governor can sign a warrant of execution, a defendant must undergo executive clemency and this review generally starts after a federal petition for writ of habeas corpus has been denied in the federal district court and relief has been denied by the 11th Circuit Court of Appeals. Id. Significant changes were made in 2013 with the passing of the Timely Justice Act, Fla. Stat. § 922.052(2)(a), requiring the clerk of the FSC to inform the Governor in writing of a person convicted and sentenced to death who had either completed federal habeas review or allowed the time permitted for filing a habeas corpus petition in federal court to expire. Response at 26. The state court record demonstrates that shortly after the Timely Justice Act effective date of July 1, 2013 passed, Mr. Norgard filed a motion to withdraw as counsel.[8]

[8] The Court takes judicial notice of case no. 97-CF-6680 (in the Circuit Court of the Fourth Judicial Circuit in and for Duval County). See Motion to Withdraw as Counsel (Docket 1192, filed August 27 2013) and Order on Motion to Withdraw and Re-Appointing Court-Appointed Counsel (Docket 1194, filed September 25, 2013).

The clerk's October 4, 2013 certification letter identified David Miller, Jr., as a capital defendant who had been denied relief in state post-conviction proceedings but had not filed a federal habeas petition within the time frame allowed. Lugo v. Sec'y, Fla. Dep't of Corr., 750 F.3d 1198, 1225 n.14 (11th Cir. 2014), cert. denied, 574 U.S. 1125 (2015). Respondents state, "executive clemency *likely* has not occurred in this case[.]" Response at 26 (emphasis added).

Although significant allegations are raised concerning Mr. Norgard's conduct and his representation of this capital defendant, Petitioner, in the Reply, simply surmises there was "apparent abandonment by prior counsel." Reply at 9. Numerous questions are raised by Respondents' contention that Mr. Norgard intentionally missed the federal habeas deadline, including but not limited to: (1) did Mr. Norgard intentionally miss the federal habeas deadline; (2) if Mr. Norgard intentionally missed the deadline, did Mr. Norgard discuss his strategy with Petitioner and did Petitioner agree with the strategy to attempt to delay the scheduling of his execution date by failing to timely file a federal petition or agree to some other strategy not yet revealed; (3) did Mr.

In his motion, Mr. Norgard said, as of July 1, 2013, he "no longer has a contractual obligation to represent Mr. Miller." The circuit court granted Mr. Norgard's motion to withdraw effective the date the order was signed: September 24, 2013.

Norgard negligently miss the deadline; (4) did Mr. Norgard's conduct amount to abandonment of the attorney-client relationship; (5) was there severance of the agency relationship; (6) did Mr. Norgard purposely act adversely to Petitioner's interests by acting or failing to act for the purpose of advancing Norgard's own interests or those of a third party; and (7) did Mr. Norgard take actions that were contrary to Petitioner's instructions and adverse to his interests.

Petitioner states there is "need for thorough fact-finding[.]" Reply at 9. The Court agrees. Mr. Norgard represented Petitioner on the appeal of the denial of the Rule 3.851 motion, Appeal No. SC04-892. Ex. 31; Ex. 33. On April 13, 2006, the mandate issued after the denial of relief from the FSC. Ex. 34. Thus, the federal one-year limitation period expired on August 3, 2006, under Mr. Norgard's watch. Indeed, Mr. Norgard continued to represent Petitioner until September 24, 2013, the effective date of the court's order allowing Mr. Norgard to withdraw.

Whether Petitioner is entitled to equitable tolling of the period when Petitioner was represented by Mr. Norgard is a primary issue in this case. Therefore, the Court will conduct a limited evidentiary hearing addressing the conduct of Mr. Norgard, including the questions outlined above, and addressing whether Petitioner was informed of Mr. Norgard's strategy (if one

existed) and agreed with an intentional strategy of not filing a timely federal petition or acquiesced in counsel's decision or some similar strategy as yet unrevealed. The parties shall prepare for this limited evidentiary hearing accordingly. The limited evidentiary hearing will be scheduled by separate order after the reopening of the case.

Accordingly, it is now

ORDERED:

1. CHU-N's request that CHU-M be appointed as limited equitable tolling counsel (Doc. 33) is **DENIED.**

2. Respondents' request that CHU-N be relieved of its responsibilities in this case (Doc. 29) is **GRANTED** to the extent that CHU-N is relieved of any further responsibility in this case with the exception of transferring the case to CHU-M.

3. The Court finds good cause to appoint CHU-M as counsel for Petitioner. See 18 U.S.C. § 3599.

4. CHU-M shall file a notice of appearance acknowledging this appointment by **April 23, 2021.**

5. The **Clerk** shall administratively close the case.

6. CHU-M shall file a memorandum concerning equitable tolling of the limitation period during the period of CHU-N's representation of Petitioner

in state court to the point of the filing of the Petition in this Court. The memorandum shall be limited to **3000 words** and must be filed by **June 11, 2021.** Respondents may file a memorandum in response of no more than **3000 words** by **June 30, 2021.** After the memoranda are filed, the Court will reopen the case.

7. A limited evidentiary hearing as described herein will be scheduled by separate order.

DONE AND ORDERED at Jacksonville, Florida, this 16th day of April, 2021.

BRIAN J. DAVIS
United States District Judge

sa 4/15
c:
David Miller, Jr.
Counsel of Record
CHU-North
CHU-Middle
Carol Wright, Esquire

APPENDIX A-15

May 24, 2021, District Court Order

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

vs. Case No. 3:17-cv-932-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

1. The **Clerk** shall lift the stay and reopen the case.

2. Petitioner, on May 14, 2021, filed an Opposed Motion for an Extension of Time to File Memorandum Regarding Equitable Tolling During CHU-North's Representation of Petitioner (Motion) (Doc. 40). To date, Respondents have not filed a response. Respondents shall file any opposition by **May 28, 2021.**

In the Motion, Petitioner states that "CHU-M has chosen to prioritize obtaining, indexing, and reviewing CHU-N's file over those of Mr. Miller's earlier counsel." Motion at 5. As expressed in the Court's Order (Doc. 35), Petitioner should prioritize preparing for an evidentiary hearing concerning

Mr. Robert Norgard's conduct and his representation of Petitioner. See Order (Doc. 35 at 10-12). Not only was Mr. Norgard representing Petitioner on the appeal of the denial of the Rule 3.851 motion, he continued to represent Petitioner until September 24, 2013. (Doc. 35 at 11). During Mr. Norgard's period of representation, the federal one-year limitation period expired on August 3, 2006. Id. Numerous questions have been raised, and the parties are reminded that the Court will conduct a limited evidentiary hearing addressing the conduct of Mr. Norgard and the related conduct of Petitioner. The parties shall prepare accordingly. As noted previously, a limited evidentiary hearing will be scheduled by separate order.

DONE AND ORDERED at Jacksonville, Florida, this 24th day of May, 2021.

BRIAN J. DAVIS
United States District Judge

sa 5/21
c:
Counsel of Record

APPENDIX A-16

June 9, 2021, District Court Order Granting Motion for Extension

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

vs. Case No. 3:17-cv-932-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

Petitioner's Motion for an Extension of Time to File Memorandum Regarding Equitable Tolling During CHU-North's Representation of Petitioner (Doc. 40) is **GRANTED**. Petitioner shall file a memorandum, in compliance with the Court's Order (Doc. 35), by **December 8, 2021**. Respondents may file a memorandum in response, in compliance with the Court's Order (Doc. 35), by **December 30, 2021.**

DONE AND ORDERED at Jacksonville, Florida, this 9th day of June, 2021.

Brian J. Davis

BRIAN J. DAVIS
United States District Judge

sa 6/8
c:
Counsel of Record

APPENDIX A-17

July 26, 2021, Respondents' Motion to Determine Waiver of Privilege and Motion to Call Additional Witness at Evidentiary Hearing

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v.

CASE NO.: 3:17-cv-932-BJD-JBT
CAPITAL CASE

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

_____/

MOTION TO DETERMINE WAIVER OF PRIVILEGE AND
MOTION TO CALL ADDITIONAL WITNESS AT EVIDENTIARY HEARING

The Secretary moves this Court to determine that the attorney-client privilege between Petitioner Miller and his former attorneys including Robert Norgard has been waived. This Court has ordered a limited evidentiary hearing on the issue of equitable tolling regarding Miller's former state postconviciton counsel Robert Norgard's conduct. (Docs. #35, #41, #44). The issue is whether Norgard intentionally missed the deadline as part of a habeas litigation strategy to avoid being considered for a death warrant and, if so, whether equitable tolling is available at all such circumstances and, if available, whether that intentional conduct can amount to extraordinary circumstances to establish equitable tolling.

Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 257 (2016) (holding tribe was not entitled to equitable tolling of limitations period because equitable tolling is not available "when a litigant was responsible for its own delay" discussing the "*stood in his way*" phrase in *Holland v. Florida*, 560 U.S. 631, 649 (2010) (emphasis in original)).

Petitioner Miller asserting a claim of equitable tolling based on his former attorneys' conduct to excuse his belated filing of the habeas petition necessarily waives, as a matter of law, any attorney-client privilege between him and his former attorneys. *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001) (noting that a defendant claiming his counsel was ineffective waives the attorney-client privilege with respect to communications that concern his attorneys' possible strategic choices relying on *Laughner v. United States*, 373 F.2d 326 (5th Cir. 1967)); *United States v. Pinson*, 584 F.3d 972, 977-78 (10th Cir. 2009) (explaining that when a federal habeas petitioner raises a claim of ineffective assistance of counsel, he puts communications between himself and his attorney directly at issue, and "thus by implication waives the attorney-client privilege" citing other circuit cases including *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) (en banc)). As the Fifth Circuit has explained, a client waives the attorney-client privilege by affirmatively relying on attorney-client communications to support an element of a legal claim or defense because he has put those communications "at issue" in the case by raising the claim or defense. *In re Itron,*

Inc., 883 F.3d 553, 558 (5th Cir. 2018) (citing federal sources). And in the word's of the United States Supreme Court, in a civil case where the defendant raised misadvise of counsel as a defense, the client waives the right to object to the attorney giving "his own account of the matter." *Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888).[1] The waiver includes both privileged communications and work-product information including any information relating to strategy. *Reed* v. State, 640 So.2d 1094, 1097 (Fla. 1994). Miller waived the attorney-client privilege by raising an equitable tolling defense.[2]

---

[1] That the attorney-client privilege is waived by raising claims and defenses is Florida law as well. *Arbelaez v. State*, 775 So.2d 909, 917 (Fla. 2000) (explaining, in a capital case, that a defendant may not invoke the attorney-client privilege to preclude trial counsel from testifying about their conversations when those discussions relate to the defendant's claims of ineffective assistance and that waiver extends to trial counsel's files); *Reed v. State*, 640 So.2d 1094, 1096-97 (Fla. 1994) (holding that a capital defendant waives his attorney-client privilege when he files a postconviction motion claiming ineffective assistance of counsel and that waiver includes trial counsel's files citing *Wilson v. Wainwright*, 248 So.2d 249 (Fla. 1st DCA 1971), and *Turner v. State*, 530 So.2d 45 (Fla. 1987)). As the Florida Supreme Court has explained, "such a waiver includes not only privileged communications between defendant and counsel, but also must necessarily include information relating to strategy ordinarily protected under the work-product doctrine." *Reed*, 640 So.2d at 1097.

[2] The possible defense of equitable tolling also establishes a current conflict between Petitioner Miller and his former attorneys as well. *Christeson v. Roper*, 574 U.S. 373 (2015) (holding a federal district court abused its discretion in denying a motion for substitution of federal habeas counsel when current counsel's conduct was under question for missing the federal habeas deadline for filing a timely habeas petition). As the Fifth Circuit has noted, when state habeas counsel are also federal habeas counsel, they face a possible conflict of interest in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). *Tabler v. Stephens*, 591 Fed. Appx. 281 (5th Cir. 2015); *Ramirez v. Davis*, 780 Fed. Appx. 110, 117 (5th Cir. 2019) (agreeing *Trevino* created a potential

Petitioner Miller's former attorneys during the equitable tolling period include Robert Norgard, Frank Tassone, Christopher Anderson, and the CHU-N including its former chief, Billy Nolas and its current chief, Terri Backhus. Miller has waived the attorney-client privilege for all these attorneys regarding any aspect of the strategy relating to missing the deadline to file the federal habeas petition for asserting equitable tolling. The current attorneys for both parties should be permitted to speak with these former attorneys to prepare for the evidentiary hearing.

Furthermore, the Office of the Attorney General should be permitted to present the testimony of any of these former attorneys at the upcoming limited evidentiary hearing to testify regarding their conversations with Norgard as well as their own knowledge of whether there was any type of strategy to miss the deadline. This Court should order the former attorneys to be available to testify at the limited evidentiary hearing regarding Norgard and equitable tolling, if either party subpoenas them to do so.

---

conflict of interest but finding no actual conflict). A conflict of interest arises when an attorney's interest in avoiding damage to her own reputation is at odds with her client's "strongest" argument. *Maples v. Thomas*, 565 U.S. 266, 285-86 n.8 (2012). All of Miller's former attorneys including the Capital Habeas Unit of the Federal Public Defender Office of the Northern District of Florida (CHU-N) have a possible conflict.

Accordingly, this Court should rule that the privilege has been waived and order all former attorneys to speak with current counsel for the parties as well as to be available to testify at the limited evidentiary hearing.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Charmaine M. Millsaps
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
CAPITAL APPEALS
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the MOTION TO DETERMINE WAIVER OF PRIVILEGE/MOTION TO CALL ADDITIONAL WITNESS AT EVIDENTIARY HEARING has been furnished by CM/ECF to GREGORY W. BROWN, Assistant Federal Defender, Capital Habeas Unit, Office of the Federal Public Defender of the Middle District of Florida, 400 N. Tampa Street, Suite 2700, Tampa, FL 33602; phone: (813) 228-2715; email: greg_brown@fd.org; secondary email: FLM_CHU@fd.org and TENNIE B. MARTIN, Assistant Federal Defender, Capital Habeas Unit, Office of the Federal Public Defender of the Middle District of Florida, 400 N. Tampa Street, Suite 2700, Tampa, FL 33602; phone: (813) 228-2715; email: tennie_martin@fd.org; secondary email: FLM_CHU@fd.org this __ day of July, 2021.

/s/ Charmaine M. Millsaps
Charmaine M. Millsaps
Attorney for Respondent

CERTIFICATE OF CONSULTATION

I HEREBY CERTIFY that counsel for Respondents consulted with counsel for the Petitioner regarding this motion, as required by Middle District of Florida local rule 3.01(g). Counsel for Miller, Greg Brown of CHU-M, and undersigned spoke on the phone on July 23, 2021, and he agreed to this motion.

/s/ *Charmaine Millsaps*
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
COUNSEL FOR RESPONDENTS

APPENDIX A-18

July 27, 2021, District Court Order Denying Respondents' Motion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

vs. Case No. 3:17-cv-932-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

This cause is before the Court on Respondents' Motion to Determine Waiver of Privilege and Motion to Call Additional Witness [sic] at Evidentiary Hearing (Doc. 45).[1] As the Court stated in previous orders, the Court is going to schedule **a limited evidentiary hearing** addressing the conduct of Mr. Norgard and the related conduct of Petitioner. See Orders (Docs. 35 & 41). Respondents attempt to broaden the scope of this limited hearing will not be entertained at this juncture; Respondents' Motion to Determine Waiver of Privilege and Motion to Call Additional Witness [sic] at Evidentiary Hearing

[1] Respondents seek to speak with and/or call as witnesses all of Petitioner's former attorneys, including Frank Tassone; Christopher Anderson; the CHU-N; Billy Nolas, former chief of CHU-N; and Terri Backhus, current chief of CHU-N.

(Doc. 45) is due to be denied. This is a limited proceeding. See Order (Doc. 35 at 10-13). Thus, the parties should prepare accordingly.

Accordingly, it is now

ORDERED:

Respondents' Motion to Determine Waiver of Privilege and Motion to Call Additional Witness [sic] at Evidentiary Hearing (Doc. 45) is **DENIED without prejudice.**

DONE AND ORDERED at Jacksonville, Florida, this 27th day of July, 2021.

Brian J. Davis

BRIAN J. DAVIS
United States District Judge

sa 7/27
c:
Counsel of Record

APPENDIX A-19

August 9, 2021, District Court Order Scheduling Limited Evidentiary Hearing

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v. Case No. 3:17-cv-932-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

TAKE NOTICE that this case is hereby **SET** for a **limited evidentiary hearing** on **OCTOBER 21, 2021 at 9:00 A.M.**[1] At the hearing the Court will address the conduct of Mr. Robert Norgard, Esquire, and the related conduct of Petitioner. The hearing will take place before the Honorable Brian J. Davis, United States District Judge, in the United States Courthouse, Courtroom 12C, 300 North Hogan Street, Jacksonville, Florida.[2]

---

[1] The Court has reserved **one half day** for this hearing. The morning session will begin at 9:00 a.m. precisely, and conclude at 11:00 a.m. The afternoon session will resume at 2:00 p.m., if necessary.

[2] All persons entering the Courthouse must present photo identification to Court Security Officers. Although cell phones, laptop computers, and similar electronic devices generally are not permitted in the building, attorneys may bring those items with them upon presentation to Court Security Officers of proof of membership in The Florida Bar or an Order of special admission pro hac vice. Additionally, all parties shall wear a face mask covering their nose and mouth and comply with social

The Department of Corrections is hereby ordered to deliver Plaintiff **David Miller, Jr.**, Inmate Number **J08118** (who is currently on death row incarcerated at **Union Correctional Institution**) to the United States Courthouse, Courtroom No. 12C, 300 North Hogan Street, Jacksonville, Florida, no later than **8:30 a.m. on October 21, 2021**. After the Court recesses at the conclusion of the hearing, the Department may return Plaintiff to his penal institution.

The parties are directed to arrange for the presence of Mr. Robert Norgard, Esquire, at this hearing.

The **Clerk** shall provide a copy of this Order to the United States Marshal's Office, the Court Security Office, the Correctional Services Consultant of the Florida Department of Corrections, as well as the other offices and individuals listed below.

DONE and **ORDERED** in Jacksonville, Florida this 9th day of August, 2021.

Brian J. Davis

BRIAN J. DAVIS
United States District Judge

distancing measures. See In re Restriction on Courthouse Access due to COVID-19, Case No. 3:20-mc-23-J-32 D.E. 4 (M.D. Fla. July 30, 2021).

caw 8/5
c:
Counsel of record
FDOC Correctional Services Consultant (email)
Warden, Union Correctional Institution
United States Marshal
Court Security Office

APPENDIX A-20

September 22, 2021, Petitioner's Motion to Continue Limited Evidentiary Hearing

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

v. **Case No. 3:17-cv-00932-BJD-JBT**

DEATH PENALTY CASE

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

PETITIONER'S OPPOSED MOTION TO CONTINUE LIMITED EVIDENTIARY HEARING CURRENTLY SCHEDULED FOR OCTOBER 21, 2021

COMES NOW the Petitioner, David Miller, Jr., through counsel, and respectfully requests that this Court continue the limited evidentiary hearing currently scheduled for October 21, 2021, or in the alternative, bifurcate the hearing to allow for the presentation of mental status evidence. Counsel for Petitioner has consulted with respondent who indicated they oppose this motion. In support thereof, Petitioner states the following:

I. BACKGROUND

This Court has scheduled an evidentiary hearing for October 21, 2021, to address the conduct of Mr. Robert Norgard, Esquire and the related conduct of the

Petitioner. This date was chosen at the recommendation of the parties in coordination with Mr. Norgard, after this Court ordered that the parties confer and select a date for the hearing. (Doc. 44). In that order, this Court indicated that "The Court intends that the focus of the hearing will be upon the questions set forth in its Order (Doc. 35 at 10- 11)." In this Court's order (Doc. 35), this Court recognized that Respondent in this case has alleged "they 'believe' Robert Norgard, Esquire, Petitioner's original post-conviction counsel, 'intentionally missed the federal habeas deadline in this case and others in order to avoid his clients' inclusion on the list of defendants eligible for a death warrant.'" This Court proposed the following questions, which are to be the focus of the evidentiary hearing:

(1) did Mr. Norgard intentionally miss the federal habeas deadline;

(2) if Mr. Norgard intentionally missed the deadline, did Mr. Norgard discuss his strategy with Petitioner and did Petitioner agree with the strategy to attempt to delay the scheduling of his execution date by failing to timely file a federal petition or agree to some other strategy not yet revealed;

(3) did Mr. Norgard negligently miss the deadline;

(4) did Mr. Norgard's conduct amount to abandonment of the attorney-client relationship;

(5) was there severance of the agency relationship;

(6) did Mr. Norgard purposely act adversely to Petitioner's interests by acting or failing to act for the purpose of advancing Norgard's own interests or those of a third party; and

(7) did Mr. Norgard take actions that were contrary to Petitioner's instructions and adverse to his interests.

Doc. 35 at 10-11.

II. ARGUMENT

A. Despite CHU-M's Diligent Efforts to Obtain Records, a Number of Requests to Florida State Agencies for Relevant Documents Remain Outstanding

Following this Court's April 16, 2021 order appointing CHU-M as Petitioner's federal habeas counsel, CHU-M has been diligently gathering records related to Petitioner's case. Numerous requests for records were sent beginning on April 20, 2021. While CHU-M has been successful in obtaining a plethora of records, numerous requests to Florida state agencies for relevant records remain outstanding. Petitioner anticipates that many of these records will have a direct bearing on the questions posed by this Court. For example[1], the following records requests remain outstanding: 1) request to the Florida Department of Corrections for logs of attorney visits and phone calls with Petitioner[2]; 2) request to the Florida Department of Corrections for Petitioner's entire file (including mental status records); and 3) request to the Florida Department of Financial Services for records

[1] Petitioner has not received or reviewed any of the following records and some might contain privileged or confidential materials. Petitioner is not at this time listing any of these records as exhibits or implying that they may ultimately be discoverable in this case.

[2] Petitioner initially requested, and recently received, visitation and call logs beginning on July 1, 2004, based upon a publicly available order indicating Mr. Norgard was appointed as state post-conviction counsel on August 2, 2004. Counsel subsequently learned that Mr. Norgard entered an appearance as second chair on September 30, 2003, and counsel has a request for visitation and call logs from this earlier date outstanding.

of Mr. Norgard's billing for legal services in Petitioner's case[3]. At the time Petitioner agreed to the proposed October 21, 2021 hearing date, counsel believed based on experience that these records would be provided with sufficient time to prepare for the hearing. Additionally, counsel's understanding of the facts and issues involved has continued to evolve as more records are received and reviewed, leading to the need to additional and supplemental requests.

Petitioner believes that these outstanding records will contain evidence that directly addresses many of the questions posed by this Court. The prison attorney visit and phone call logs will show if or when Mr. Norgard spoke to Petitioner. These logs could potentially prove a lack of opportunity for Mr. Norgard to have discussed the case with Petitioner and could potentially be direct evidence of client abandonment. The Florida Department of Corrections entire file could potentially contain substantial relevant information. This might include mental status diagnoses and treatment Petitioner was receiving during the relevant time periods, as well as correspondences between Mr. Norgard and the prison including attempts to schedule visitation and phone calls. With regard to attorney billing records, Petitioner's ongoing investigation indicates that Mr. Norgard was compensated for representing Petitioner based on the submission of detailed billing statements to the Department

[3] Counsel is also attempting to gather similar information by way of motions for payment of attorney fees and costs submitted to the state trial court, but counsel does not expert these records to be as comprehensive.

of Financial Services listing the dates, time, and type of service rendered. These billing statements could be direct evidence of abandonment during the relevant time periods. Petitioner has made inquiries with the various agencies on the status of these requests and will continue to do everything possible to obtain them before the scheduled October 21, 2021 hearing. However, based on counsel's experience, these types of requests are being fulfilled much more slowly during the COVID-19 pandemic than they were previously.

B. CHU-M's Ongoing Investigation Suggests that There Is No Factual Support for Respondent's Allegation that the Blown AEDPA Statute of Limitations in this Case Was Part of an Intentional Strategy to Avoid Petitioner's Name Appearing on a Death Warrant Eligible List. Rather, CHU-M Believes that Petitioner's Mental Status will be the Focus of the Equitable Tolling Analysis

While CHU-M's investigation remains ongoing, all indications thus far point to the conclusion that there is no evidentiary support for Respondent's assertion that there was an intentional strategy to miss the federal habeas deadline. As such, at this time Petitioner believes that the answer to this Court's first two questions will be "no." Of course, Respondents can present whatever evidence they have regarding this alleged intentional strategy at the evidentiary hearing. However, for planning purposes, counsel for Petitioner believes it is prudent to advise the Court that it is highly unlikely, given the evidence reviewed, that the issue of equitable tolling will

turn on the existence of an intentional strategy, much less Petitioner's acquiescence to such[4].

With regards to the remaining questions posed by this Court, CHU-M's ongoing investigation suggests that Petitioner's case for equitable tolling will rely primarily on Petitioner's mental status at the relevant times, and much less on the conduct of Mr. Norgard or Petitioner. Additionally, Petitioner expects that the mental status evidence he intends to present is relevant to tolling not just during Mr. Norgard's representation, but also to the that of all subsequent attorneys. This Court's order to address the conduct of Mr. Robert Norgard, Esquire and the related conduct of Petitioner at the October 21, 2021 evidentiary hearing does not appear to encompass evidence of Petitioner's mental status, through the testimony of expert witnesses and documentary evidence. To the extent that it does encompass such evidence, counsel for Petitioner does not anticipate being prepared to address Petitioner's mental status as it relates to equitable tolling by the October 21, 2021 evidentiary hearing, as will be further discussed below.

This Court has made it abundantly clear that it wishes to limit the October 21, 2021 evidentiary hearing to testimony regarding Mr. Norgard's conduct and the Petitioner's related conduct. Based on CHU-M's ongoing investigation, the

[4] Counsel for Petitioner makes these representations without reference or reliance upon any attorney-client privileged materials or conversations, and in no way waives the attorney-client privilege.

Petitioner believes that neither Mr. Norgard's conduct nor Petitioner's related conduct can be meaningfully understood without the context of Petitioner's mental status during that period, and that none of this Court's questions can be fully answered without such context. To the extent that this Court's questions can be partially addressed without reference to Petitioner's mental state, Petitioner does not anticipate being fully prepared by the October 21, 2021 evidentiary hearing due to changed circumstances, and the delays in record gathering outside of Petitioner's control outlined above.

C. The Resurgence of the COVID-19 Pandemic in the Period Since the Evidentiary Hearing Was Scheduled Has Made Preparing for the Hearing More Difficult, and Attending the Hearing More Risky

The trajectory of the ongoing COVID-19 pandemic has changed dramatically since this Court requested that the parties confer and choose a date for the evidentiary hearing. It appeared briefly between May and July 2021, that widespread vaccination was succeeding in greatly reducing the number of COVID-19 cases and deaths. New 7-day average daily cases in the United States dipped as low as 11,956 on June 21, 2021, and the 7-day average for new deaths in the nation stood at 247 on July 6, 2021. In Florida, the 7-day average for new cases dipped to 1477 on June 19, 2021, and the 7-day average for new deaths fell to 24 on June 28, 2021.

With the improving COVID-19 numbers, the Federal Public Defender's Office for the Middle District of Florida set August 9, 2021 as the date for employees

to return to the office for in person work for the first time since March of 2020. At the time counsel for Petitioner agreed to the October 21, 2021 evidentiary hearing date, counsel expected to have been back at the office for a couple of months, to have resumed routine client visits at Union Correctional Institute ("UCI"), and for the reluctance of expert witnesses to conduct client evaluations at UCI to have greatly receded.

All of the progress and hope for a return to normal were dashed as a new summer surge gripped the country, and Florida in particular. The 7-day average for new cases in the country during the summer surge appears to have peaked at 166,562 on September 2, 2021. It is not yet clear if average daily deaths have peaked, but on September 15, 2021 they reached 1,682. Florida has fared worse. Average new cases remained above 20,000 through the end of September, and August 25, 2021 saw an average new deaths of 335, by far the highest at any time during the pandemic. It is not yet clear if new deaths have peaked, as it can take weeks for deaths to be reported. Hospitalizations for COVID-19 in Florida peaked at over 16,000 in late August 2021, more than double that of any other time during the pandemic. While hospitalizations appear to be improving, they remain at approximately 10,000, higher than peak levels during any of the prior COVID-19 surges.

This new summer surge caused the Federal Public Defender for the Middle District of Florida to first delay its reopening first from August 9, 2021 to September 13, 2021, and then as of August 20, 2021, to suspend reopening indefinitely. Resuming in-person client visits at UCI, and finding experts willing to do in-persons evaluations at UCI have also been setback. The Florida Department of Corrections suspended its mask mandate in June of 2021. The failure to require masks, especially for unvaccinated individuals in a crowded prison setting, has made visits to the prison, including by expert witnesses, more dangerous, particularly to those who are high-risk or have high-risk family members. The CDC currently recommends that all individuals, regardless of vaccination status, wear masks indoors.[5]

Lead counsel for Petitioner briefly resumed in-person client visits in June-July 2021 when conditions appeared to have improved and vaccines had become available. During those visits, with the exception of co-counsel and one client, counsel did not observe a single other person, prisoner, or employee, wearing a mask within UCI after the prison ended its mask mandate in June. Additionally, CHU-M is based in Tampa, Florida, Mr. Norgard is based in Bartow, Florida, Respondent's counsel is based in Tallahassee, Florida, and Petitioner is housed at UCI in Raiford,

[5]Ctrs. for Disease Control & Protection, *When You've Been Fully Vaccinated*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html (Last accessed Sept. 20, 2021).

Florida. Attending the hearing in-person will require CHU-M attorneys and staff to travel to Jacksonville, stay overnight in a hotel, and the hearing itself will involve persons from around the state congregating together indoors, including a significant transport and security detail. This is particularly risky given the emergence of the more transmissible and more dangerous Delta variant.

As the pandemic has progressed, the COVID-19 virus has mutated into several variants. The Delta variant was first identified in India in December 2020. It was first detected in the United States in March 2021.[6] It has rapidly become the dominant strain of the virus in the United States, comprising 99% of cases as of September 20, 2021.[7] The Delta variant "causes more infections and spreads faster" than earlier forms of the virus that causes COVID-19.[8]

The CDC has noted that Delta in particular is "more than 2x as contagious as previous variants," even in some vaccinated individuals. In addition, early data suggests that Delta variant may cause "more severe illness than previous variants in unvaccinated people." Indeed, two different studies have shown that "patients

[6]Ctrs. for Disease Control & Protection, *About Variants of the Virus that Causes COVID-19*, https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html (last accessed July 22, 2021).

[7]Ctrs. for Disease Control & Protection, *Variant Proportions*, https://covid.cdc.gov/covid-data-tracker/#variant-proportions (last accessed July 22, 2021). This is an 33% increase from July 3, 2021. *Id.*

[8]Ctrs. for Disease Control & Protection, *COVID Data Tracker Weekly Review*, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html (last accessed Sept. 20, 2021).

infected with the Delta variant were more likely to be hospitalized than patients infected with Alpha or the original virus that causes COVID-19."[9] Finally, with this variant, "[c]ertain monoclonal antibody treatments are less effective against this variant."[10]

While Pfizer, Moderna, and Johnson & Johnson vaccines are widely available and still offer some protection against the Delta variant, studies have shown reduced effectiveness of preventing infection as compared to previous versions of the virus, given Delta's hyper-transmissibility. A recent CDC study showed that protection for the Pfizer-BioNTech vaccine "declined 4 months after vaccination," and post-vaccination antibody levels "were significantly lower in persons vaccinated with the Johnson & Johnson vaccine than the Moderna or Pfizer-BioNTech vaccines."[11] As a result, both the Pfizer and Johnson and Johnson vaccines had a lower rate of effectiveness against hospitalization than Moderna.[12]

---

[9]Ctrs. for Disease Control & Protection, *Delta Variant: What We Know About the Science*, https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html (last accessed Sept. 20, 2021).

[10]Ctrs. for Disease Control & Protection, *SARS-CoV-2 Variant Classifications and Definitions*, https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-info.html (last accessed Sept. 20, 2021).

[11]Ctrs. for Disease Control & Protection, *Comparative Effectiveness of Moderna, Pfizer-BioNTech, and Janssen (Johnson & Johnson) Vaccines in Preventing COVID-19 Hospitalizations Among Adults Without Immunocompromising Conditions—United States, March-August 2021*, https://www.cdc.gov/mmwr/volumes/70/wr/mm7038e1.htm?s_cid=mm7038e1_w (last accessed Sept. 20, 2021).

[12] *Id.*

III. CONCLUSION

Petitioner respectfully requests that this Court continue the limited evidentiary hearing until March of 2022. This continuance will allow Petitioner to finish gathering all of the relevant records in this case, including visitation and call logs and Mr. Norgard's billing records. Additionally, rescheduling the hearing will allow Petitioner to complete expert evaluations of Petitioner's mental status, which Petitioner believes will be at the heart of his case for equitable tolling. Because Petitioner's mental status will be the focus of his case for equitable tolling, and the conduct of his attorneys will be secondary, conducting the evidentiary hearing in the absence of expert witness mental status testimony will deprive the Court of the necessary context within which to analyze Mr. Norgard and Petitioner's conduct. Additionally, rescheduling the hearing will hopefully allow all parties travelling and attending the hearing to do so in a safer environment. Multiple models predict Florida's COVID-19 situation dramatically improving in the coming months[13].

WHEREFORE Petitioner, through undersigned counsel, respectfully requests that this Court continue the limited evidentiary hearing to March 2022 so that Petitioner can finish gathering the necessary documents and prepare mental status testimony to be presented alongside Mr. Norgard's testimony. Should this Court

[13]Ctrs. for Disease Control & Protection, *State and County Forecasts*, September 13, 2021 update, https://www.cdc.gov/coronavirus/2019-ncov/downloads/science/forecasting/cases/september2021/Consolidated-Cases-Forecasts-2021-09-13.pdf (last accessed Sept. 21, 2021).

order that the October 21, 2021 hearing will go forward as scheduled, Petitioner respectfully requests an order bifurcating the hearing so that Petitioner can present mental status evidence before the Court rules on equitable tolling during Mr. Norgard's representation, and so that Petitioner can potentially recall Mr. Norgard and enter further evidence should Petitioner obtain any records that further support his case for equitable tolling, or records that might be used to impeach Mr. Norgard's evidentiary hearing testimony.

Respectfully submitted this 22nd day of September 2021,

A. FITZGERALD HALL, ESQ.,
FEDERAL DEFENDER

CAROL A. WRIGHT, ESQ.,
CHIEF, CAPITAL HABEAS UNIT

/s Gregory W. Brown
Gregory W. Brown, Esq.,
Assistant Federal Defender
Florida Bar # 086437
Office of the Federal Public Defender
Capital Habeas Unit
Middle District of Florida
400 N. Tampa Street, Suite 2600
Tampa, Florida 33602
Tel: 813-228-2715
Email: greg_brown@fd.org
Secondary Email: FLM_CHU@fd.org

/s Tennie B. Martin
Tennie B. Martin, Esq.,
Assistant Federal Defender
Arizona Bar # 016257
Office of the Federal Public Defender
Capital Habeas Unit
Middle District of Florida
400 N. Tampa Street, Suite 2600
Tampa, Florida 33602
Tel: 813-228-2715
Email: tennie_martin@fd.org
Secondary Email: FLM_CHU@fd.org

Counsel for the Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of September 2021, a true and correct copy of the foregoing was furnished by using the CM/ECF system with the Clerk of the Court, which will send notice of the electronic filing to Office of the Attorney General, CHARMAINE M. MILLSAPS, Assistant Attorney General, Office of the Attorney General at charmaine.millsaps@myfloridalegal.com; Office of the Attorney General at capapp@myfloridalegal.com and to all interested parties of record.

Respectfully submitted,

/s Gregory W. Brown
Gregory W. Brown, Esq.
Assistant Federal Defender
Capital Habeas Unit

/s Tennie B. Martin
Tennie B. Martin, Esq.,
Assistant Federal Defender
Capital Habeas Unit

Counsel for the Petitioner.

APPENDIX A-21

October 7, 2021, District Court Order Denying Motion to Continue

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,

Petitioner,

vs. Case No. 3:17-cv-932-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

This cause is before the Court on Petitioner's Opposed Motion to Continue Limited Evidentiary Hearing Currently Scheduled for October 21, 2021 (Doc. 48). As previously stated, the Court is conducting a **limited evidentiary hearing** addressing the conduct of Mr. Norgard and the related conduct of Petitioner. See Orders (Docs. 35, 41, 46, 47). Petitioner's request to continue the limited evidentiary hearing until March of 2022 is due to be denied. The Court has adopted protocols and procedures for conducting in-person hearings. Counsel may visit the latest Courthouse protocols and pandemic procedures: United States District Court for the Middle District of Florida homepage, http://www.flmd.uscourts.gov/locations/jacksonville.

Accordingly, it is now

ORDERED:

Petitioner's Opposed Motion to Continue Limited Evidentiary Hearing Currently Scheduled for October 21, 2021 (Doc. 48) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida, this 6th day of October, 2021.

BRIAN J. DAVIS
United States District Judge

sa 10/6
c:
Counsel of Record

APPENDIX A-22

Transcript of October 21, 2021, Limited Evidentiary Hearing

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER JR.,

Plaintiff,

-vs-

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Defendants.

Jacksonville, Florida

Case No. 3:17-cv-932-BJD-JBT

October 21, 2021

9:06 a.m.

Courtroom 12C

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE BRIAN J. DAVIS
UNITED STATES DISTRICT JUDGE

OFFICIAL COURT REPORTER:

Shelli Kozachenko, RPR, CRR, CRC
221 N. Hogan Street, #185
Jacksonville, FL 32202
Telephone: (904) 301-6842

(Proceedings reported by stenography; transcript produced by computer.)

A P P E A R A N C E S

COUNSEL FOR PLAINTIFF:

Gregory Brown, Esquire
Tennie Martin, Esquire
Office of the Federal Public Defender
Capital Habeas Unit
400 North Tampa Street, Suite 2700
Tampa, FL 33602

COUNSEL FOR DEFENDANTS:

Charmaine Millsaps, Esquire
Office of the Attorney General
107 West Gaines Street, Suite 543
Tallahassee, FL 32399

Michael Kennett, Esquire
Department of Legal Affairs
PL-01 The Capitol
Tallahassee, FL 32399

TABLE OF CONTENTS

PETITIONER'S WITNESS:	Page No.
ROBERT NORGARD	
DIRECT EXAMINATION BY MR. BROWN.....	25
CROSS-EXAMINATION BY MR. KENNETT.....	119
REDIRECT EXAMINATION BY MR. BROWN.....	125
RECROSS-EXAMINATION BY MR. KENNETT.....	129

E X H I B I T S R E C E I V E D

PETITIONER'S EXHIBITS:	Page No.
PETITIONER'S EXHIBIT 17.....	20
PETITIONER'S EXHIBIT 1.....	31
PETITIONER'S EXHIBIT 2.....	33
PETITIONER'S EXHIBIT 3.....	34
PETITIONER'S EXHIBIT 4.....	43
PETITIONER'S EXHIBIT 5.....	45
PETITIONER'S EXHIBIT 6.....	46
PETITIONER'S EXHIBIT 7.....	54
PETITIONER'S EXHIBIT 8.....	56
PETITIONER'S EXHIBIT 9.....	58
PETITIONER'S EXHIBITS 10 THROUGH 12.....	63
PETITIONER'S EXHIBIT 13.....	66
PETITIONER'S EXHIBIT 14.....	69
PETITIONER'S EXHIBIT 15.....	84
PETITIONER'S EXHIBITS 16A THROUGH 16H.....	90
PETITIONER'S EXHIBIT 18.....	108
PETITIONER'S EXHIBIT 19.....	110
PETITIONER'S EXHIBITS 20 AND 21.....	115

P R O C E E D I N G S

October 21, 2021 9:06 a.m.

- - -

COURT SECURITY OFFICER: All rise. United States District Court in and for the Middle District of Florida is now in session, the Honorable Brian J. Davis presiding.

Please be seated.

THE COURT: Good morning to all.

MR. BROWN: Good morning.

THE COURT: Good morning to all.

ALL: Good morning, Your Honor.

THE COURT: Thank you.

Court is convened today in connection with David Miller Jr. versus the Secretary, Florida Department of Corrections, et al. It's Case No. 3:17-cv-932.

And it's on the Court's calendar -- excuse me -- on the Court's calendar for a limited evidentiary hearing in connection with Mr. Miller's petition under the habeas provisions of our statutes and his argument that equitable tolling should be used to excuse a failure of counsel to have filed a timely habeas petition as it relates to the Antiterrorism and Death Penalty Act.

The record should reflect that Mr. Miller is present with counsel, Attorney Gregory Brown and Attorney Tennie Martin, and that the government is represented today by

Attorney Charmaine Millsaps and Attorney Michael Terrence Kennett. Welcome to all of you.

I want to take up first the motion to strike because it bears on the evidence that will be offered during the course of the hearing today. That is filed by the government, by the Capital Habeas Unit for the Middle District of Florida.

And I'm not sure -- I see Ms. Millsaps has arisen to argue that motion. I'll hear from you.

MS. MILLSAPS: Yes, Your Honor. I filed the motion because -- on two grounds, that I thought it was outside the scope of what Your Honor set as the hearing. Obviously Your Honor's the best judge of what you think is outside the scope, but it seems a great deal of the exhibits -- and you can see the binder here -- go more toward Mr. Miller's mental health.

And that may indeed become an issue in this case at some point, Your Honor. I think that goes, in the counseled case, to the diligence prong of equitable tolling, which has two prongs, diligence and extraordinary circumstances.

But unless -- but in a counseled case, the extraordinary circumstances would have to be related to the attorney, and there's no allegation in this case that Mr. Norgard or any of the subsequent attorneys themselves' mental health is at issue.

So really I took this evidentiary hearing to be limited to the attorney's conduct, and -- so I don't think

we're at this point yet. I'm not asking you to strike it permanently. If we get to that prong, obviously some of this is going to be relevant.

So I would, you know, strike it or exclude it, Your Honor. Strike was just the way I could think of it, to express it. Exclude it for the time being or not allow them to get into it because that's -- Your Honor had seven questions, and I don't think this -- Mr. Miller's mental health relates to any of them.

I also think that, you know, it's pretty hard -- I really only had one thing in the state court record, and I literally put the part of it I wanted. I -- this is too much for us to consume at this late a date, so we wouldn't be ready to rebut it, Your Honor, although I'm not even sure how much of it we would rebut.

THE COURT: All right.

MS. MILLSAPS: That's my argument, Your Honor.

THE COURT: Very good.

On behalf of petitioner?

MR. BROWN: Good morning, Your Honor.

THE COURT: Good morning.

MR. BROWN: May I use the podium?

THE COURT: You may.

MR. BROWN: And my only copy of that motion is on my computer, so I hope it doesn't bother you to use my computer as

well.

As to the first issue raised by the respondents, that it's outside the scope of the hearing, Your Honor's order, first of all, indicated that those seven questions -- that the hearing would be -- would include but would not be limited to those seven questions. So that's the first thing that I would point out.

The second thing that I would point out is that all of the documents that we have in our exhibit binder that relate to Mr. Miller's mental health are documents that were in Mr. Norgard's possession as he was litigating the 3.851 motion, the state postconviction motion.

So these are -- these are -- this is information that he was aware of at the time that he was litigating that motion, and this is information that he was aware of at the time that he failed to file the habeas petition.

My expectation is that the explanation that is given for why the habeas petition is not filed is going to be in part related to Mr. Miller's mental health. That's part of the reason why I asked to continue the hearing, so that we could have our mental health experts ready.

But Your Honor obviously ordered to go forward with the hearing this morning, but Mr. Norgard's knowledge of the matters contained in these exhibits is going to be directly relevant to the issue of equitable tolling.

Additionally, my burden, in order to establish equitable tolling, requires me to prove both extraordinary circumstances and diligence. And if I'm prevented from getting into diligence -- and it's my position that Mr. Miller's mental status goes towards both extraordinary circumstances and diligence. But I think that that's an issue that we'll be most likely briefing at a later date.

But my position is it applies to both. But I certainly have to prove diligence; it's part of my burden. And if I'm unable to present any evidence regarding Mr. Miller's mental health, I won't be able to establish, certainly, the diligence element.

So it's directly relevant to the hearing that we're going to have today. So on that first issue of it being outside the scope, I think it's going to be directly the scope, and we'll all find that out, I think, when the witness takes the stand.

As to it being provided late, the civil rules of discovery are -- do not apply in 2254 cases. We are governed by Rule 6 of the rules governing habeas cases. Rule 6 requires leave of court to conduct discovery.

So first of all, I wasn't under any obligation to provide my exhibits to the respondents whatsoever, but, however, I provided a detailed exhibit list two weeks ago to the respondents which lists every exhibit that I was planning

on entering.

There's 21 exhibits listed. I think it's 18 out of the 21 all come from the record on appeal.

Respondents have represented the State of Florida in this action since 1998 when they were appointed on direct appeal. They represented the State of Florida in this action in postconviction as well. These documents are -- have been in their possession for decades, the vast majority of them.

The respondents took particular issue with the *Bolin* case that I cited or that I listed as Exhibit 20 and 21 in my exhibit list. I gave a very specific citation in that list to the document and to the case number, so I don't think that there's any question what document I was referring to.

So I wasn't obligated to provide the exhibits. I provided the exhibit list two weeks in advance. I haven't received any request from respondents to provide any of these exhibits. And so I don't -- I don't think that there's any issue with the timeliness of my disclosures.

I'm sorry. I'm having a little trouble breathing, through this mask, but --

THE COURT: You can take it off while you're at the podium.

MR. BROWN: Thank you.

THE COURT: Uh-huh.

MR. BROWN: I'll keep my mask on when I'm sitting at

counsel table, but it's getting a little hot in there.

So I don't think that there's anything untimely about my filing because the rules didn't require it, and I gave them two weeks' notice of a bunch of documents that they've had in their possession for, in many cases, approximately 18 years and, in other cases, approximately 10 years.

So that would be my argument as to the exhibits.

THE COURT: Mr. Brown, tell me what evidence you intend to offer today during the hearing.

MR. BROWN: The evidence that I intend to offer is primarily going to be the testimony of Mr. Norgard.

Are you asking me for what I anticipate Mr. Norgard's testimony is going to be?

THE COURT: As well, yes.

MR. BROWN: My anticipation is that Mr. Norgard is going to say that he did not file the federal habeas petition because Mr. Miller had indicated that he would volunteer for death if Mr. Norgard filed the federal habeas petition.

It's also my anticipation that Mr. Norgard will testify that Mr. Miller was not competent to make that decision and that had he made that decision, that he would have had mental health experts appointed to evaluate Mr. Miller's mental health and to present that to the court to prevent him from volunteering for death.

And so it's my estimation that these documents are

relevant to prove that Mr. Norgard (1) had those concerns, and secondly, that those concerns should have applied equally to Mr. Miller's ability to waive his federal habeas proceedings.

It's also my anticipation that there will be records presented that indicate a certain lack of diligence by Mr. Norgard in terms of visitation, phone calls, and the like, and that given the professional norms in death cases, that there is a heightened duty of care when you're dealing with a client with mental illness and that Mr. Norgard -- that these records are relevant to proving that he violated those professional norms.

THE COURT: All right. Thank you.

MR. BROWN: Thank you.

THE COURT: Ms. Millsaps, do you wish to be heard further?

MS. MILLSAPS: Your Honor, if -- if *Bolin* is limited to those two documents, I read those two documents, so I withdraw my objection to *Bolin*, if -- if it is limited to those two documents.

Your Honor, many of this stuff we have, but I have a whole records room --

THE COURT: Take your mask off.

MS. MILLSAPS: I have a whole records room full of materials. I need more than just we had it. I need to know what -- what he's going to do with it.

But it seems to me, once again, Your Honor, as I understood Your Honor's order, we were going to be limited to Mr. Norgard's conduct and his interaction with the defendant and that we -- this was -- this was not going to be on the diligence prong.

If -- if he wants a particular document to cross-examine Norgard about what he was thinking, I'm not sure I -- I don't want to be in the way, Your Honor. I just want notice. That's -- that's all I'm doing.

I don't think -- we're not ready to -- to -- to argue about diligence because we didn't take Your Honor's order -- including not only the original order; but, Your Honor, when they moved to continue, a huge part of their motion to continue was based on that, and you -- you denied that as well.

So I thought there were two orders from this Court saying that we're going to be limited mainly to attorney conduct regarding the extraordinary circumstances prong.

THE COURT: Yeah. But if that conduct implicates his interaction with petitioner and petitioner's mental state -- I'm not sure why you would limit Mr. Norgard's conduct to simply what he filed or didn't file or do or didn't do without considering the potential relevance of his interaction with the petitioner, either with respect to diligence or extraordinary circumstances.

I didn't limit the hearing to either diligence or

extraordinary circumstances. We're here to explore the parameters of equitable tolling.

I don't want to -- it sounds to me that the only -- the content of these mental health records is not going to change. It is static. And I don't know that continuing the hearing to find out Mr. Norgard's reliance on them or interaction with his client concerning them is going to be furthered by your opportunity to explore them earlier.

So I'm -- I'm going to -- I will entertain objections to the use of the documents as we proceed. I will determine relevance; prejudice, if any, relative to your not having been provided them sooner. And we will see -- we will see whether or not they are admitted or not --

MS. MILLSAPS: Yes, Your Honor.

THE COURT: -- all right?

Mr. Brown, this is your burden. We'll hear from you.

MR. BROWN: Yes, Your Honor. And there's a couple of other motions that remain pending that I think it's worth addressing before we call witnesses.

THE COURT: Call my attention to them.

MR. BROWN: So just for the clerk's clarification, one of them was a motion to file the mental health exhibits under seal, so those exhibits will then be received under seal?

THE COURT: Yes, sir.

MR. BROWN: We also had respondent's request for

judicial notice, which --

THE COURT: You've heard the limitation that Ms. Millsaps has offered with respect to the judicial notice request.

Is that right, Ms. Millsaps? Your limitation is paragraph --

MS. MILLSAPS: Yes, Your Honor. As I understood Your Honor's order, the dates from the -- you didn't seem to have any trouble with the *Jones* federal docket, the docketing of that.

THE COURT: Correct.

MS. MILLSAPS: The state court dockets, you also said you didn't care about that, that you were fine with taking judicial notice of the dates in the actual docket sheets. What you wanted was notice of the underlying documents.

The only underlying document in the state court record of *Jones* I want is literally -- and I didn't want to even give you the whole -- my whole answer on *Hurst*. I wanted to give you the part of it -- the one paragraph I cared about.

So, yes, that's -- for the underlying documents, I'm going to need both of those in terms of timing, when what happened, but I can get that straight from --

THE COURT: The docket --

MS. MILLSAPS: -- the docket.

THE COURT: -- correct.

You want the Court to take judicial notice of this Jones did not file a habeas petition anytime. The habeas petition would have been due shortly after the mandate issued in 2006. And despite being listed on the certification list, as required by the Timely Justice Act, since October 4th, 2013, Jones has still not filed a federal habeas petition.

MS. MILLSAPS: Jones filed a federal habeas petition; Miller did not. Jones -- Mr. Norgard, in *Jones*, did file one. There's a federal one -- which I made the same allegations I'm making here. A motion to dismiss is untimely based on intentional conduct.

It was -- it was dismissed as moot before we got very far, okay? So there is a federal one as well. There's a federal *Jones* case.

THE COURT: All right. Then I may have --

MS. MILLSAPS: Let me give you the Middle District's number for that. It's 3:18-cv-168-J-32PDB. And it was filed -- well, the order dismissing it was April 2020. It was filed -- the federal habeas petition was filed in 2018.

THE COURT: All right. And you're objecting to the Court taking judicial notice of that, Mr. Brown?

MR. BROWN: Judge, I don't have any issue with the Court taking judicial notice of the fact that a habeas petition wasn't filed until, you know, however many years after it was due, that Mr. Norgard was the attorney. That passage from one

of the pleadings, I don't have any issue with that.

I just -- I don't know which documents in *Jones,* you know, the respondent's prepared to rely on. That was the main issue. From the beginning my position is I'm willing to stipulate to any facts from the *Jones* case, any particular documents, to examine Mr. Norgard. I'm just not entirely certain still, as we sit here, beyond that one passage, which documents respondents plan to use.

But generally speaking, I'm -- I think it might be useful if they ask specifically for a document as we go along here, because I still don't know which documents it is that they plan on relying on.

THE COURT: Well, it appears that it's the one document that contains the reference to the Timely Justice Act.

MS. MILLSAPS: Well, Your Honor, what -- yes. My passage from the state court record -- the only underlying documents I want is that passage. That is from the State's answer to the successive motion filed in state court --

THE COURT: Do you have the document?

MS. MILLSAPS: No, Your Honor. I didn't bring it with me.

THE COURT: Do we have the document?

LAW CLERK: (Nods head up and down.)

MS. MILLSAPS: As I understood it, Your Honor, the entire records, all these records, were filed with the Court.

THE COURT: They are, but they are so voluminous, it -- I need -- when we are creating this record, I need to be specific and . . .

Thank you.

It's the State's answer to successive Rule 3.851, a motion for postconviction, filed in Case No. --

MS. MILLSAPS: Filed in Case No. --

THE COURT: -- 93-CF-2757.

MS. MILLSAPS: Yes. Filed in state court --

THE COURT: Did you see this?

MS. MILLSAPS: -- January 5th, 2017.

THE COURT: Give that to him.

MS. MILLSAPS: It's also in -- available in the -- the case went up on appeal. It might be easier for somebody to get it from the Florida Supreme Court's website.

THE COURT: Do you have an objection, Mr. Brown?

MR. BROWN: Your Honor, I don't have any objection to that particular passage, as long as we're making it clear that --

THE COURT: You shouldn't have any objection to the entire document. This Court can take judicial of dockets and documents filed in this court and in state court.

So if you want to argue about the substantive effect of that at some point in time, you can do it, but I'm going to take judicial notice of it.

MR. BROWN: That's fine. I don't -- and I don't have any objection to it, and I don't want to appear as if I'm being obstructionist.

I just wanted to make clear that the arguments contained in a pleading filed by the opposing party, that I'm not stipulating that those are adjudicated facts in this proceeding. And that's the only point that I wish to make, Your Honor.

So there is no objection.

THE COURT: Very good.

MR. BROWN: And, Your Honor, may I approach the bench to return this document?

THE COURT: Please. Thank you.

MR. BROWN: Your Honor, I also have an Exhibit 17, which I intend to enter under Rule 1006, a summary to prove content.

We can address that as we get to Exhibit 17, if you prefer, or we can address that before we get started.

THE COURT: Let's address it before we get started.

What is this?

MR. BROWN: Your Honor, this is a list of cases that Mr. Norgard has handled, capital cases before the Florida Supreme Court. It is in chronological order, and it is highlighted to show the stage of litigation that each case was in.

So, for instance, the cases in green are cases that Mr. Norgard handled that were direct appeal cases. The cases in -- the way it printed it's kind of a reddish color. The 3.851 appeal cases are the cases that are in a posture -- or that -- Mr. Miller's case, the posture that it was in.

I would -- it would take voluminous records to establish the various stages that these cases were in, as well as the dates that they were filed and that they were disposed.

I've also attached on the back side of it a certified copy of the same list of cases from the Florida Supreme Court to show the accuracy and authenticity of those cases.

But this summary, the purpose of it is to give the Court and the parties an easy visual way to see what types of cases Mr. Norgard had handled throughout his career.

MS. MILLSAPS: Your Honor, we don't have any objection to this. This looks approximately like what I've looked at doing the same kind of search on the Florida Supreme Court's website.

THE COURT: Very good. It will be admitted.

(Petitioner's Exhibit 17 was received in evidence.)

MR. BROWN: And, Judge, the last thing I would ask is for the Court to take judicial notice of its own order in document 35, just establishing that the mandate was issued on April 13th, 2006, that there were 112 days remaining on the statute of limitations, and that the statute of limitations ran

on August 3rd, 2006.

I can refresh Mr. Norgard's recollection with certain documents to establish that, but I think that it will -- it will aid this hearing and the flow of this hearing if we establish from the get-go the date that the mandate was issued which caused the statute of limitations to continue to run, the amount of days that were remaining on it, and then the date that the statute of limitations actually ran.

MS. MILLSAPS: Your Honor, I think we have a disagreement on when we think the petition was due. I think we agree with the -- the mandate date is adjudicatory right on the Florida Supreme Court's website.

I think we're probably disagreeing about the days remaining. I've got the petition due June the 15th, 2006, okay? But, Your Honor, I really -- this was missed by decades. I'm not sure it's worth fighting about.

But you're going to notice in the pleadings before Your Honor in this case, that's the date we used. So I'm not sure the dates really matter, but we could each, in our post-evidentiary hearing memos to you, explain our various time calculations.

But, really, for purposes of equitable tolling, we have over a decade we have to account for, so literally less than 30 days is just not worth the fight, Your Honor.

But -- but I would like to redo -- I'm not going to

agree to something that, at least on first blush, in terms of the date it was due -- I don't think it really matters.

But our -- the date we believe it is is June the 15th, 2006. I will verify that though, Your Honor.

THE COURT: In light of the difference, Mr. Brown, I'm not going to take judicial notice of -- or to require Ms. Millsaps to accept your offer of stipulation to that date. But you can certainly reference the date that you believe is -- the dates that you believe are applicable to the timing and the process.

MS. MILLSAPS: And, Your Honor --

MR. BROWN: Yes, Your Honor.

MS. MILLSAPS: -- for purpose of this evidentiary hearing, I'm just going to use the year 2006.

THE COURT: That's fine.

MR. BROWN: Yes, Your Honor. I don't have any other preliminary matters to address with the Court. I'm not sure if the respondents have any. Otherwise, I'm ready to call my first witness.

THE COURT: Anything else preliminarily, Ms. Millsaps?

MS. MILLSAPS: No, Your Honor, no more preliminary matters from the State.

THE COURT: Very good.

MR. BROWN: And, Your Honor, I have an investigator

here who I've listed as a witness, Mr. Colin Kelly.

THE COURT: Yes, sir.

MR. BROWN: I understand that his testimony, if any, will only be to impeach Mr. Norgard, but he is present in the courtroom, if the parties want him excluded.

THE COURT: Is there a request for the rule of sequestration to be invoked?

MS. MILLSAPS: No, Your Honor. We don't care about sequestration.

THE COURT: Very good.

MR. BROWN: With that, Your Honor, I'd call Attorney Robert Norgard to the stand.

THE COURT: Mr. Norgard, if you would, please, approach the bench and then the witness stand here to my right.

Please watch your step. You have to step up to the witness stand a couple of times.

And if you'll remain standing for just a moment, our clerk will place you under oath.

COURTROOM DEPUTY: Do you solemnly swear or affirm that the testimony you're about to give before this Court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

COURTROOM DEPUTY: Please state your full name for the record and spell your last name.

THE WITNESS: Robert Norgard, N-o-r-g-a-r-d.

COURTROOM DEPUTY: Thank you. Please be seated.

THE COURT: Mr. Norgard, you can remove your mask while testifying. It will make it easier for us to hear you.

THE WITNESS: Thank you, sir, and easier to breathe.

THE COURT: Yeah, that's true.

And please pull that microphone closer to your mouth so that we can hear your testimony.

THE WITNESS: All right. How's that?

THE COURT: It's better. Thank you.

MR. BROWN: And, Your Honor, may I approach the witness with my exhibit binder?

THE COURT: You may, and you don't need to ask permission each time you need to approach him.

MR. BROWN: Thank you, Your Honor.

THE COURT: You're welcome.

MR. BROWN: Your Honor, I've provided a copy of the exhibit binder to Your Honor and to --

THE COURT: I have it.

MR. BROWN: -- the respondents. I've also -- many of the documents are certified copies of public records. I provided the clerk with copies of those certified records.

Additionally, there are a few exhibits that are certified public records where I provided the clerk with the original copy as well as a Bates stamped copy, and the Bates

stamped copy is what appears in our exhibit binder so that everyone can be aware of which pages we're talking about for exhibits that did not already have page numbers on them.

THE COURT: Very good. Thank you.

ROBERT NORGARD, PETITIONER'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BROWN:

Q. Mr. Norgard, could you just start by stating your name?

A. Robert Norgard.

Q. And what is your profession?

A. I'm an attorney.

Q. And how long have you been an attorney?

A. Since June of 1981.

Q. And what was your educational background?

A. I have a bachelor's of English from the University of South Florida and a juris doctor from Stetson University College of Law.

Q. And what did you do when you first got out of law school?

A. My first year of practice I was in a private law firm for about one year.

Q. Was that with other individuals or as a sole practitioner?

A. It was with a group called Penrose, Mouser & Harris.

Q. And what did you do after that?

A. Then I was with the Public Defender's Office for the Sixth Judicial Circuit for three-and-a-half years. Then I was with

the Public Defender's Office for the Tenth Judicial Circuit for approximately ten years, and then I've been in private practice since 1995.

Q. All right. And during your time with those two public defense organizations, what types of cases did you handle?

A. Obviously it was all criminal. When I was in the Sixth Circuit, towards the end of my time period there, I began handling capital cases. And then when I was with the Public Defender's Office in the Tenth Judicial Circuit, 90 percent of the time I was there, I was doing capital cases.

Q. And those were at the trial level?

A. Yes, sir.

Q. Did you do any direct appeals or postconviction capital work during that employment?

A. I believe when I was with the Public Defender's Office, although I didn't handle any direct appeals, I did testify in at least one postconviction hearing, death penalty case, as an expert witness.

Q. All right. And when you left employment with the Public Defender's Office --

A. Actually, it was in two different cases while I was at the Public Defender's Office. And towards the end of my time with the Public Defender's Office -- I'm not sure. Some of those would have been when I was in the Public Defender's Office and private practice, but I have testified in that role.

Q. Okay. And when you left the Public Defender's Office and went into private practice, was that in your own law firm?
A. Initially as a sole practitioner, yes, sir.
Q. Okay. And has -- over time did your law firm change at all?
A. Yes. My wife is also an attorney. She came to work in my office in the early 2000s. Her background had been in appeals. About six years ago we added another partner to our law firm.
Q. Okay. So during the relevant time period for this case, being approximately 2003 to approximately 2013, it would have been Norgard & Norgard, yourself and your wife?
A. Around 2003 it would have just been myself, but she would have been with the firm during the early -- starting about the early portions of my representation of Mr. Miller.
Q. Okay. And did you work on each other's cases, or were -- if you were appointed to a case, did you work on that only by yourself?
A. It would vary. Sometimes, with trial-level cases, I would work on those. If we had an appellate case, we would potentially both work on it. On postconviction cases, we would both work on it.
Q. Okay. Early on in -- after going out and forming your own law firm, what types of capital cases did you start handling in terms of what stage were they at?
A. Once I went into private practice in 1995, it was shortly

after that that they created the registry for capital postconviction cases. I did do some appointments in that area.

I also continued to do state-level trial cases. I did do a few direct appeals in capital cases that were court appointed, and I was also doing federal death penalty cases in Puerto Rico for about seven years.

Q. Okay. So early on after starting your law firm, you didn't do any postconviction cases; is that correct?

A. Would have been shortly after I created my law firm in 1995 that I would have, probably in '96, gotten involved in postconviction cases.

Q. Okay. Just to give a little bit of background, what's the rule in Florida that postconviction motions are filed under?

A. 3.851.

Q. And would a trial --

A. And when I -- when I first started, I believe it would have been under 3.850, then they created a separate Rule 3.851.

Q. Okay. And would a trial attorney ever handle the 3.851 -- would the same trial attorney that did the trial handle that same case's 3.851?

A. No, sir.

Q. And that's because 3.851's typically deal with ineffective assistance of counsel claims?

A. That's one area, yes.

Q. Okay. And under Florida law is a capital postconviction

attorney required to litigate all stages of subsequent litigation after the 3.851, to include federal habeas?

A. It would depend on how you were involved in the case. If you were privately retained, then it would be if you were hired for each stage of the case.

Under the registry contract, you're basically signing up to handle subsequent litigation.

Q. Okay. And explain a little bit about what -- how you would be appointed as a registry attorney.

A. Basically there's a list maintained of attorneys who are qualified to do death penalty postconviction cases. The judge assigned to -- my understanding is the judge assigned to the case would have the availability of that list to contact and see if attorneys were willing to take appointments.

Q. Okay. And is -- so what percentage of your cases were retained -- capital cases were retained versus appointed?

A. At the trial level, it's probably pretty low, like about maybe 5 percent. I believe I was retained one time on a postconviction case. Ultimately -- because of the life of postconviction death penalty cases, ultimately it was -- I was appointed.

Q. Okay. And in Mr. Miller's case --

A. And I apologize. There were two cases that I was retained in and then eventually was court appointed on.

Q. In Mr. Miller's case you were an appointed registry

attorney, correct?
A. Correct. Yes, sir.
Q. All right. And you're aware of Florida Statute 27.711(2) that states that throughout all postconviction of capital -- that an appointed registry attorney will be responsible throughout all postconviction capital proceedings, including federal habeas corpus proceedings?
A. Yes, sir.
Q. Okay. How did you first get involved in Mr. Miller's case?
A. I'm sure my office would have been contacted by the judge's office to see if I wanted -- oh, actually, I take -- I apologize.

In David Miller's case, what happened is, is he was originally represented by Capital Collateral Representatives North. That agency was disbanded at one point. What happened is, is a number of attorneys who worked in that agency, when the agency was disbanded, they kept some of the cases that they had been working on.

I was contacted by Heidi Brewer, who was the attorney that was appointed to represent Mr. Miller leading up to his postconviction evidentiary hearing. And she contacted me to assist with the litigation in the evidentiary hearing because of my having more experience at dealing with court hearing type matters involving witnesses, examination, arguments, things

like that.
Q. So she brought you in essentially for your trial experience to handle the evidentiary hearing on the 3.851?
A. At that point I'd also had appellate experience and postconviction experience, so it was based on my experience at that time.
Q. Okay.
MR. BROWN: Your Honor, I'd offer into evidence at this point Plaintiff's Exhibit for identification 1, which is a certified copy of the notice of appearance filed by Attorney Norgard.
THE COURT: Any objection?
MS. MILLSAPS: No, Your Honor.
THE COURT: It will be marked and admitted as Exhibit 1 for the petitioner.
(Petitioner's Exhibit 1 was received in evidence.)
BY MR. BROWN:
Q. Now, Mr. Norgard, how did the appointment of second-chair attorneys work at that time in Florida courts for capital postconviction cases?
A. Under Chapter 27, what happens is, is an attorney is appointed through the registry to represent the client. That attorney, by statute, can associate another attorney to work with them on the case.
Q. So that wouldn't require -- for a second chair to be

appointed, that wouldn't inquire a court order.
A. Correct.
Q. All right. And if you could turn to Exhibit 1, please.
A. (Complies.)
Q. What was the date that you appeared as co-counsel?
A. Well, my notice of appearance was -- the certificate of service was signed September 30th, 2003, and it looks like it was filed and received by the court on October 6th of 2003.
Q. And I think you've kind of already stated it, but just to be clear, who was the lead attorney on the case at that time?
A. Heidi Brewer, B-r-e-w-e-r.
Q. And eventually did Ms. Brewer withdraw from the case, and did you take over as lead counsel?
A. Yes, sir.
Q. Okay.

MR. BROWN: And, Your Honor, at this time I'd offer into evidence Plaintiff's Exhibit 2 for identification, which is a certified copy of the order appointing Mr. Norgard as registry counsel.

MS. MILLSAPS: No objection.

BY MR. BROWN:
Q. Mr. Norgard, if you could turn --

THE COURT: That will be marked and admitted without objection.

I thought I heard you say no objection, Ms. Millsaps.

MS. MILLSAPS: No objection, Your Honor.

THE COURT: Please speak up for our record. Thank you.

MR. BROWN: Thank you, Your Honor.

THE COURT: You're welcome.

(Petitioner's Exhibit 2 was received in evidence.)

BY MR. BROWN:

Q. If you could turn to Exhibit 2, Mr. Norgard.

A. (Complies.)

Q. What was the date you appeared as first-chair registry counsel?

A. The date that the order was signed was August 2nd, 2004, but it looks like it was done in a quasi-nunc pro tunc manner where it was effective June 15th, 2004.

Q. Thank you.

And did you ever designate a second chair to assist you with Mr. Miller's postconviction proceedings?

A. I did have Mrs. Norgard working on the case with me.

Q. Did she ever file a notice of appearance?

A. Not in the state court.

Q. Where did she file a notice of appearance?

A. She would have been involved with the direct appeal in the Florida Supreme Court.

Q. When you use the phrase "direct appeal," just so that we're being clear, are you talking about the appeal of the

denial of the --
A. The appeal from the denial of the 3.851.
Q. Okay. And then at some point in time you withdrew from Mr. Miller's case; is that correct?
A. Yes, sir.
MR. BROWN: And, Your Honor, at this time I'd offer into evidence Plaintiff's Exhibit 3 for identification, which is a certified copy of Mr. Norgard's motion to withdraw.
MS. MILLSAPS: No objection, Your Honor.
THE COURT: Thank you.
It will be so marked and admitted.
(Petitioner's Exhibit 3 was received in evidence.)
BY MR. BROWN:
Q. And, Mr. Norgard, taking a look at Exhibit 3, on what date did you withdraw as counsel for Mr. Miller?
A. The certificate of service is dated August 27th, 2013, and I don't see any stamp from the court showing when it was received by the clerk.
Q. All right. But for the first three exhibits, when you indicate the date of service, is it your practice to put the date that you're actually filing the motion on the certificate of service?
A. Yes, sir.
Q. Okay. What was the reason that you withdrew from Mr. Miller's case?

A. I had met with Mr. Miller on October 9th, 2013, and although there had been a number of discussions with him prior to this about his wanting to be a death volunteer, on the meeting of August 9th, 2013, he was unequivocal in his request that I pursue him being a death volunteer.

I felt that created an issue for me in terms of representing him, and I moved to withdraw.

Q. And just, again, looking at Exhibit 3, did you also indicate that you were no longer under a contractual obligation to do so?

A. That was the reason I filed with the court, and I wasn't. That was a basis for me to withdraw. I wasn't going to put in there, "Mr. Miller wants to be a death volunteer, and I disagree with him."

Q. All right. So based on the records that we've just looked at, were you Mr. Miller's sole postconviction counsel, I guess, from that nunc pro tunc June 15th, two thousand and -- I'm sorry; let me look back at the exact date so I'm not getting it incorrect -- so from June 15, 2004, when your order appointing registry counsel was effective nunc pro tunc, through August 27th, 2013, or some later date when the Court granted your motion to withdraw.

A. If you're asking if I was the sole attorney on it, Mrs. Norgard would have been involved during the time period of the direct appeal.

I would have been primarily involved as lead counsel beyond the direct appeal, but I would have talked to her about the issues we were dealing with as to his wanting to be a death volunteer.

Q. Okay. And so the law firm of Norgard & Norgard was Mr. Miller's sole representation from June 2004 through August 2013.

A. Yes, sir.

Q. Okay. Did you file a federal habeas on Mr. Miller's behalf?

A. No, sir.

Q. Why didn't you file a federal habeas petition on Mr. Miller's behalf?

A. Mr. Miller specifically did not authorize me to file a federal habeas, and he indicated if I did, that he would seek to have it dismissed and make the Court aware of his wish to be a death volunteer.

Q. What, if any, role did you believe that mental illness played in Mr. Miller's desire to volunteer for death?

A. To get into that, I'd have to go into my representation of Mr. Miller that would predate my getting ready for the evidentiary hearing.

Clearly mental health issues were a major issue in Mr. Miller's life. He had had some prior contact with the criminal justice system in North Carolina where there was

extensive mental health records, including evidence that at the time of the prior crime in North Carolina, that his capacity to appreciate criminality was impaired.

His mental illness clearly impacted on his prior criminal behavior. There was fairly extensive records regarding competency issues, things of that nature.

Q. All right. Now, I don't mean to cut you off, but we're going to be going through those records --

A. Sure.

Q. -- so we can address them as we get to them.

A. Okay. Well, basically, based on his prior mental health history, I would have been aware of that. At the time of the evidentiary hearing, some of the major evidence related to that was the mental health evidence, including the testimony of Dr. Wu.

So basically it was pretty clear Mr. Miller had mental health issues. I was aware of that. Obviously, at the time of the evidentiary hearing, it was felt that he was competent. He was present for part of the evidentiary hearing but not all of it. He was certainly competent to proceed with the court matters.

Clearly, on the other hand, he did have mental health issues. I felt that he would be competent to proceed in court based on my contact with him. I felt he would be competent to be executed under the legal standards related to that. I felt

he was competent to waive matters that he could waive as part of his case.

On the flipside of the coin, I felt that all of his desire to do any of those things was because of the mental health issues.

Q. What are those things that you just referred to?

A. Things such as wanting to be a death volunteer, things such as wanting to waive his appeal.

Q. Okay. And what would you have done had Mr. Miller attempted to volunteer to either waive his appeal or volunteer for death?

A. I would have requested a mental health evaluation for that. At the same time, I was very pessimistic about an expert finding him not to be competent to waive those matters.

Q. Is that pessimism based on your experience with courts applying the legal standards for competency, or is it based on you not thinking that mental illness was a significant factor in his desire to waive?

A. It was based on the low threshold of what is competent in order to appear at trial, competent to waive matters. You know, somebody can be a paranoid schizophrenic but still be competent to go to trial.

It's the low threshold of the legal standard to determine whether somebody has the ability to waive legal rights and the ability to appear in court.

Q. All right. So you testified that you were going to have him evaluated for his competency to make those waivers.

Was that based in part on the mental health records that you had reviewed up to that point in time?

A. Yes, sir.

Q. And was that based also on evaluations that you and Ms. Brewer had had done by mental health professionals of Mr. Miller?

A. I had not initiated or had done any of the mental health stuff. That had all been done prior to my becoming involved in the case.

Q. All right. But you presented, at the evidentiary hearing on the 3.851, mental health testimony; is that correct?

A. Yes, sir.

Q. And you would have read the reports that were created on Ms. Brewer's behalf before the evidentiary hearing?

A. I know that I would have reviewed Dr. Wu's report. There was also a report by a nurse psychologist.

I'm confident I would have reviewed it. I just don't have an independent recollection of that at this time. And looking at the report doesn't refresh my recollection, but I would have been aware of it.

Q. All right. But -- so did the -- did having read through those reports factor in to your concerns regarding Mr. Miller's competency to waive?

A. I had concerns about his mental health. I -- like I said, I firmly believed, given the low thresholds of competency, that he would be found competent.

Q. All right. Let's now just go back a little bit and talk about your representation of him in state court.

What was your role in the state court proceedings at the point where you were appointed -- where you appeared as second chair?

A. I was involved in the conducting of the evidentiary hearing.

Q. And was an evidentiary hearing held on Mr. Miller's 3.851 on November 4th and 5th of 2003?

A. I don't recall the dates, but there was an evidentiary hearing, yes, sir.

Q. Mr. Norgard, would reviewing a copy of the written closing arguments that were filed by Ms. Brewer help refresh your recollection as to the date of the evidentiary hearing?

A. I mean, I could look at a court docket, anything. I mean, I accept those are the dates.

Q. All right. I guess we'll just get there when we get there.

But who was the lead attorney during --

A. I mean, I would never -- I mean, I do not have an independent recollection of the days those occurred.

Q. I understand.

A. If the records show they were on those days, I -- they were on those days.
Q. I understand, Mr. Norgard.
Who was the lead attorney during the evidentiary hearing?
A. I don't believe we designated it one way or the other, and I think I did most of the evidentiary hearing.
Q. When you say "did most of the evidentiary hearing," are you talking about examination of witnesses?
A. Yes, sir.
Q. Okay. So it's your -- it's your recollection that you handled most of the testimony during the --
A. I believe so, yes, sir.
Q. -- evidentiary hearing.
A. Or at least -- you know, I did Dr. Wu, the trial counsel who would, in a case like this, be -- summon the more important witnesses.
Q. And at that point in time, during that evidentiary hearing, you were still appearing as a second chair, correct?
A. Yes. I mean, under the registry, they don't really call it first and second chair. It's --
Q. Or co-counsel.
A. -- for the attorney that -- yeah. Yes, sir.
Q. Okay. Just turning back briefly to Exhibit 1 and the date of September 30th, 2003, that would have been approximately --

that's the date that you appeared as co-counsel.

That would have been approximately one month before the evidentiary hearing?

A. Yes, sir.

Q. So you weren't on the case for very long before the evidentiary hearing.

A. No, sir.

Q. Okay. What types of claims are typically raised in 3.851 motions?

A. The most common is ineffective assistance of trial counsel.

Q. And were ineffective assistance of trial counsel claims raised in Mr. Miller's 3.851?

A. Yes, sir.

Q. Do you recall who Mr. Miller's trial lawyer was?

A. I believe it was Refik Miller or Refik --

Q. Eler?

A. Eler, yeah.

Q. Is that someone that you've dealt with before?

A. On a very limited basis.

Q. Do you recall if any of your postconviction ineffective assistance of counsel claims related to Mr. Miller's mental illness?

A. Well, they involved issues of not presenting evidence of his mental illness to the jury.

Q. Do you recall -- strike that.

Do you recall an additional claim that had to do with failure to present mental health experts to discuss the ramifications of certain life events of Mr. Miller's?

A. I -- I have not reviewed the 3.851 motion in quite some time. I've not looked at the -- anything related to that. So I couldn't sit here and independently say -- I know we presented mental health evidence where we felt counsel was ineffective for various reasons.

Q. Okay. And you entered that mental health documentation as an exhibit at the evidentiary hearing?

A. Again, I don't have independent recall of that, but it is part of the record, is my understanding.

MR. BROWN: Your Honor, at this time I'd offer into evidence Plaintiff's Exhibit 4 for identification, which is a certified copy of a response to the State's requests for production that was filed in Mr. Miller's 3.851 hearing.

THE COURT: Ms. Millsaps?

MS. MILLSAPS: No objection, Your Honor.

THE COURT: It will be marked and admitted as Petitioner's Exhibit 4.

(Petitioner's Exhibit 4 was received in evidence.)

BY MR. BROWN:

Q. Mr. Norgard, can you take a look at Exhibit 4.

A. (Complies.)

Q. Is Exhibit 4 a response to requests for production?
A. Yes, sir.
Q. And was that filed by Ms. Brewer?
A. Yes, sir.
Q. And does that response list a host of mental health records that the State was attempting to force production of?
A. I don't know if I'd characterize it that way, but they did list different mental health records in response to a State's requests for production.
Q. All right. And so you and Ms. Brewer were in possession of all of the documents listed in that response to requests for production?
A. At that time Ms. Brewer would be. I would not have necessarily been.
Q. All right. But when you joined the case as co-counsel, you would have had access to all of the records that Ms. Brewer had; is that correct?
A. Yes, sir.
Q. And would you have reviewed those mental health records in preparation for the evidentiary hearing?
A. Give me a chance to look down the list.
Yes, sir.
Q. All right.
MR. BROWN: And, Your Honor --
BY MR. BROWN:

Q. Or, Mr. Norgard, did you file exhibits at the evidentiary hearing?
A. I'm sure we did. I don't have independent recall of that, though.
MR. BROWN: Your Honor, I'd offer into evidence at this time Plaintiff's Exhibit 5 for identification, which is a clerk's exhibit memo listing the evidence received at the evidentiary hearing.
MS. MILLSAPS: No objection, Your Honor.
THE COURT: It will be marked and admitted as Petitioner's Exhibit 5.
(Petitioner's Exhibit 5 was received in evidence.)
BY MR. BROWN:
Q. Mr. Norgard, the Exhibit 1 listed on the clerk's exhibit memorandum, which is a background package, was that an exhibit put together consisting of Mr. Miller's mental health records that Ms. -- that you were alleging Mr. Eler should have introduced at trial?
A. Give me a chance to take a look at it.
Q. And would looking at Plaintiff's Exhibit for identification 6, which is the background packet, refresh your recollection?
A. Yes, sir.
Q. And is -- is that a -- the record -- the mental health records that you were alleging Mr. Eler should have admitted at

trial?
A. Yes, sir, or certainly information contained in those records.
There are some things -- my recollection -- and this is going back to 2003. There were some things in the records that we would not have felt were relevant and would have actually been harmful to Mr. Miller. But certainly the things that would be relevant and positive in terms of mitigation, we would have wanted to introduce.
Q. All right.
MR. BROWN: And, Your Honor, I'd offer into evidence Plaintiff's Exhibit 6 for identification, which is the background package that was entered as Exhibit 1 at the November 4th through 5th evidentiary hearing, 2003 evidentiary hearing.
THE COURT: Ms. Millsaps?
MS. MILLSAPS: No objection, Your Honor. Some of it is difficult to read, and, you know, obviously we're not necessarily -- no objection, Your Honor.
THE COURT: Very good.
They will be marked and admitted as Petitioner's Exhibit No. 6.
(Petitioner's Exhibit 6 was received in evidence.)
BY MR. BROWN:
Q. Now, Mr. Norgard, if I could just start turning to

Plaintiff's Exhibit 6, there's an index which would be on page 4 of the exhibit. There are Bates stamps in the bottom right-hand corner.

Could you turn to that --

A. I can --

Q. -- page for me?

A. Okay. What page do you want me to look at?

Q. So the index and Volume II, which -- actually, let me turn back to page 3.

There's an index on page 4 that indicates there's a Volume I and a Volume II; is that correct?

A. I have something that says Volume II. I'm not seeing a Volume I.

Q. All right. So on page 3 it indicates that Volume II was entered as the exhibit; is that correct?

A. You're looking at the exhibit -- okay. Because I don't have page numbers on any of this.

Q. You don't have Bates stamps on the bottom right-hand corner of that exhibit that say Miller EH00003?

A. Okay. I see what you're talking about. Okay. Yes. Yes, I do, yeah.

Q. Okay. So on page 3, that indicates that this exhibit was Volume II; is that correct?

A. Yes, sir.

Q. And on page 4 we have an index that indicates what was

included in Volume I, which was not filed, and Volume II, which was filed; is that correct?

A. Yes, sir.

Q. All right. And so that would have included school records, Navy records, Forsyth Stokes Mental Health Center records, Dorothea Dix Hospital records, North Carolina Department of Corrections records, VA Medical Center records, Forsyth Memorial Hospital records, Harry Krop notes from psychological evaluation, and Dr. Krop's trial testimony; is that correct?

A. Yes, sir.

Q. Now, I know this exhibit is, I believe, 434 pages, so I don't want to -- to go too in-depth into this exhibit because the record somewhat speaks for itself, but I want to ask you a couple of questions about information that you were aware of at the time of the 3.851 hearing.

So if we could start, were you aware that Mr. Miller had a history of involuntary commitment to mental health facilities and suicide attempts dating back to September of 1983?

And if it would refresh your recollection, those records are contained in Exhibit 6 on page 80.

A. And where on there are you looking at?

Q. Well, let me just ask you first, without reviewing the exhibit, were you aware -- as we sit here today, do you recall

if you were aware that Mr. Miller had been involuntarily committed in the past?
A. Yes, sir.
Q. And were you aware that he had attempted suicide?
A. Yes, sir.
Q. Were you aware that as far back as September 1983, that Mr. Miller had reported experiencing auditory hallucinations?
A. I would have reviewed these reports back at the time. I can't sit here and say I remember reading -- specifically reading these today, like, this many years later.
Q. Are you saying that you don't recall having read them, or that you don't recall the contents?
A. I would have read them, but I -- you know, I don't have an independent -- you know, at this point -- I would have read them that many years ago.
Q. All right. Can you turn briefly to Exhibit 6, page 121.
A. (Complies.)
Q. And in the center of that page in the handwritten notes does it indicate, "Patient reported auditory hallucinations who said, 'David, you better stop.' Reported depression, crying spells"?
A. Yes, sir.
Q. And you would have been aware of that at the time of the evidentiary hearing?
A. Yeah. I would have reviewed this packet before it was

submitted into evidence.
Q. Were you aware at the time of the evidentiary hearing that Mr. Miller was diagnosed with personality disorder, mixed, with avoidant, schizoid, paranoid, and borderline features and had had testing consistent with schizoid personality disorder and schizophrenia dating back to at least March 24th of 1986?
A. I knew from reviewing the records there'd been a variety of mental health diagnoses made on him and was aware that he did have mental health issues. As far as to sit here today and remember the exact ones, I can't do that.
Q. All right. And just briefly turning to page 151, middle of the page in the end of the first full paragraph, it states: "Diagnosis of schizoid personality and schizophrenia are the most commonly found with this described profile." Is that correct?
A. If it's in the report, I would agree with that. And I would have reviewed those, but to sit here today and say --
Q. All right. And just briefly, on page 153, there is a list of diagnoses; is that correct?
A. Which page?
Q. On page 153.
A. Yes, sir.
Q. And on the Axis II diagnosis there was a diagnosis of personality disorder, mixed, with avoidant, schizoid, paranoid, and borderline features?

A. From my standpoint, the simplest way I can put it is I think that it wasn't -- you know, there's an Axis I of adjustment disorder, which very honestly what I know about adjustment disorder, that makes no sense to me.

I believe he had a chronic mental health issue that never -- over time was never fully examined and diagnosed. I think he had a major Axis I mental health diagnosis and not just adjustment disorder.

That's a temporary -- that can be a temporary thing only, to a situation. I feel that certainly -- I felt his mental illnesses were worse than that as described in this report.

Q. Well, first of all, Mr. Norgard, you're not a mental health professional, correct?

A. No, sir.

Q. And these would be historical records that might -- is it possible that an individual's mental illness would progress over time?

A. The simplest way I can put it is, unlike the examiners in this particular situation who saw Mr. Miller in a limited clinical setting, I had the benefit of seeing all his mental health records over time, what the various mental health professionals felt.

I would have had the opportunity to have the benefit of Dr. Wu, the benefit of Dr. Krop, to have a much clearer

picture of what Mr. Miller's mental issues were above and beyond a clinician who saw him in a very isolated period of time.

Q. All right. And your opinion is that Mr. Miller's mental health was worse than the mental health professionals diagnosed?

A. Yeah. I don't think adjustment disorder is his main issue. I really don't.

Q. You think it was something more severe than that.

A. Yes, sir.

Q. Is it fair to say that pretty much from the beginning of your representation that you were aware of Mr. Miller's significant mental health issues?

A. Yes, sir.

Q. During the time that Mr. Miller's federal habeas statute of limitations was running and ultimately elapsed, were you aware of the various mental health diagnoses contained in Plaintiff's Exhibit 6?

A. Yes, sir.

Q. Did you and Ms. Brewer develop your own mental health evidence on top of what was contained in the historical record?

A. Yes, sir. Well, I was not involved in the development of it. I was involved in the presentation of it.

Q. All right. Were there mental health experts that were retained by Ms. Brewer prior to you appearing as co-counsel?

A. Yes, sir.
Q. All right. And was one of those individuals Dr. Joseph Wu?
A. Yes, sir.
Q. Do you know what Mr. -- or what Dr. Wu's specialty is?
A. He primarily does PET scans.
Q. Briefly, what exactly is a PET scan from a nonscientific perspective?
A. Brain imaging where the methods he used, he attempts to identify brain activity associated with mental health issues.
Q. And do you recall if Dr. Wu created a report?
A. Yes, sir.
Q. And could you take a look at Plaintiff's Exhibit 7 for identification.
A. (Complies.)
Q. Does that appear to be the report that was created by Dr. Wu as part of Mr. Miller's 3.851 litigation?
A. Yes, sir.
Q. Does it appear to have been -- I have added Bates stamps to it for ease of this examination, but does it appear to have been materially altered in any way?
A. It does not on its face, no.
Q. So this appears to be a true and correct copy of Dr. Wu's report that was provided to Mr. Miller's postconviction counsel.

A. I can only make that assumption. I mean, I can't mentally memorize a two-page report and look at it and go, "Yep, that's exactly what it is."

MR. BROWN: Your Honor, I'd offer into evidence Plaintiff's Exhibit 7 for identification, Dr. Wu's report provided to postconviction counsel.

MS. MILLSAPS: No objection, Your Honor.

THE COURT: Thank you.

It will be marked and admitted as Petitioner's Exhibit 7.

(Petitioner's Exhibit 7 was received in evidence.)

BY MR. BROWN:

Q. Would you have reviewed this report in advance of the evidentiary hearing?

A. Yes, sir.

Q. And did Dr. Wu testify at the evidentiary hearing?

A. Yes, sir.

Q. Do you recall if Dr. Wu found any evidence that Mr. Miller suffered from any brain damage or disease?

A. I mean, at this point in time, to have specific recall of that, no. I know he found abnormalities and documented it in his report and testified to it at the hearing.

Q. And do you remember Dr. Wu having diagnosed Mr. Miller with encephalopathy?

A. I mean, I don't have an independent recall of that, but

that's what's in his report.
Q. And do you recall him finding that Mr. Miller's PET scan was consistent with schizophrenia spectrum disorder?
A. His differential diagnosis was fairly broad and included a number of things, including that, yes, sir.
Q. And calling your attention briefly to the brief overview of medical history on page 2 of Dr. Wu's report, there's reference to an evaluation having been done by Dr. Krop and Dr. Golden.

Do you recognize those individuals' names?

A. Yes, sir. I would have -- yes.
Q. And was Dr. Golden retained by Ms. Brewer to do a neuropsychological assessment of Mr. Miller?
A. Yes, sir.
Q. And did he create a report for the defense team?
A. I'm looking at it right now, yes, sir.
Q. Okay.

MR. BROWN: And, Your Honor --

BY MR. BROWN:
Q. Mr. Norgard, do you recognize this report as we sit here today?
A. Yes, sir. I did review that report.
Q. Okay. And does it appear to have been materially --

MR. BROWN: Your Honor, I'd offer into evidence Plaintiff's Exhibit 8 for identification, Dr. Golden's report.

MS. MILLSAPS: No objection, Your Honor.

THE COURT: It will be marked and admitted as Plaintiff's Exhibit 8.

(Petitioner's Exhibit 8 was received in evidence.)

BY MR. BROWN:

Q. Now, Mr. Norgard, I just want to go through -- would you have reviewed Dr. Golden's report prior to the evidentiary hearing?

A. Yes, sir.

Q. Okay. On page 4 of Dr. Golden's report, under the heading Affect, did Dr. Golden find that Mr. Miller's performance on neuropsychological tests were consistent in individuals with schizoid/schizophrenic disorders?

A. Yes, sir.

Q. On page 5 of Dr. Golden's report under the heading Mediation, did Dr. Golden find, "Mr. Miller has poor ties with reality and difficulty developing accurate abstractions, especially when emotional material is involved. He is unable to perceive the world as other people do, leading to multiple misunderstandings with others"?

A. I would have reviewed that, but I don't have an independent recall of that specific reference.

Q. But that is what is in the report, correct?

A. And I believe that's -- that has to do with psychological testing and, I believe, general conclusions that can be drawn

from that.
Q. All right. On page 7, middle of the third paragraph, did Dr. Golden find that "Mr. Miller is someone who does not live in a reality-based world but in one that is more fantasy oriented"?
A. You said page 7?
Q. Yes, in the middle of the third paragraph.
A. Yeah. Again, I would have reviewed the report. As far as having specific recall of that one sentence right now, I don't.
Q. All right. And during the time that Mr. Miller's federal habeas statute of limitations was running and ultimately elapsed, were you aware of Dr. Golden's various findings regarding Mr. Miller's mental status?
A. Yes, sir.
Q. Now, do you recall if Dr. Golden's report was entered at the evidentiary hearing?
A. I do not.
Q. You don't recall if it was or not or --
A. Yeah, I --
Q. -- it was not?
A. I don't believe it was.
Q. Okay. Is it your understanding, however, that all of the other mental health records that we discussed today were entered into evidence at the evidentiary hearing?
A. Yeah. What's ever contained in that packet that was the

exhibit.
Q. All right. Now, as the second chair, did you assist Ms. Brewer with completing written closing arguments after the evidentiary hearing?
A. I'm sure I would have given input on it. I don't have independent recall of that.
Q. Would reviewing your billing affidavit from that time period help refresh your recollection?
A. Yes, sir. Again, I'm sure I did. I just don't recall specifically what I contributed to that.
Q. Okay. Is it fair to say that if the billing records contained entries for assisting Ms. Brewer with preparation of the written closing arguments, that you, in fact, assisted Ms. Brewer with the written closing arguments?
A. Yeah. I'm sure I assisted her with it, but as far as having specific recall of how I assisted her, I don't.
MR. BROWN: All right. And, Your Honor, I'd offer into evidence Plaintiff's Exhibit No. 9 for identification, which is a certified copy of the written closing arguments filed in Mr. Miller's evidentiary -- following Mr. Miller's evidentiary hearing.
MS. MILLSAPS: No objection, Your Honor.
THE COURT: They will be marked and admitted as Petitioner's Exhibit 9.
(Petitioner's Exhibit 9 was received in evidence.)

BY MR. BROWN:
Q. All right. Mr. Norgard, if we could briefly turn -- well, part of your argument was that Mr. Eler was ineffective for failing to present mental health evidence; is that correct?
A. Yes, sir.
Q. And if we could turn to page 11, there's a Bates stamped page 809 on the same page.
A. (Complies.)
Q. In subsection (C), was one of your claims failure to present Mr. Miller's prior self-help attempts and failures of the system to address them and failure to introduce into evidence voluminous and detailed records and witness testimony documenting Mr. Miller's longstanding mental health, drug and alcohol addictions, and periods when he was institutionalized?
A. Yes, sir.
Q. And on -- I'll go with the Bates stamp pages at the bottom.

On page 812, subsection (D), was one of your claims failure to develop and present compelling and persuasive PET scan evidence?
A. Yes, sir.
Q. And on page 826 there's a portion of your direct examination of Mr. Eler.

Did you question him regarding whether -- whether he was aware of Mr. Miller's involuntary commitments?

A. And, sorry, what was your question there? I had to look at the material.
Q. That's fine.
Was -- did you question Mr. Eler at the evidentiary hearing about periods in which Mr. Miller was involuntarily committed?
A. Yes, sir.
Q. Okay. Is it fair to say that Mr. Miller's mental health status was a feature of the evidentiary hearing?
A. It was one of the major aspects of the 3.851, yes, sir.
Q. The mental health records that we have reviewed here today, did that -- did those factor in to your belief that Mr. Miller was not competent to volunteer for death?
A. I never reached that conclusion.
Q. Did those records factor in to your concerns with whether or not Mr. Miller was competent to make that decision?
A. As I stated earlier, I felt he was competent. At the same time, I felt that if he did not have these mental health issues, that he would not move towards being a death volunteer.
Q. Your conclusion that he was competent, was that based on your disagreement with the standards that the Florida courts use to assess competency?
A. I can't say I disagree with them. The standards are the standards. They're very low threshold.
And I felt that Mr. Miller, you know, met that

threshold of, you know, that level of competence of, you know, for example, things like knowing what he's charged with, knowing the consequences, you know, what the penalties -- you know, the competency factors.

I felt he was competent to potentially waive any rights, but I also felt like if he did not have these mental health issues, it wouldn't be a conversation about him wanting to do that.

Q. So you believe that his desire to waive his federal habeas and other appellate rights was a product of his mental illness.

A. I guess the simplest way of putting it, we have somebody with a history of suicide, and the fact that he wanted to kill himself and had trouble living with his mental illness doesn't surprise me.

I mean, it's almost like a state-assisted suicide in this case, and he'd certainly tried to do it on his own before.

Q. Did you ever have any specific conversations with Mr. Miller about filing his federal habeas petition?

A. Yes, sir.

Q. Do you recall when those took place?

A. It would have been -- well, the simplest way -- the initial conversation I would have had with him about his pursuing his legal rights would have been at the evidentiary hearing.

Q. Let me ask you about that.

Did you meet with Mr. Miller prior to the evidentiary hearing?
A. I would have met him and been introduced to him and -- during the evidentiary hearing.
Q. And when you say during the evidentiary hearing, are you referring to specifically in court?
A. Well, the issue came up in court, and then we were allowed to talk to him privately, and those issues were discussed then.
Q. And that was the first time that you met him was in court?
A. Yes, sir.
Q. Okay. Do you recall when the federal habeas petition was due?
A. I don't know, sir.
Q. Is that something that you --
A. Apparently nobody's sure, but . . .
Q. Is that something that you were aware of at some point in time?
A. I would have, you know, been -- kept track of that, yes, sir.
Q. Is it your understanding that that petition was due sometime in the summer of 2006?
A. Yes, sir.
Q. Do you recall whether Mr. Miller was housed in the Jacksonville jail during the evidentiary hearing?
A. He was transported in the day of the evidentiary hearing,

is my recollection.

It was during the first day of the evidentiary hearing that we had the conversation that I referenced a few minutes ago. And it was at that point in time he agreed to at least waive his appearance at the evidentiary hearing and not pursue the other matters he had indicated to us and waived his appearance. And I believe he was taken back that same day.

Q. Okay. Do you recall whether or not you met with him at any time at the Jacksonville county jail?

A. Oh, no. No. He was definitely brought in from the state prison.

MR. BROWN: All right. Your Honor, at this time I'd offer into evidence Plaintiff's Exhibit 10 for identification purposes, which is a motion to transport defendant filed by Mr. Miller's postconviction counsel; Plaintiff's Exhibit 11 for identification, which is an order to transport the defendant; and Plaintiff's Exhibit 12 for identification, which is a Jacksonville Sheriff's Office custody record for David Miller.

MS. MILLSAPS: No objection, Your Honor.

THE COURT: Thank you. Plaintiff's -- excuse me, Petitioner's Exhibits for identification 10, 11, and 12 will all be marked and admitted without objection.

(Petitioner's Exhibits 10 through 12 were received in evidence.)

BY MR. BROWN:

Q. Now, Mr. Norgard, just briefly looking at Exhibit 10, is that a motion that was filed by Ms. Brewer to have Mr. Miller transported to the evidentiary hearing?
A. Yes, sir.
Q. And on Bates stamp page 763, paragraph No. 1, does that indicate that the evidentiary hearing was scheduled for November 4th through 5th, 2003?
A. Yes, sir.
Q. And then the last full sentence of the first page, page 763 on to page 764, does that state that "Undersigned counsel requests Mr. Miller be transported no later than 8:00 a.m., Monday, November 3rd. Said transport is necessary in order to allow undersigned counsel to consult with Mr. Miller in preparation for the evidentiary hearing"?
A. Yes, sir.
Q. Okay. And turning briefly to Petitioner's Exhibit 11 for -- Petitioner's Exhibit 11, which is an order to transport the defendant, does that indicate essentially that the judge granted that motion for transport?
A. I'm just now seeing it for the first time, and I probably wouldn't have even looked at this relative to the evidentiary hearing.

I believe in the motion they were asking him to be housed at the Duval County Jail, but I believe that the judge's order does not indicate that. It's just simply to be

transported for the court hearing.
Q. All right. Turning to Plaintiff's Exhibit -- Petitioner's Exhibit 12 -- I'm sorry I keep using that wrong term, Judge -- Petitioner's Exhibit 12, does that appear to be a record from the Jacksonville Sheriff's Department of Corrections for Mr. Miller?
A. Yes, sir.
Q. And does that indicate that he was admitted to the Jacksonville -- to the jail on November 4th, 2003, at 2:44 p.m.?
A. Yes, sir.
Q. And does that additionally indicate that he was released on November 6th, 2003, at 9:47 a.m.?
A. I'm looking for that.
Q. That would be under inmate information, the third category, released.
A. Yeah. I mean, that's what it says.
Q. All right. And so you did not visit with Mr. Miller at the Jacksonville jail anytime between November 4th and November 6th when he was housed there?
A. No, sir. Like I said, my recollection is they brought -- said they were transporting him -- that's what I was told, is they were transporting him in the morning of the hearing from the prison. I mean, that stuck in my head because it kind of surprised me that they didn't have him in the jail.

MR. BROWN: And, Your Honor, I'd offer into evidence Petitioner's Exhibit 13 for identification, which is an inmate movement log from the Department of Corrections for David Miller.

MS. MILLSAPS: No objection.

THE COURT: It will be marked and admitted as Petitioner's Exhibit 13.

(Petitioner's Exhibit 13 was received in evidence.)

BY MR. BROWN:

Q. And, Mr. Norgard, if you wouldn't mind -- just one moment.

Turning to page 2 of Exhibit 13, the section that's entitled Current Incarceration, does this indicate that Mr. Miller was received by the Department of Corrections July 24th of 1998?

A. Yes, sir.

Q. And that was at RMC - Main Unit.

Do you know what RMC is?

A. Yes, sir.

Q. Is that the classification division of the Department of Corrections?

A. That's my understanding, yes, sir.

Q. And does that exhibit indicate that he was transferred on July 27th, 1998, to the Florida State Prison?

A. Yes, sir.

Q. And on December 28th, 1999, was he transferred to Union

Correctional Institute?
A. Yes, sir.
Q. What is your understanding of where Florida's death row is located?
A. At those facilities.
Q. And by those facilities, are we talking about Florida State Prison and Union Correctional Institute?
A. Yes, sir.
Q. And where are those two facilities located?
A. Starke -- well, general area of Starke. One's in --
Q. Is it technically in Raiford, Florida?
A. Yes, sir.
Q. Okay. And are -- where are they in relation to one another?
A. They're, like, maybe half a mile away as the crow flies.
Q. Okay. Does that record -- again, we're looking at the current incarceration -- indicate "Out to court, Duval," on November 4th, 2003?
A. Yes, sir.
Q. And does that record indicate, in abbreviated form, returned from court on November 6th, 2003?
A. Yes, sir.
Q. And that was back to Union Correctional?
A. Yes, sir.
Q. And does that report indicate any other periods where

Mr. Miller was out of the Department of Corrections' custody after 1998?

A. No, sir.

Q. And does -- do the dates of -- that the DOC has of November 4th through November 6th, does that match with the Jacksonville jail's dates that he was in custody at the Jacksonville jail?

A. Yes, sir.

Q. Given that Mr. Miller was in the custody of the Department of Corrections at all times from 1998 and excluding November 4th through 6th, 2003, where would you have needed to go to contact Mr. Miller?

A. At the facility he's at.

Q. And would you also have had the ability to make phone calls to that facility?

A. Yes, sir.

Q. So the only way that you would have been able to speak with Mr. Miller after November 4th through 6th, 2003, would have been visiting or calling him at the Department of Corrections.

A. Yes, sir.

Q. Did you ever call or visit Mr. Miller at Florida State Prison or Union Correctional Institute?

A. Both.

Q. Okay.

MR. BROWN: Your Honor, I'd offer at this time Petitioner's Exhibit 14 for identification, which is a Florida Department of Corrections call and visitation log for David Miller Jr.

MS. MILLSAPS: No objection, Your Honor.

THE COURT: It will be marked and admitted as Petitioner's Exhibit 14.

(Petitioner's Exhibit 14 was received in evidence.)

BY MR. BROWN:

Q. All right. So if we would begin with the date September 30th, 2003, that you filed your notice of appearance as co-counsel, let's, please, turn to page 27, and that's the Bates stamped page number in the bottom right-hand corner.

In fact, let's start on page 26, if you would, Mr. Norgard.

And page 26, is that a visit that was conducted on November 21st, 2002?

A. It would appear so, yes, sir.

Q. And so that would be before your appointment as co-counsel, correct?

A. Correct. Yes, sir.

Q. On page 27 does that appear to be a visit on May 7th, 2004?

A. Yes, sir.

Q. And that would have been prior to your appointment?

A. Yes, sir.
Q. And that was Ms. Heidi Brewer?
A. Yes, sir.
Q. And then on page 28, that would be June 4th, 2004, before your appointment, a visit with Ms. Brewer?
A. Yes, sir.
Q. Now, the next record is dated Wednesday, January 17th, 2007; is that correct?
A. Yes, sir.
Q. And is that a visit with Rosalie Bolin, Investigator?
A. Correct. Yes, sir.
Q. Do you know who that individual is?
A. She was someone who at the time did some work for me on capital cases.
Q. Did you retain her to do work in Mr. Miller's case?
A. This refreshes my recollection that, yes, she would have.
Q. And Wednesday, January 17th, 2007, that would have been after your appointment as co-counsel, correct?
A. Yes, sir.
Q. And that would have been after your notice of appearance as registry attorney, correct?
A. Yes, sir.
Q. And that also would have been after the statute of limitations ran on Mr. Miller's federal habeas petition; is that correct?

A. Yes, sir.
Q. And if you'll turn to page 30, please, this one is very faint, but does that appear to be a fax cover sheet from Rosalie Bolin scheduling a visit on January 19th, 2007?
A. Yes, sir.
Q. Turning to page 31, does that appear to be a visit scheduled by Investigator Bolin on Thursday, March 1st, 2007?
A. Yes, sir.
Q. And on page 32, does that appear to be a fax cover sheet referencing the same March 2nd, 2007, visit?
A. Yes, sir.
Q. All right. Page 33, does that appear to be a request for a phone call with Mr. Miller between yourself and Mr. Miller on September 22nd, 2011?
A. Yes, sir.
Q. On page 34, does that appear to be the fax transmittal form for that Thursday, September 22nd, 2011, phone call?
A. Yes, sir.
Q. And that was between yourself and Mr. Miller, correct?
A. Yes, sir.
Q. And on page 35, does that appear to be a request for a legal phone call from you with Mr. Miller on May 3rd, 2012?
A. Yes, sir.
Q. On page 36, does that appear to be a request for a phone call between you and Mr. Miller scheduled for May 3rd, 2012?

A. Yes, sir.
Q. On page 37, does that appear to be a request for a visit between you and Mr. Miller scheduled for Friday, August 9th, 2013?
A. Yes, sir.
Q. And then on the following page, page 38, does that also seem to be a request for an August 9th, 2013, visit?
A. Yes, sir.
Q. And does it appear -- I know that the Department of Corrections has redacted this record, but does it appear that you had visited multiple clients on that day?
A. Yes, sir.
Q. And if we refer back to Plaintiff's -- or to Petitioner's Exhibit 3, which was your motion to withdraw, that motion was filed on August 27th of 2013?
A. Yes, sir.
Q. So this visit for August 9th, 2013, would have been just a couple weeks before your withdrawal.
A. Correct. Yes, sir.
Q. Do you recall what the purpose of that visit on August 9th, 2013, was?
A. I continued to maintain contact and visit with Mr. Miller about trying to accomplish two things: to try to persuade him to allow me to do something in his case, despite his request for waivers and not wanting me to do anything other than seek

his execution, and to also continue to try to keep him from taking affirmative actions on his own without my part to keep from being a death volunteer.

Q. Okay. Your testimony's not that the purpose of that visit was to notify him that you were withdrawing?

A. I did not make that decision till after I met with him, and he unequivocally wanted me to -- I mean, I -- and I couldn't even get him to waffle one bit from pursuing his being a death volunteer.

Q. All right. The Department of Corrections' records indicate that your first visit with Mr. Miller was August 9th, 2013, which was almost ten years after you first appeared in the case.

Do you believe that the Department of Corrections records are accurate?

A. No, sir.

Q. The Department of Corrections' records also indicate that in the time that you represented Mr. Miller, you had two phone calls and one visit with Mr. Miller.

Do you believe that those records are accurate?

A. No, sir.

Q. How many visits and calls do you believe are missing from the Department of Corrections' record?

A. Around the time -- and I'm referring to what I was able to pull up from our office records. I would have seen him August

5th, 2004, which would have been around the time that I took over the case from Ms. Brewer.

Q. That was a visit?

A. Yes, sir.

Q. Do you know why that's not reflected in the Department of Corrections' visitation logs?

A. I have no idea.

Q. Okay. What other calls and visits did you have with Mr. Miller?

A. A phone call March 6, 2006; a phone call March 26 --

Q. Let me just ask you about each call individually --

A. Sure.

Q. -- if you don't mind.

March 6, 2006, do you have any way of knowing whether you actually spoke to Mr. Miller on that date or just that you believe a call was scheduled?

A. On that one I'm fairly sure I talked to him.

Q. And what do you base that recollection on?

A. There -- well, there are some other records that we had that indicated a refused -- a refused phone call, so generally that would have been noted.

The records that I'm referring to is on anything before -- January of 2011 our office had a flood where some of Mr. Miller's documents were destroyed.

Q. Some or all?

A. Some.
Q. Which records weren't destroyed?
A. With respect to my representation of Mr. Miller, I was involved in his evidentiary hearing, so the materials that I utilized at the evidentiary hearing would have been maintained in my office, on our physical office site. Any ongoing things, such as contacts with Mr. Miller, those would have been kept on our office site.

When I took over the case from Ms. Brewer, the boxes and boxes that would have been generated by CCRC and Ms. Brewer prior to my involvement, those were actually, because of the number of them, put into my storage shed.

Q. All right. What are the other dates that you believe you spoke to Mr. Miller?
A. Well, March 22nd, 2006, was a scheduled phone call, and the notes we have were that he refused that call.

April 26, 2006.

Q. And do you have any idea whether that call was taken?
A. There's no indication that call was refused.
Q. But do you have any independent recollection of that conversation?
A. I know that prior to the deadline for the federal habeas that I did have contact with him and talked to him about it.
Q. What other dates do you have notations of phone calls?
A. March 16th, 2007.

Q. All right. Let me -- let me just stop you there because at this point, in 2007, we're past this -- the statute --
A. Right.
Q. -- of limitations, correct?
A. Yeah. But there was ongoing contact beyond that, but those would have been the calls relative to the statute of limitations, and the visit.
Q. All right. Briefly, if you will, could you list the other dates that you believe you had contact with Mr. Miller?
A. I believe I just said March 16th, 2007; July 20th, 2009; November 30th, 2009; August 5th, 2010; September 22nd, 2011; May 3rd, 2012; August 9th, 2013, and that would have been a visit. The others were all phone calls.
Q. All right. So of the dates that you listed, you had an August 5th, 2004, visit and an August 9th, 2013, visit, and all of the other were phone calls.
A. Correct. Yes, sir.
Q. I want to go back through a few of the records in the Department of Corrections' log, if you will, very briefly, starting on page 2.

Page 2 appears to be a May 30th, 2001, visit with Heidi Brewer; is that correct?
A. Yes, sir.
Q. Page 3 appears to be a June 13th, 2001, visit with Michael Baggett, Investigator?

A. Yes, sir.
Q. Page 4 appears to be a July 10th, 2001, visit with Heidi Brewer and --
A. Yes, sir.
Q. -- Legal Intern Sonia Loi; is that correct?
A. Yes.
Q. Page 5 appears to be a visit on August 15th, 2001, between Marc Levi, Investigator, and Sonia Loi, Legal Intern?
A. Yes, sir.
Q. Page 6 appears to be a duplicate of page 5.

Page 7 appears to be a visit on September 26th, 2001, with Heidi Brewer and Mr. Miller, correct?
A. Yes, sir.
Q. Page 8 appears to be an October 4th, 2001, visit between Amanda Regan-Worl and John Jackson, Attorneys, with Mr. Miller; is that correct?
A. Yes, sir.
Q. Page 9 appears to be a visit on December 11th, 2001, between Amanda Regan-Worl and Rosa Greenbaum.

Does that appear to be correct?
A. Yes, sir.
Q. Page 10 appears to be a visit on December 20th, 2001, between John Jackson and Michael Baggett and Mr. Miller.

Does that appear to be correct?
A. Yes, sir.

Q. Page 11 appears to be the visit between Dr. Charles Golden and Mr. Miller on January 16th, 2002.

Does that appear to be correct?

A. Yes, sir.

Q. And page 12 appears to be a January 17th, 2002, visit with Amanda Regan-Worl and Mr. Miller; is that correct?

A. Yes, sir.

Q. And page 13 appears to be a February 7, 2002, visit between Heidi Brewer and Mr. Miller.

Does that appear to be correct?

A. Yes, sir.

Q. Page 14 appears to be a February 7th, 2002, visit between Dr. Michael Herkov and Mr. Miller?

A. Yes, sir.

Q. Do you recognize who Dr. Michael Herkov is?

A. Does not ring a bell right now.

Q. Page 15 appears to be a February 11th, 2002, visit between Michael Baggett and Mr. Miller.

A. Yes, sir.

Q. Page 16, again, appears to be a visit between Mr. Herkov and Mr. Miller, this one occurring on February 21st, 2002.

A. Dr. Herkov, yes.

Q. I apologize. Dr. Herkov.

A. Yes.

Q. Does that appear to be correct?

A. Yes, sir.
Q. Page 17 appears to be a March 5th, 2002, visit between Heidi Brewer and Mr. Miller.
A. Yes, sir.
Q. And page 19 -- page 18 appears to be --
A. It also appears there was a notary present for that, or a notary involved.
Q. Okay. Page 18, March 8th, 2002, visit, Jonita Whitehead, Daniel Ashton, Amanda Regan-Worl, and Mr. Miller?
A. Yes.
Q. Page 19, March 20th, 2002, visit, Douglas Partyka and Heidi Brewer and Mr. Miller?
A. Yes, sir.
Q. Page 20, May 9th, 2002, visit, Daniel J. Ashton, Investigator, and Mr. Miller?
A. Yes, sir.
Q. Page 21, May 13th, 2002, a visit, Amanda Regan-Worl and Mr. Miller?
A. Yes, sir.
Q. Page 22, June 24th, 2002, visit, Daniel Ashton Investigator?
A. Yes, sir.
Q. Page 23, July -- it's hard to tell if it says 24th or 25th, but 2002, Dr. -- or Mr. Daniel Ashton, Investigator?
A. Yes. It appears to be the 25th. There's a written

reference to it again below there.
Q. You're correct. Thank you, Mr. Norgard.
Page 24 is an August 19th, 2002, visit, Lavern Nelson, Dan Ashton, Tiffany Murphy, and Mr. Miller?
A. Yes, sir.
Q. Page 25, November 4th, 2002, Jonita Whitehead, Investigator, and Mr. Miller?
A. Yes, sir.
Q. Page 26, November 21st, 2002, Mr. Miller and Tiffany Murphy, Attorney, correct?
A. Yes, sir.
Q. Page 27, May 7th, 2004, Heidi Brewer and Mr. Miller?
A. Yes, sir.
Q. And I believe we reviewed these starting at this point earlier in the examination.
If I'm counting correct -- just one moment, please.
If I'm counting correct, the Department of Corrections noted eight visits between Attorney Heidi Brewer and Mr. Miller, five visits between Attorney Amanda Regan-Worl and Mr. Miller, five visits between Investigator Daniel Ashton and Mr. Miller, and three visits between Mr. Michael Baggett, and three visits between Intern Sonia Loi and Mr. Miller.
Why do you believe that the Department of Corrections was able to capture all of those visits but so few of yours?
A. I don't know if they captured all their visits. I -- you

know, I know what I have in my records.
Q. Okay. And just to be clear, the period -- if we turn back to page 2, the first visit with Ms. Brewer was May 30th, 2001, correct?
A. That's what it says, yes, sir.
Q. And then the last visit, which is on page 28, which is a visit on June 4th, 2004, with Ms. Brewer, that would be approximately a three-year period --
A. Yes, sir.
Q. -- when all of those visits occurred and were captured?
A. Yes, sir.
Q. Okay.
THE COURT: Mr. Brown?
MR. BROWN: Yes, Your Honor.
THE COURT: As noticed, we'll need to stand in recess at this point until 2:00 p.m.
MR. BROWN: Yes, Your Honor.
THE COURT: We're in recess.
Thank you.
COURT SECURITY OFFICER: All rise.
(Recess from 11:00 a.m. until 2:04 p.m.; all parties present.)
COURT SECURITY OFFICER: All rise. This Honorable Court is now in session.
Please be seated.

THE COURT: Counsel, is there anything we need to take up preliminarily before Mr. Norgard takes the stand again?

MR. BROWN: Your Honor, I don't have any preliminary matters.

MS. MILLSAPS: No, Your Honor.

THE COURT: Very good.

Mr. Norgard, please retake the witness stand. I'll remind you, as you come, that you remain under oath.

And, again, watch your step.

THE WITNESS: Yes, sir. Thank you. That is tricky.

THE COURT: It is a little bit.

THE WITNESS: I have a feeling that comes from experience, that you warn people of that.

THE COURT: Mr. Brown, you may inquire.

MR. BROWN: Thank you, Your Honor.

BY MR. BROWN:

Q. Mr. Norgard, in terms of phone calls with death row inmates, was there a 30-minute maximum on the length of those calls?

A. That's my understanding, yes, sir.

Q. In terms of visits with death row inmates, is there a limitation on the length of those visits?

A. There is, but it's within the time period of the visitation hours.

Q. Okay. So, for instance, if we just very quickly turn to

page 11 of Exhibit 14, Dr. Golden -- and I apologize; the record is a little bit difficult to read.

He was able to visit with Mr. Miller from 9:30 a.m. until 11:30 a.m. and then again from 1:15 to 4:30 p.m.; is that correct?

A. Correct. Yes.

Q. And does that roughly match up with your understanding of the morning and afternoon time frames for visitation?

A. That's roughly my understanding of what times they allow.

Q. All right. Was -- were you able to call anytime you wanted if you wanted to speak to Mr. Miller, or did you have to arrange that in advance?

A. It was arranged in advance.

Q. And do you know how that was done?

A. Typically calling and getting a time and then confirming it with a fax.

Q. Is that something that you did or something that you had a support staff member do?

A. Support staff would do that.

MR. BROWN: Your Honor, at this time I'd offer into evidence Petitioner's Exhibit No. 15 for identification, which is a Florida Supreme -- certified copy of a Florida Supreme Court docket report for David Miller Jr.

MS. MILLSAPS: No objection, Your Honor.

THE COURT: It will be marked and admitted as

Petitioner's Exhibit 15.

(Petitioner's Exhibit 15 was received in evidence.)

BY MR. BROWN:

Q. Now, Mr. Norgard, if I could have you turn first to page 3 out of 4 of Exhibit No. 15.

A. (Complies.)

Q. Does that exhibit indicate that the oral argument in this case before the Florida Supreme Court on appeal was held on December 1st, 2005?

A. Give me one second here.

Yes, sir.

Q. And towards the bottom of the page, does the Florida Supreme Court docket indicate that the Florida Supreme Court denied Mr. Miller's appeal on March 23rd, 2006?

A. Yes, sir.

Q. And if you wouldn't mind turning the page, does the Florida Supreme Court docket indicate that the mandate was issued on April the 13th of 2006?

A. Yes, sir.

Q. What is your understanding of when the statute -- when statutory tolling ends for purposes of the AEDPA statute of limitations?

A. At the mandate.

Q. So starting on April 13th, 2006, the statute of limitations would have been running again; is that correct?

A. Yes, sir.
Q. Did you speak with Mr. Miller after the mandate issued to see if he had changed his mind about whether to file?
A. Yes, sir.
Q. And what date would that have been?
A. April 26th of 2006.
Q. And that was --
A. And also I would have talked to him about that previous, because I have no way of knowing when the court's going to issue an opinion or a mandate, and so I need to be prepared, you know, for it being just dropped on me at a moment's notice, so . . .
Q. But you can't check whether someone's changed their mind in the past or whether they're going to in the future, correct?
A. Right. But what I can do is confirm with them that they have a continuing desire not to pursue their appeals.
Q. All right. And so that April 26th phone call would have been the only call that occurred after the mandate was issued, correct?
A. Yes, sir.
Q. And that would have been a maximum of 30 minutes.
A. Yes, sir.
Q. Did you, at any point after you took over representation from Ms. Brewer, have Mr. Miller examined by any mental health expert?

A. No, sir. And I tried to get him to do that, and he wouldn't.
Q. Did you ever raise the issue of Mr. Miller's competency during your representation?
A. No, sir.
Q. That's not something that you would need permission from -- from the client to do, is it?
A. No, but I also didn't have any question about his competency.
Q. Did you ever draft a federal habeas petition in case Mr. Miller wanted one filed?
A. I had identified the issues and would have been prepared to move forward in a timely manner, but from the time of the evidentiary hearing through that last call, he would not hear anything about any further appeals, and my bringing it up even caused him to want me not to be his attorney if I pursued that.

He was insis- -- I mean, every phone call, every contact, he was insistent on me moving forward with him being a death volunteer. I would get him to the point in the conversation where I'd get him to at least be equivocal and end the call.
Q. Okay. My question was whether you ever drafted a federal habeas petition for Mr. --
A. I didn't draft the habeas petition, but I had the issues ready to go.

Q. As a registry attorney, how are you compensated for work done on Mr. Miller's case?
A. At an hourly rate of a hundred dollars an hour.
Q. And how would you go about collecting your fee?
A. And actually that's in state court work. If I'm doing federal work, I actually get paid more.
Q. What -- do you know what the rate was in federal court --
A. It bounces --
Q. -- during that time?
A. It bounces around so much, it's hard to keep track of. It goes up and down, but it's in the high 100s.
Q. And you wouldn't have -- or you can't bill for work done on a federal case in state court, correct?
A. Correct.
Q. And likewise, you can't bill for work done in state court in federal court.
A. Correct.
Q. So any -- any work that you did on the federal case would have to be billed in federal court.
A. Correct.
Q. And in order to bill in federal court, you would first have to at least enter a notice of appearance in federal court.
A. I would have to be appoint- -- you know, seek and get the federal appointment, yes, sir.
Q. You --

A. As a special -- I wouldn't be a CJA panel attorney, but I could get appointed on that particular proceeding.
Q. Were you ever appointed in federal court on Mr. Miller's case?
A. No, sir.
Q. And so, then, you therefore couldn't have billed for federal time in federal court.
A. Correct. I mean, any time I spent, you know, organizing the issues, anything related to that, I just ate that time.
Q. How were you -- or what did you need to do to collect your fee for work done in state court?
A. Submit a -- well, first, do a billing log and submit a motion and order, a proposed order, and then there generally might be a hearing.
Q. And so that would be a pleading that would be filed before the state circuit court?
A. Correct. Yes, sir.
Q. Was compensation for registry work your main source of income back in -- between 2003 and 2013?
A. Not even close, no, sir.
Q. What was your main source of income?
A. Private -- privately retained cases, as well as I also did court-appointed cases but not as part of the registry.
Q. Okay. Was it important for you to submit accurate bills?
A. Yes, sir.

Q. Did you swear or affirm in the motions that you filed that the -- that those were -- that your bills were accurate?
A. I don't know if that language is in there.
Q. Were you entitled to compensation for client visits, phone calls, traveling, and correspondences?
A. Yes, sir.
Q. And that would have been at the $100 an hour in state court rate?
A. Yes, sir.
Q. Was it your regular practice, between 2003 and 2013, to bill for client visits and phone calls?
A. Yes, sir.
Q. Was it your practice to bill for phone calls where the client refused those calls?
A. Sometimes I would; sometimes I wouldn't. I mean, that -- I -- you know, that varies.
Q. And those would be very short calls, correct?
A. To give you an example what I'm referring to, at the time this was going on, I would probably, as a general rule back then, have had my secretary initiate the call, and then I would get on the line when the client got there.

So if my secretary simply called and they said he refused the call, I would not bill for that. If I actually made the call, had the communication with the correctional officer, I would have probably billed for that, like, a tenth

of an hour.
Q. Okay. And is the tenth of the hour the minimum billing period?
A. Yes, sir.
Q. And how long would a call such as that actually have taken, in terms of finding out from the deputy that the individual had refused the phone call?
A. Take a couple, three minutes.
MR. BROWN: Your Honor, I'd offer at this time into evidence Petitioner's Composite Exhibit 16, which contains Exhibits 16A through 16H, which are billing motions filed by Mr. Norgard in the state circuit court.
THE COURT: That is what they appear to be.
Any objection?
MS. MILLSAPS: No, Your Honor.
THE COURT: They'll be marked and admitted as Plaintiff's Exhibit -- excuse me, Petitioner's Exhibit 16A through 16H.
(Petitioner's Exhibits 16A through 16H were received in evidence.)
BY MR. BROWN:
Q. Mr. Norgard, if you'd turn first to Exhibit 16A, does that appear to be a motion for order directing payment of approved expenses (Norgard) filed by Heidi Brewer?
A. Yes, sir.

Q. And I think we talked about this a little bit earlier, but -- so at the time that you were appointed or at the time that you appeared as co-counsel, your billing would have been done through Ms. Brewer; is that correct?
A. I believe I would file a separate motion.
Q. Okay. That doesn't appear to be what happened in this situation; is that correct?
A. This was just related to expenses, not attorney's fees.
Q. All right. And with regards to Exhibit 16A, is that related to travel for a witness by the name of Deborah Lee for the evidentiary hearing?
A. If you could show me where it indicates that, it would probably expedite things.
Q. Yes, sir. If we --
A. Okay. I see something on there indicating -- yeah, for -- on my letterhead, something that has to do with "For witness Deborah Lee."
Q. Okay. And there is a -- there appears to be an airline ticket and a hotel stay for Ms. Deborah Lee?
A. Yes, sir.
Q. Okay. And so you essentially fronted the expenses for Ms. Lee to attend the November 2003 evidentiary hearing and were compensated for that, correct?
A. I sent -- the way it works with the registry is that, by contract, which you have no negotiating power over, you

essentially have to front costs like this. So it comes out of my pocket, and then I have to get reimbursed.

Q. Okay. If we can turn to Exhibit 16B, please.

A. (Complies.)

Q. Does that appear to be a motion for order directing payment of approved attorney's fees (Norgard) once again filed by Attorney Heidi Brewer?

A. Yes, sir.

Q. And is there an affidavit attached to that motion describing the work that you were being compensated for?

A. Yes, sir.

Q. What is the date, the beginning date, of that affidavit?

A. September 29th, 2003, through -- if you want to go there -- May 3rd, 2004.

Q. All right. And just as an example, the very first entry there is a phone call to and from co-counsel which you billed for .1 hours.

A. Correct.

Q. So you were billing essentially for six minutes of work in that situation.

A. Correct. Yes.

Q. And ultimately you were compensated $7,880?

A. Yes, sir.

Q. And you signed that affidavit on the last page, correct?

A. Yes, sir.

Q. All right. If we could turn to Exhibit 16C, please.
A. (Complies.)
Q. Is that a motion for delivery service reimbursement filed by you?
A. Yes, sir.
Q. And was that filed on November 29th, 2004?
A. Yes, sir.
Q. And does that appear to be a bill for essentially picking up and delivering Ms. Brewer's records to yourself?
A. Yes, sir.
Q. And that date of October 1st, 2004, would have been right around the time that you took over as first-chair counsel, correct?
A. Yes, sir.
Q. All right. If we could please turn to Exhibit 16D.
A. Okay.
Q. Does that appear to be a motion for payment of attorney's fees?
A. Yes, sir.
Q. Filed by yourself on April 28th, 2005?
A. Yes, sir.
Q. And what are the dates that that affidavit -- the affidavit attached to that cover?
A. February 16th, 2005, through March 14th, 2005.
Q. And, Mr. Norgard, are there any notations about calls or

visits between you and Mr. Miller?
A. No, sir.
Q. And I neglected to ask you that question with regards to Exhibit 16B.
If you could turn back to the affidavit in 16B, are there any notations for calls or visits between you and Mr. Miller in Exhibit 16B?
A. Give me one minute to flip back.
Yeah. This all had to do with the evidentiary hearing, so I was not acting as Mr. Miller's primary counsel at that point in time, and I would not have had -- or have any records setting up any phone calls during that time period.
Q. Okay. But the exhibit also doesn't reflect any of those having taken place, correct?
A. I wouldn't have set any or done any.
Q. And if we turn back to Exhibit 16D, what stage of the litigation was that?
A. 16D was related to the state habeas petition in the Florida Supreme Court.
Q. And I think you already answered, but there's no indication that you had any visits or calls during that period, correct?
A. Correct. Yes, sir.
Q. If we could turn to Exhibit 16E, motion for payment of attorney's fees filed by you on November 5th, 2016 [verbatim];

is that correct?
A. Yes. Let me look at the date. Yes, sir.
Q. And what are the dates covered by the affidavit?
A. July 2nd, 2005, through September 14th, 2005.
Q. And are there any notations in that affidavit that indicate that you met or called Mr. Miller during that time period?
A. No, sir.
Q. What stage of the litigation does that appear to cover?
A. This would have been the appeal from the denial of the 3.851 motion.
Q. If we could turn to Exhibit 16F, please.
A. (Complies.)
Q. Does this appear to be a motion for payment of investigator fees and costs filed by you on March 21st, 2007?
A. Yes, sir.
Q. And does that include an affidavit submitted by your investigator, Rosalie Bolin?
A. Yes, sir.
Q. And does that --
THE COURT: Mr. Brown, let me stop you. I think you misidentified the date. Earlier, in referencing Exhibit 16E, you identified the relevant date to be November 16th [verbatim], 2016.
MR. BROWN: I apologize, Your Honor.

THE COURT: You intended to say November 5th -- I mean, 2005, did you not?

MR. BROWN: That's correct.

THE COURT: Okay. I just . . .

MR. BROWN: Thank you, Your Honor.

THE COURT: Uh-huh. Thank you.

BY MR. BROWN:

Q. All right. Turning back to Exhibit 16F, that includes an affidavit from Ms. Bolin, your investigator, correct?

A. Correct. Yes, sir.

Q. And Ms. Bolin's affidavit includes a notation from January the 19th, 2007: Description of services, client contact, and then a -- well, is that correct?

A. Yes, sir.

Q. And an additional notation: March 2nd, 2007, travel to and from UCI. Client contact, delivered military records; is that correct?

A. Yes, sir.

Q. Now, if we turn back to Exhibit 14 briefly, on pages 29 -- beginning on page 29, there was a visit by Ms. Bolin on January 17th, 2007, correct?

A. Yes, sir.

Q. And on page 30, there was a visit on --

A. Page 31 was the --

MR. BROWN: Just a moment, Your Honor, if I may.

THE WITNESS: Page 31 was the March visit.
BY MR. BROWN:
Q. I misspoke.
On page 29 the visit took place on January 19th, 2007, correct?
A. Yes, sir.
Q. Corresponding with the date in her billing affidavit, correct?
A. Yes, sir.
Q. And then on page 31, there is a visit on March 2nd, 2007, for Ms. Bolin, correct?
A. Yes, sir.
Q. And that would correspond also with the visit contained in her billing affidavit, correct?
A. Yes, sir.
Q. If you wouldn't mind turning back to Exhibit 16, subsection G, is that a motion for reimbursement filed by yourself on December the 13th, 2007?
A. Yes, sir.
Q. And the affidavit attached to that exhibit, does that appear to be a bill for storage fees?
A. Which one are we on now, 16 --
Q. 16G.
A. G. Okay.
Yes, sir.

Q. And the dates -- what are the dates that you had Mr. Miller's records in storage listed on that affidavit?
A. February 2006, March through December 2006, January through December 2007.
Q. And you had an off-site storage facility?
A. Yes, sir.
Q. And that's where -- what this bill would be referencing?
A. Yes, sir.
Q. And so you began storing Mr. Miller's file at your off-site storage in February 2006?
A. No, sir.
Q. Is that what the exhibit indicates?
A. No. I mean, I'd have to go back and look at when Ms. Brewer shipped me these items.
Q. Well, Mr. Norgard, Exhibit No. 16G indicates that you billed the State of Florida $103.60 beginning in February of 2006 for Mr. Miller's case, though --
A. Okay. Can we --
Q. -- correct?
A. Okay. Can we go back to when Ms. Brewer sent me the documents?
Q. Sure. What --
A. And when was that? Which exhibit was that and when were they sent?
Q. That would be Exhibit 16C.

A. Okay.
Q. And so does that indicate that the files were delivered to you in October -- October 1st of 2004?
A. Correct. So they would have been in my storage site from October 1st, 2004.
And my recollection is what was done is that the cost of storage was allocated over a number of cases I had that required storage.
Q. Okay. Why didn't you bill for storage between October of 2004 and February of 2006?
A. I either allocated it on a different case where I had the storage, or I didn't bill for it.
Q. Well, Mr. Norgard, on this exhibit, if we look at the total of $1,986.80, you divided that by four for the total bill due in Mr. Miller's case, did you not?
A. Yes, sir.
Q. So that would indicate -- would it not? -- that you were dividing that by the number of clients' files that you were storing.
A. That's very possible. I mean, the bottom line is, is somebody told me I could get paid for the storage if I was keeping capital cases. That's the time period I billed for, but his files were in my storage facility from 2004 till I turned them over to successor counsel.
Q. And, Mr. Norgard, that bill was filed -- or the motion

for -- containing that bill was filed December 13th, 2007, correct?
A. Yes, sir.
Q. And you went back to February 2006 with that bill, correct?
A. Correct.
Q. Is there any reason that you couldn't have included in that bill October 1st, 2004, through February 2006?
A. My recollection is, is that Mr. Catledge, who handled this for Department of Financial Services, indicated he would do it this one time, but normally they didn't compensate for us having to pay for storage.
Q. Mr. Norgard, if we could turn briefly back to Exhibit 15, which is the Florida Supreme Court docket page.
A. (Complies.)
Q. And the mandate, again, issued on April 13th, 2006, correct?
A. Yes, sir. And if I could -- I could actually -- if I could go back, you're asking me to remember back 15 years with office things.

Initially I may have stored some of my postconviction cases on site at my main office. In the interim period I changed office locations.

I'd have to go back and look at my storage records as to when I started having a separate storage facility versus

keeping them at my office, the office where the flood occurred. By then I know I had a storage facility.

Q. Okay.

THE COURT: Mr. Brown, let me stop you for a moment.

MR. BROWN: Yes, Your Honor.

THE COURT: These records do certainly reflect the testimony you've been able to elicit from Mr. Norgard. I'm having some difficulty understanding their relevance to your argument.

MR. BROWN: With specific regards to the storage?

THE COURT: Yes, sir.

MR. BROWN: Your Honor, the -- Exhibit 15 establishes that the oral argument was held on December 1st of 2005. Two months later the files went into storage. And as I get to the subsequent billing, it will indicate that there was no billing done after the oral argument in this case.

So the implication would be that the file was sent to storage because Mr. Norgard was finished with his work on the case.

THE COURT: All right. Proceed.

You could ask him if he was finished.

MR. BROWN: Yes, Your Honor.

BY MR. BROWN:

Q. Were you finished working on the case?

A. No, sir.

Q. Turning to Exhibit 16H, which is -- does that appear to be an order for payment of attorney's fees filed by you on June 25th of 2013?
A. Yes, sir.
Q. Actually, that -- I'm sorry. That was an order of the court issued on June 25th, 2013, in relation to a motion for attorney's fees filed by you on June 24th of 2013; is that correct?
A. Yes, sir. Yes, sir.
Q. And is there a billing affidavit attached to that?
A. Yes, sir.
Q. And what are the dates covered by that billing affidavit?
A. November 23rd of '05 through December 1st of '05.
Q. Now, this was a bill filed in 2013 for work done in 2005, correct?
A. Yes, sir.
Q. And are there any notations in that affidavit indicating any visits or calls with Mr. Miller?
A. No, sir. I mean, also there's nothing in here about my conferring with co-counsel. I primarily just billed for the major work items.
Q. By 2005 there was no co-counsel in the case; is that correct?
A. No, that's not correct. I'd already said that Mrs. Norgard was working with me on the case.

Q. All right. Mr. Norgard, is there a notation in any of your bills that you consulted with Mrs. Norgard on this case?
A. I -- because of the nature of the relationship, a lot of times I don't bill for it because . . .
Q. Okay. But the fact -- you filed this motion in 2013 for work in 2005, correct?
A. That's what it says, yes, sir.
Q. And so in 2013 you could have -- if you could include things from 2005, you could have included anything in that bill for work that you had done on the case, correct?
A. If I still kept -- had those records.
Q. And what stage of litigation does Exhibit 16H cover?
A. That had to do with the oral argument.
Q. Mr. Norgard, are you aware of any other bills that you filed in this case after that bill?
A. No. I did not, no.
Q. And the date that this was filed, on June 24th, 2013, that was about a month before you withdrew from the case; is that correct?
A. Yes, sir. And as you stated earlier, I wouldn't include in my state court bills anything that I considered work relative to habeas. Once the mandate was issued, I wouldn't have had a basis to make any application for state court payments.
So to correct what I said earlier, things that were

done post mandate I would have considered work related to a potential habeas and not something I could have billed the state court for.

Q. Okay. So your -- your testimony is that you represented Mr. Miller from 2005 through 2013 for no compensation.

A. Basically, yes.

Q. If I --

MR. BROWN: Your Honor, at this time I'd offer Petitioner's Exhibit 17 for identification, which is the summary to prove content of Mr. Norgard's Florida Supreme Court cases, which I believe we addressed at the beginning and there was no objection.

MS. MILLSAPS: That is correct, Your Honor.

THE COURT: Very good.

17 will be marked and admitted. It's a petitioner's exhibit.

BY MR. BROWN:

Q. All right, Mr. Norgard. We talked a little bit about your experience in capital cases. I want to just briefly go over, chronologically, that experience.

The first five cases that you litigated in front of the Florida Supreme Court, were those all direct appeal cases?

A. Yes, sir.

Q. And -- and just so I'm being clear, we're talking exclusively of capital cases, so my questions are not in

reference to any -- any other appeals you might have had.
A. Yeah. Those five cases were direct appeals in capital cases.
Q. All right. And then the sixth case you handled was Jermaine Lebron.
That was a resentencing direct appeal, was it not?
A. Yes.
Q. And for practical purposes, a resentencing direct appeal is no different than a direct appeal, with the exception that you don't address the guilt phase claims; is that correct?
A. Correct. Yes, sir.
Q. All right. And the next two entries that you argued before the Florida Supreme Court are Marvin Jones and David Miller; is that correct?
A. Yes, sir.
Q. And those were each 3.851 cases.
A. Yes, sir.
Q. And so those were the first 3.851 appeal cases that you handled before the Florida Supreme Court.
A. Yes, sir.
Q. And were those also the first two 3.851 cases you handled before the state circuit court?
A. Yes, sir.
Q. And based on the dates that those were filed, Marvin Jones was February 28th of 2004 -- is that correct?

A. Yes, sir.
Q. And David Miller was May 24th of 2004, correct?
A. Correct.
Q. And Marvin Jones' case was disposed April 13th of 2006, correct?
A. Yes, sir.
Q. And as we've already discussed, David Miller's case was disposed March 23rd of 2006; is that correct?
A. Correct. Yes, sir.
Q. All right. And then the next 3.851 case that you handled would have been Juan Carlos Chavez, correct?
A. Yes, sir.
Q. And that would have been filed before the Florida Supreme Court in May of 2007?
A. Yes, sir.
Q. And disposed in June of 2009.
A. Correct.
Q. And the next case would have been -- next 3.851 case would have been Oscar Ray Bolin filed in October of 2008 and disposed in July of 2010, correct?
A. Yes, sir.
Q. The next 3.851 case you handled was Kenneth Stewart filed in November 2008, disposed May 2010.
A. Yes, sir.
Q. And then Theodore Rodgers, filed November 2011, disposed

May 2009?
A. Yes, sir.
Q. And Robert Long, January 19th, 2012, filed; July 11th, 2013, disposed, correct?
A. Correct. Yes, sir.
Q. Now, I want to talk a little bit about the Marvin Jones case.
You were Mr. Jones' 3.851 counsel, correct?
A. Yes, sir.
Q. And you were Mr. Jones' 3.851 appeal counsel, correct?
A. Correct. Yes, sir.
Q. And ultimately you were Mr. Jones' federal habeas counsel, correct?
A. Yes, sir.
Q. Now, your -- or my office was appointed under very similar circumstances in Mr. Jones' case as we were in Mr. Miller's case; is that correct?
A. I -- I don't know how similar they are or how similar I would attach them to each other; but, yes, you did get appointed on Mr. Jones.
Q. All right.
MR. BROWN: And, Your Honor, at this point I would offer into evidence Petitioner's Exhibit 18 for identification, which is a motion for substitution of habeas counsel due to ethical dilemma. That's a certified copy.

MS. MILLSAPS: No objection, Your Honor.

Just for the record, I wrote that.

THE COURT: It will be marked and admitted.

(Petitioner's Exhibit 18 was received in evidence.)

MS. MILLSAPS: Yes. The exhibit is my exhibit. I wrote it in the Jones' case, Your Honor. I was the attorney in Jones, is what I'm telling you.

THE COURT: Thank you.

BY MR. BROWN:

Q. In fact, Mr. Norgard, you were appointed in Marvin Jones' case; I was appointed in Mr. Jones' case; Ms. Martin was appointed in Mr. Jones' case; and Ms. Millsaps was --

A. I -- yes. I believe so, yes.

Q. Okay. And if we take a look briefly at Exhibit 19 [verbatim].

A. (Complies.)

Q. In the first page, Ms. Millsaps argued in her motion for substitution that "Federal habeas counsel Norgard intentionally missed the deadline as part of a strategy to avoid ever being considered eligible for a death warrant."

Is that correct?

A. That's what it says.

Q. That -- it's correct that that's what Ms. Millsaps alleged in that case, correct?

A. Yes, sir.

Q. And that essentially is what -- a similar allegation is what led us all here today; is that correct?
A. Yes, sir. I mean, other things, but . . .
Q. Now, you, I assume, have had attorney-client privileged conversations with Mr. Jones; is that correct?
A. Yes, sir.
Q. And he has not waived the attorney-client privilege; is that correct?
A. No, sir, not to my knowledge.
Q. And Mr. Jones has passed away; is that correct?
A. Correct. Yes.
Q. All right. And so as I ask you some questions about Mr. Jones' case, I do not intend to ask you anything that would cover attorney-client privileged materials, but I do want to ask you some general questions about Mr. Jones' case.

Have you ever discussed your litigation strategy in Mr. Miller's case or in Mr. Jones' case with Ms. Millsaps or anyone from the Attorney General's Office?
A. Not to my recollection, no.
Q. Did you intentionally miss the deadline in either Mr. Miller or Mr. Jones' case to keep them off of a warrant-eligible list?
A. No, sir.

MR. BROWN: Your Honor, I'd also offer into evidence Petitioner's Exhibit 19 for identification, which is an order,

document 17 from the Marvin Jones case, and it's a certified copy.

THE COURT: Without objection, I presume?

MS. MILLSAPS: (Shakes head from side to side.)

MR. BROWN: Thank you, Your Honor.

THE COURT: For the record, Judge Corrigan wrote this one.

MS. MILLSAPS: Yes. Exactly.

THE COURT: It will be marked and admitted as Petitioner's Exhibit 19.

(Petitioner's Exhibit 19 was received in evidence.)

BY MR. BROWN:

Q. All right. And, Mr. Norgard, just looking briefly at Exhibit 19, that just establishes what I've already covered, which is that my office was appointed to do an analysis of -- for equitable tolling; is that correct?

A. Yes, sir.

Q. Okay. Now, if we turn briefly back to Exhibit 17, which is the color-coded chart of your cases -- well, to begin, the first two cases that you would have had federal habeas petitions due would have been Marvin Jones and David Miller, correct?

A. Yes, sir.

Q. And those would have been due -- it's hard to deduce from this exhibit the exact date that they would have been due, but

the statute of limitations would have been -- would have resumed running in each of their cases in 2006, correct?
A. Yeah. My rec- -- on Mr. Jones, I know it was a relatively short time period because this was an early case where there had been a shell motion filed, and then I got involved and filed the actual motion. It was very convoluted.
Q. But the time remaining would depend on how early the 3.851 was filed within the statute of limitations.
A. Correct. Yes.
Q. But in any event, that period is a maximum of one year, correct?
A. Yes, sir.
Q. So even if you filed the 3.851 on the first possible day, those petitions would have been due, at the latest, in 2007.
A. Yes.
Q. Okay. The next case that you had a -- that you were 3.851 counsel, that was Juan Chavez, correct?
A. Yes, sir.
Q. And his case was not disposed until June of 2009, correct?
A. Yes, sir.
Q. And so his petition would not have been due until, at the earliest, June of 2009 but potentially up to a year after that, correct?
A. We were actually Mr. Chavez's, I believe, third registry attorney, and the times had already been blown by then.

Q. Okay. So I guess -- so the time was already blown by the time you filed a federal habeas motion?
A. By the previous attorneys, yes, sir.
Q. Okay. And it's also true that the time to file a federal habeas -- so let me ask you this way.
Mr. Chavez, his federal habeas petition was dismissed because it was filed outside of the statute of limitations.
A. Correct. Yes.
Q. But that was a case where you got involved after that time had already passed, correct?
A. Correct. Yes, sir.
Q. All right. Now, Mr. Stewart and Mr. Bolin, their federal habeas petitions were also dismissed for being filed outside the statute of limitations; is that correct?
A. On Bolin it was a weird situation where, when we drafted the 3.851, what happened is, is we had prepared an affidavit that was the correct -- or the correct --
Q. Let me stop you briefly.
Who's "we"?
A. My office had drafted the correct -- the correct -- you know, what the inmate needed to sign at that time. Somebody -- I don't know who -- substituted, unknown to me, a best -- "to the best of my knowledge." And it was stricken for that reason, and that caused the time to be blown.
Q. All right. So in Mr. Bolin's case, the 3.851 that was

filed was deemed to be not -- not timely filed because of an error with the -- I'm sorry. Let me strike that.

A. A corrected -- a corrected amended motion was filed with the correct attestation by the defendant.

And then I inherited Mr. Long's case, and in that case they related it back to the correct motion.

So in one case I had, they said the relate-back rule of Florida did not apply, in Bolin, but it did in Long, so go figure.

Q. Okay. So the statute of limitations is tolled by a properly filed 3.85 petition, correct?

A. Correct. Yes, sir.

Q. In Bolin's case it was ruled that your office filed an improperly filed 3.851 petition; is that correct?

A. Based on the attestation by the defendant.

Q. And at that period of time, it was required that a criminal defendant attest to the accuracy of the motion?

A. Correct. Yes.

Q. And that was what caused it to be imperfect, correct?

A. Yes.

Q. And so ultimately Mr. Bolin's federal habeas was dismissed as being filed outside the statute of limitations.

A. Yes, sir.

Q. And is it your recollection that Mr. Stewart's case was also dismissed for being filed outside the statute of

limitations?
A. Yeah. And, again, that was a case I inherited where the time had already been missed.
Q. Okay. So Mr. Chavez and Mr. Stewart were both cases that you inherited --
A. Correct.
Q. -- where the time had already been blown --
A. That's --
Q. -- correct?
A. That's my recollection, yes, sir. I know definitely on Chavez. That -- that was so bad, but -- okay.
Q. And so the first three cases where you were responsible for filing the federal habeas petition, Marvin Jones, David Miller, and Oscar Ray Bolin, all three of those were dismissed for failure to timely file a federal habeas petition; is that correct?
A. Yes, sir. And on Bolin they did -- even though they didn't utilize the relate-back rule like they did in Robert Long to determine when the affidavit was -- or the motion was considered a legally sufficient motion, they did also review it on the merits and deny it on the merits as well --
Q. Okay.
A. -- Mr. Bolin's case.
MR. BROWN: Your Honor, I'd offer into evidence Petitioner's Exhibit 18 and Petitioner's Exhibit 19, which are

certified copies -- actually, did I -- I'm sorry. Did I enter these exhibits previously?

THE COURT: You did.

MR. BROWN: What I meant to enter at this time, Your Honor, is Petitioner's Exhibit 20 and Petitioner's Exhibit 21, which are orders from Oscar Ray Bolin's case, and they are both certified copies.

THE COURT: Without objection?

MS. MILLSAPS: No objection.

THE COURT: They will be so marked and admitted.

(Petitioner's Exhibits 20 and 21 were received in evidence.)

MR. BROWN: If I may have a moment, Your Honor?

THE COURT: You may.

(Pause in proceedings.)

MR. BROWN: May I proceed, Your Honor?

THE COURT: You may.

BY MR. BROWN:

Q. All right. Mr. Norgard, I want to briefly turn back to Exhibit 17, the color-coded list of your cases.

A. I'm still on it.

Q. You're still on it.

There were Theodore Rodgers, which was disposed of in May 2013, and Robert Long, which was disposed in July of 2013.

A. Yes, sir.

Q. And were those petitions timely filed?
A. Yes, sir.
Q. And do you recall the dates that those petitions were filed?
A. I do not.
Q. Would it refresh your recollection to review docket sheets from --
A. I would have to do that.
Mr. Rodgers' case was one where fortunately we were involved early on, versus a lot of these cases where we were successor attorneys.
Mr. Long's case, like I say, we had to relate -- had to litigate the issue of the relate-back rule, which was pretty tricky. But the court in that agreed with us, so . . .
MR. BROWN: And may I approach, Your Honor?
THE COURT: You may.
THE WITNESS: I mean, you can just show me the date that --
THE COURT: Have you provided copies to opposing counsel?
MR. BROWN: I have copies for opposing counsel, Your Honor, but I have not previously provided them.
And, Your Honor, these are docket sheets for Mr. Long and Mr. Rodgers from the state court, and I'm asking to refresh Mr. Norgard's recollection as to the date that --

THE WITNESS: I mean, you can show me the date, but it's not going to refresh my recollection. I mean, I would not remember the date.
BY MR. BROWN:
Q. Okay.
A. The date would be whatever it says.
Q. Would you dispute that Mr. Rodgers' federal habeas petition was filed May 17th of 2013?
A. No, sir.
Q. And would you dispute that Mr. Long's petition was filed August 12th of 2013?
A. No, sir.
Q. Is it true that the Rodgers and Long habeas petitions were the first timely filed habeas petitions that you filed?
A. I think Bolin was filed timely. The court felt otherwise --
Q. Okay.
A. -- on the same grounds that they determined Long was timely filed, so . . .
Q. But in terms of -- in terms of what the court ruled, were those the first two petitions that were considered timely filed?
A. Yes, sir.
Q. And so in May 2013 when you filed the Rodgers petition, that would have been a little under seven years after

Mr. Miller's petition was due in --
A. I didn't pay --
Q. -- summer of 2006?
A. I did not pay enough attention to do the math, so . . .
Q. All right. You'd agree that between --
A. If it was 2006 to 2013, seven years, yes.
Q. Approximately seven years.
A. Yes, sir.
Q. When you were appointed to Mr. Miller's case in 2003, along with Mr. Jones', you had -- you had -- did that occur around the same time, approximately?
A. I got involved in Mr. Jones's case in 1996.
Q. In what capacity?
A. As the registry counsel.
Q. What stage of the litigation?
A. There had been a shell motion filed, and I took over the case from CCRC.
Q. Okay. In 2006, when both of their petitions were due, at that stage you had no federal habeas experience; is that correct?
A. No, sir.
Q. That's not correct?
A. I mean no, that is correct. I mean --
Q. Okay.
MR. BROWN: Your Honor, may I have a moment to

consult with counsel, co-counsel?

THE COURT: You may.

(Pause in proceedings.)

MR. BROWN: Your Honor, I have no further questions for Mr. Norgard.

THE COURT: Thank you, Mr. Brown.

Cross-examination, Mr. Kennett.

MR. KENNETT: Your Honor, with the Court's permission, I'd like to be the attorney who cross-examines.

THE COURT: That's fine.

CROSS-EXAMINATION

BY MR. KENNETT:

Q. Mr. Norgard, who made the decision to forgo the filing of a 2254 petition, you or the petitioner?

A. Mr. Miller.

Q. And when did he first communicate to you his desire to forgo filing a 2254 petition?

A. Essentially at the evidentiary hearing.

Q. And when you refer to the evidentiary hearing, you're referring to the state postconviction evidentiary hearing, correct?

A. Correct.

Q. And around what time was that, what year?

A. We've talked about the dates --

Q. It's okay if you don't recall.

A. -- but it was two thousand --
Q. That's fine.
A. November the 6th and the 7th or somewhere in 2003.
Q. 2003.
A. Yes, sir.
Q. Thank you.
And then after the mandate was issued by the Florida Supreme Court and the denial of his state postconviction appeal, you reached out to petitioner again, correct?
A. Yes, sir. I mean, I've reflected the dates that I have in my records that I would have had contact with him.
Q. And at that time he affirmed his desire to forgo filing a 2254 petition, correct?
A. Yes, sir.
Q. At any time did the petitioner ever communicate to you that he wanted you to file a petition in federal habeas?
A. The opposite. He basically threatened to get rid of me as counsel and move forward as a death volunteer if I filed anything.
Q. So the answer is no.
A. No. The answer's no.
Q. And you never had any -- you never -- you thought that the petitioner was competent to make that decision, correct?
A. Yes, sir, particularly at the time of the evidentiary hearing. I was -- I mean, I was floored when we're moving

through the evidentiary hearing and Mr. Miller said that he wanted it to stop.

We were allowed to have a private conversation with him. He told us that he didn't even want to file the motion. He didn't want the hearing to continue. We talked him out of that by getting him to agree we could just send him back to the prison, and we'd just do what we needed to do.

But he -- I mean, my reaction was, "What the heck?" except in a little bit stronger phraseology when I talked to Ms. Brewer about that. I mean, I was floored when that came up.

And so I would have been aware of the fact that part of the reason for all the visits they were having is he wasn't -- didn't want to even sign the 3.851. And essentially what was being communicated to me is they practically tricked him or --

MR. BROWN: Objection, Your Honor. This is based on hearsay.

THE COURT: I'm sorry?

Just let me make sure I understand what was just testified to.

"Essentially what was being communicated to me is they practically tricked him."

I'm not sure who the "they" refers to.

THE WITNESS: I was referring to his CCR counsel at

the time.

THE COURT: And this is who communicating this to you?

THE WITNESS: This would have been Ms. Brewer communicating that to me. She had been with CCRC. When they disbanded, she kept the case as a private attorney.

THE COURT: I'll sustain the objection.

BY MR. KENNETT:

Q. So, again, just yes or no. At no time did the petitioner ever communicate to you that he wanted you to file a 2254 petition.

A. I'll go yes, sir, on that.

Q. Okay.

A. He never communicated that to me.

Q. And you thought -- and, again, yes or no. You thought he was competent to make that decision.

A. I did, yes, sir.

Q. Now, the petitioner's mental health was a significant issue during the penalty phase of his capital trial, as well as during the state postconviction proceedings, correct?

A. Less so at the capital trial, more so at the postconviction proceedings.

Q. Well, the issue at the state postconviction was that more mental health evidence should have come in during the penalty phase, correct?

A. Yes, sir.
Q. That was the claim of ineffective assistance of counsel?
A. One of a number of claims, yes, sir.
Q. And that was one of the claims that you actually appealed to the Florida Supreme Court, correct?
A. Yes, sir.
Q. But there actually was mental health evidence adduced during the penalty phase of his capital trial, correct?
A. There was some, yes, sir.
Q. And during the trial and during the state postconviction proceedings, the petitioner was evaluated by several mental health professionals, correct?
A. Through the years, yes, sir. Yes.
Q. In fact, did you obtain the services of mental health professionals to evaluate the petitioner?
A. CCRC did.
Q. To your knowledge, did everyone -- to your recollection, did anyone ever communicate to you -- any mental health professional ever communicate to you any concern about the petitioner's competence?
MR. BROWN: Objection, Your Honor. That calls for hearsay.
MR. KENNETT: Effect on the listener, Your Honor.
THE COURT: Overruled.
THE WITNESS: I was never advised by -- I never saw

anything in any mental health report or through the communication with any mental health expert that he was incompetent to proceed.

BY MR. KENNETT:

Q. And you never requested a competency evaluation of the petitioner, correct?

A. I did not, no.

Q. And do you recall the facts of the petitioner's case, how he was -- how he first became a suspect? Do you recall?

A. I do not.

Q. You don't recall that he confessed to police in Baton Rouge, Louisiana, that he had killed someone in Jacksonville, Florida?

MR. BROWN: Objection as to the relevance.

THE COURT: Overruled.

THE WITNESS: This case is so long ago, and the guilt phase issues were not really on my radar. I mean, they just weren't. I mean, I was focused on the 3.851 claims.

BY MR. KENNETT:

Q. And do you recall that during the capital phase of his trial, he apologized and expressed remorse for his actions?

A. I -- yeah, I do recall that, yes, sir.

Q. So in court he apologized to the family of the dead victim and also apologized to the surviving victim, correct?

A. That's my -- yes, sir. That's my recollection.

MR. BROWN: Objection, Your Honor. That is based on hearsay.

THE COURT: Overruled.

MR. KENNETT: No further questions, Your Honor.

THE COURT: Redirect, Mr. Brown?

MR. BROWN: Just briefly, Your Honor.

THE COURT: Uh-huh.

REDIRECT EXAMINATION

BY MR. BROWN:

Q. Mr. Norgard, as to that last question about an apology, you weren't present at the trial of Mr. Miller, were you?

A. No, sir. I would have reviewed transcripts, though, and stuff.

Q. You also indicated that at the evidentiary hearing you were particularly of the opinion that Mr. Miller was competent; is that correct?

A. Yes, sir. Not based on my contact with him. Based on Ms. Brewer's representations, based on the fact that when they were having the issues with him signing the 3.851, as we looked at those visiting -- there was a mental health expert that saw him, I believe, three times during that time period.

Q. Okay. But you met him that day.

A. Yes, sir.

Q. And between the time where the statute of limitations began running again and the time that it expired, you had one,

at most, 30-minute phone call with Mr. Miller?
A. I had a visit and one, two, three phone calls -- well, one he refused. Two phone calls.
Q. That was before the statute of limitations began rerunning, was it not, on April 13th, 2006?
A. Yeah. I would have been having contact with him for two reasons -- for two reasons: (1) to keep a lid on his wish to be a death volunteer, and to assess whether he still wanted to waive his appeals, knowing that, you know, there would be a decision by the Florida Supreme Court where it was fish-or-cut-bait time.
Q. Do you feel that it's an effective method for judging your client's competency, is to have an occasional 30-minute phone call?
A. Mental health professionals meet with the client for an hour and make that determination.

He was lucid. He was able to understand what I was saying. He reiterated things that he had said to me in the past in terms of his positions on filing litigation, his desire to be a death volunteer.

I would have tried to talk him out of that, and he would express very lucid reasons as to why he wanted to just die and finish it up and get it over with.

And then my focus at that point was more just to keep a lid on his desire to be a death volunteer. And, in fact, at

one point I know he even wrote the court about that, and I was terrified that that was going to initiate the process. But nothing ever came of that.

Q. Okay.

A. He wrote the state court, not the federal court.

Q. Now, the -- you indicated there was a visit on August 5th, 2004, that's not reflected in the Department of Corrections' records.

A. Yes, sir. It's reflected that I did have that visit, yes, sir.

Q. That's reflected in your notes, correct?

A. Yes, sir.

Q. But it was not reflected in the Department of Corrections' --

A. Correct.

Q. Okay. And so did you feel that there -- did you feel that there was no reason to visit Mr. Miller again before the statute of limitations expired?

A. Yes, sir.

Q. You felt that there was no reason to visit him again?

A. Every time that I had contact with Mr. Miller, it stirred up him doing things, wanting to initiate his execution. I was trying to keep the lid on that.

I was looking at a potential federal habeas petition that had close to zero percent of winning against a -- somebody

saying they want to be a death volunteer and a very high percentage that the State of Florida would move forward on that and actually execute him.

Q. So you were intentionally avoiding visits with Mr. Miller.

A. I would maintain contact with him to assess what his position was, to see if it changed.

But I was also in the ethical dilemma of having to -- the reason I withdrew after that August visit is because in a 30-minute person-to-person visit, he made it very clear that no ifs, ands, or buts about it, he wanted to be executed, and I could not get him to be equivocal about that at all.

At least in my other conversations, I got him to be equivocal, wait a little while. I'd tell him we'd talk about it later. I was trying to keep a lid on a guy who was trying to kill himself, and I made tactical and strategic decisions as to the best way that I could do that, to keep him from being a volunteer.

Q. Okay. But that visit that you're referencing in 2013 was seven years after the statute of limitations has already expired, correct?

A. But not the time frame for him to communicate to people who would get the ball rolling on his execution, and I was trying to keep a lid on that.

MR. BROWN: May I have a moment, Your Honor?

THE COURT: You may.

MR. BROWN: I don't have any further questions, Your Honor.

THE COURT: All right. Any request for recross? I didn't hear any new subjects referenced.

MR. KENNETT: Yes, Your Honor, just to address -- the witness talked about wanting to avoid initiating the process, and with the Court's permission, I'd just like to recross on that.

THE COURT: Very good.

RECROSS-EXAMINATION

BY MR. KENNETT:

Q. Mr. Norgard, when you referred to wanting to avoid initiation of the process, were you referring to the clemency review that takes place by the State which precedes the --

A. No. I was talking about him doing, like, what he did, like write a letter to the court saying he wanted to be executed; him doing something that would alert people who would potentially set that in motion, and I would have no control over it.

Q. And so that process, just so -- the process from trial to execution would be the trial, the direct appeal, state postconviction, state postconviction appeal, 2254 petition, Eleventh Circuit appeal, state clemency review, and then the signing of a warrant, correct?

A. Yes, sir.

Q. And you were trying to prevent further steps in that process, correct?
A. Yes, sir.
Q. And so the case just kind of flew under the radar, didn't it?
A. He's sitting here today, yes, sir.
MR. KENNETT: No further questions. Thank you.
THE COURT: Thank you, Mr. Norgard.
THE WITNESS: Thank you, Your Honor.
THE COURT: May this witness be excused?
MR. BROWN: Yes, Your Honor.
THE COURT: Thank you, sir.
THE WITNESS: All right. Thank you, sir.
THE COURT: And the government doesn't require his presence further, do they?
MR. KENNETT: No, Your Honor. Thank you.
THE COURT: Very good. Thank you.
(Witness excused.)
THE COURT: Your next witness, Mr. Brown?
MR. BROWN: Your Honor, I don't have any more witnesses for this hearing, subject to my previous request that we be given the opportunity to present the testimony of mental health experts, which will not be occurring today.
THE COURT: Then take this opportunity, then, to argue to the Court how it is that Mr. Norgard's testimony is

supportive of an equitable tolling finding by this Court as it relates to the deadlines that have passed.

MR. BROWN: Yes, Your Honor. May I just reference some of my notes?

THE COURT: You may.

(Pause in proceedings.)

MR. BROWN: Your Honor, Mr. Norgard was aware, from the very beginning of his appointment to this case, that he was dealing with an individual with severe mental illness. Despite that, he did not take the time to meet with Mr. Miller at all until the day of the evidentiary hearing.

Once he was -- once he was appointed to the case and represented Mr. Miller, the records from both the Department of Corrections and the records from his own billing establish that he visited with Mr. Miller on one occasion, which was seven years after the statute of limitations ran, and that he conducted two phone calls that were each after the statute of limitations had run.

My argument would be that Mr. Norgard's testimony that additional phone calls took place should not be credited. It's disputed by both the Department of Corrections and the Duval County clerk's records and Mr. Norgard's own billing statements.

Mr. Norgard indicated that he billed for all client visits and calls. He indicated that he billed when clients

refused calls in certain circumstances. He indicated that he billed for calls with his co-counsel that were as short as one or two minutes, although he would bill for the minimum of .1 hours in those cases.

I don't think that it's credible to believe, as Mr. Norgard testified, that there were approximately eight phone calls that the Department of Corrections did not keep any record of.

I don't believe that it's credible, especially in light of the fact that over a three-year period there's a record of approximately 25 visits from his prior counsel and prior investigators, that the Department of Corrections records are exactly accurate as to Ms. Bolin's visits with Mr. Miller, but somehow they missed that number of phone calls by Mr. Norgard.

If we credit Mr. Norgard's testimony that those visits and calls took place, first of all, Mr. Norgard was not certain and did not have proof that those phone calls were actually answered, besides the fact that he had a notation in one case -- for one call that it was refused.

Now, he testified that he had recollection of phone calls but couldn't specifically testify as to the content of any specific phone call.

If we credit that those phone calls took place, we have record of Mr. Norgard speaking with Mr. Miller on one

occasion after the direct appeal was denied.

We have evidence that Mr. Norgard sent his -- Mr. Miller's file to his storage facility two months after the oral argument in the case, before the -- before the case had even been denied on appeal and before the mandate had issued.

We have evidence that Mr. Norgard did not submit a single bill for one minute spent on Mr. Miller's case after December 1st, 2005.

We also have evidence that Mr. Norgard missed the federal habeas deadlines on Marvin Jones' case around that same period of time, that he was not responsible but did not file timely petitions in two additional cases, the Chavez and Stewart cases.

And then we have evidence that Mr. Norgard missed the federal habeas deadline in Mr. Bolin's case. He started off his federal habeas career 0 for 3 on filing timely petitions and did not file a single timely petition in any case until 2013.

So, Judge, I think that the evidence established during today's hearing indicates that Mr. Norgard did not communicate at all with Mr. Miller regarding the filing of his federal habeas petition and that there was a constructive abandonment of Mr. Miller based on the fact that, knowing the severe mental health issues that he had, that Mr. Norgard did not visit or speak to Mr. Miller in any meaningful way.

And, Your Honor, in addition to that, Mr. Norgard indicated that he had concerns, although he couched that testimony, that Mr. Miller was competent to make a decision as to whether he could volunteer for death, but he had no mental health expert ever evaluate Mr. Miller, including not having him evaluated to see if he was competent to make the decision to waive his federal habeas petition.

But if -- if nothing else, Mr. Norgard demonstrated, by failing to speak -- even crediting his testimony about visits that are not corroborated by any other evidence, failed to speak with his client essentially for the remaining -- you know, we have to agree upon a specific date that the statute of limitations ran, which -- which we are going to get together and do, Your Honor, myself and the respondents.

But if we credit Mr. Norgard's testimony, he met with Mr. Miller -- or spoke with him for one 30-minute phone call, maximum 30-minute phone call, 13 days after the mandate and then never spoke to him again. And so there was certainly -- never spoke to him again while the statute of limitations was still running.

And so there was certainly abandonment at the point where Mr. Norgard stopped speaking to his client during the period where he should have been filing Mr. Miller's federal habeas petition.

I think that we also are entitled to establish,

through mental health experts, as I argued before the hearing, that Mr. Miller's mental health is an extraordinary circumstance and affects his diligence in filing the federal habeas petition.

So our position would be that we need to be given the opportunity to present that testimony through the testimony of a mental health expert.

THE COURT: All right. Thank you, Mr. Brown.

MR. BROWN: Thank you.

THE COURT: Mr. Kennett?

MR. KENNETT: Yes, Your Honor.

Mr. Norgard clearly testified that the petitioner is the one who decided to forgo filing a 2254 petition.

The petitioner failed to present any direct evidence to rebut that testimony, and the petitioner has simply failed to meet his burden to establish any basis for equitable tolling in this case.

THE COURT: All right. Thank you all for your argument and presentation of evidence.

Let me ask a couple of questions. In regard to the clemency issue that has been, even in this hearing today, suggested as part of the process that may have motivated Mr. Norgard's conduct, why is it that the government does not know whether clemency has taken place or not? I don't understand how that can be.

MR. KENNETT: Your Honor, things have changed with the Timely Justice Act of 2013. There is more active tracking of the status of the cases.

But prior to that there is the possibility that, because a federal habeas was never initiated, it was never really -- it wouldn't show up in the tracking system as completed. Therefore, clemency review wouldn't take place.

THE COURT: So does it show up in the tracking system that it's pending?

MR. KENNETT: I'm not aware of what the system showed from 2006 through 2013, but because of the Timely Justice Act, the Florida Supreme Court, the Clerk of the Court published a list, and it included the status of death row inmates. And so that brought, certainly, awareness to the issue of cases that were --

THE COURT: Had not had federal habeas petitions filed.

MR. KENNETT: Or -- correct, or state clemency review, which was a prerequisite for a warrant.

And I believe the State detailed that in its response in greater detail, Your Honor.

THE COURT: I have not been able to get -- would not the State of Florida be in possession of its clemency review records that would show whether or not Mr. Miller had been considered for that process? I'm not -- I don't understand, if

that is not the case, why it isn't the case.

MR. KENNETT: I understand the Court's question, but we weren't prepared to answer that question today, Your Honor, with all due respect.

THE COURT: Can you get an answer to that question for me, please?

MR. KENNETT: Yes, Your Honor.

THE COURT: I'd like to know it.

MS. MILLSAPS: Your Honor, I -- we certainly can write a memo to you, understanding how it worked, including our clemency rules.

And, yes, the Office of the Attorney General is part of the clemency, but remember there are other actors, most particularly the governor.

And so, no, we do not have access to the governor's clemency files. So there -- the old clemency rules were that clemency didn't start until the Eleventh Circuit denied. That's our clemency rule --

THE COURT: Right.

MS. MILLSAPS: -- so that's how it worked before, and then the Timely Justice Act changed that with the certification letters.

But we do have some. We have our own because the Attorney General is one of the people on the clemency board. But I do not -- I can -- I don't have access to them, to go

read them, but I can know whether he's been through clemency through asking about our own files --

THE COURT: Well, some of the --

MS. MILLSAPS: -- but I don't have access --

THE COURT: Someone's records --

MS. MILLSAPS: -- to the governor's files.

THE COURT: Someone's records should reflect whether or not that process was engaged in or not.

MS. MILLSAPS: Yes, but it's not like we have -- in general, the governor's clemency rules, which are only guidelines, says they will not begin clemency reviews -- that used to be the -- they will not begin clemency review until federal habeas, the initial one, has been denied by the Eleventh Circuit.

And you can verify that, Your Honor, by looking at the clemency rules.

THE COURT: Very good.

MR. BROWN: Your Honor, may I speak on that just briefly?

THE COURT: Yes.

MR. BROWN: It's the petitioner's position that if the respondents seek to assert that Mr. Miller was somehow not considered for clemency in any way because of Mr. Norgard's conduct, that they should present witnesses and exhibits to prove that and not be doing it through briefing, because that

is -- that would be evidence in this case, and we'd ask that they prove it through witnesses and exhibits.

THE COURT: Mr. Kennett?

MR. KENNETT: And, Your Honor, it was simply a question on recross to address a comment by the witness that was called by the petitioner, Mr. Norgard, when he talked about wanting to avoid the initiation of the process.

So that's why we asked the question. We're not trying to --

THE COURT: Well, I thought I recall in your -- in the response that there was a reference to an intention on Mr. Norgard's part to avoid the clemency review that would have been necessary for the -- for a warrant, essentially, at some point.

That has to be -- it should have been based in some fact.

MR. KENNETT: Yeah.

THE COURT: If you're abandoning that as a defense to why equitable tolling shouldn't apply in this case, so be it. But I haven't heard any evidence to that effect.

MR. KENNETT: Your Honor, again, the point was simply to say that at the time, the rules specified that the clemency review process, which was necessary for a warrant, wouldn't start until the initial federal habeas proceedings were concluded.

And so Mr. Norgard confirmed -- appeared to confirm that was part of his strategy when I asked him, "This case flew under the radar," and he said, "Yes. He's still sitting here alive today," something to those effects, confirming that that strategy actually worked.

THE COURT: Well, as a consequence. But I didn't hear any evidence that it was a strategy that he chose to employ, which was the implication that I took from your reply.

MR. KENNETT: Very well, Your Honor. We'll review the transcript. Thank you.

THE COURT: Okay.

MR. KENNETT: Any additional questions on that, Your Honor?

THE COURT: No.

Anything further?

MR. BROWN: Not from the petitioner, Your Honor.

MR. KENNETT: No, Your Honor. Thank you.

THE COURT: Very good.

I think we -- I appreciate your presentations today, and I will use this record to consider the petition and the process applicable to it as we move forward in this case.

Thank you very much.

COURT SECURITY OFFICER: All rise.

(The proceedings were concluded at 3:31 p.m.)

- - -

CERTIFICATE OF OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT)
MIDDLE DISTRICT OF FLORIDA)

I hereby certify that the foregoing transcript is a true and correct computer-aided transcription of my stenotype notes taken at the time and place indicated therein.

DATED this 2nd day of November, 2021.

s/Shelli Kozachenko
Shelli Kozachenko, RPR, CRR, CRC
Official Court Reporter

APPENDIX A-23

December 17, 2021, Petitioner's Motion to Alter or Amend Judgment

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,
Petitioner,

v. **Case No. 3:17-cv-00932-BJD-JBT**
DEATH PENALTY CASE

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.
_____/

PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT (Doc. 73)

COMES NOW the Petitioner, and respectfully requests this Court alter or amend this Court's Judgment (Doc. 73) entered November 18, 2021, dismissing Petitioner's 28 U.S.C § 2254 petition for habeas corpus and denying a certificate of appealability, and as grounds therefore states the following:

I. Relevant Procedural Background

1) Petitioner's conviction and sentence of death became final on January 22, 2001.

2) No attorney appeared on Petitioner's behalf in state post-conviction proceedings until May 14, 2001 and no pleadings were filed on Petitioner's behalf in post-conviction proceedings until August 8, 2001.

3) A properly filed initial amended state post-conviction motion was deemed filed on October 2, 2001 based upon a stipulation between the parties.

4) Two-hundred fifty-three (253) days of the statute of limitations elapsed

before the filing statutorily tolled the limitations period and Petitioner was without counsel for 112 of the 253 days.

5) On September 30, 2003, Attorney Robert Norgard ("Norgard") entered a notice of appearance as co-counsel in Petitioner's state postconviction proceedings.

6) The circuit court denied the amended motion on April 23, 2004.

7) On June 15, 2004, Norgard was appointed as lead counsel.

8) The Florida Supreme affirmed the denial of the amended post-conviction motion on March 23, 2006, and the mandate issued on April 13, 2006.

9) The AEDPA statute of limitations was set to run out on August 3, 2006 absent additional period of tolling. No federal habeas petition was filed before that date.

10) Under Section 27.711(2), an attorney appointed to represent a defendant in state postconviction proceedings is obligated to represent the defendant throughout all subsequent stages of litigation including federal habeas.

11) On August 27, 2013, Norgard moved to withdraw, having never sought appointment as federal habeas counsel and having never filed any pleadings on Petitioner's behalf in federal court.

12) On August 15, 2017, the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Florida ("CHU-N") moved for appointment as Petitioner's federal habeas counsel (Doc. 1), and on August 24, 2017, this Court appointed CHU-N as Petitioner's federal habeas counsel (Doc. 3).

13) On January 30, 2019, CHU-N filed Petitioner's § 2254 petition (Doc. 15).

14) On April 8, 2019, CHU-N filed a memorandum of law arguing Petitioner was entitled to equitable tolling based upon Petitioner's mental illness during the period his AEDPA statute of limitations was running compounded by the egregious failures of Petitioner's state postconviction counsel. Doc. 24.

15) On March 16, 2021, this Court discharged CHU-N as Petitioner's federal habeas counsel and appointed CHU-M as substitute conflict-free federal habeas counsel ("The Court concludes that CHU-N's representation of Petitioner in this action poses a conflict of interest warranting substitution.") The Court further ordered an evidentiary hearing on equitable tolling during Norgard's representation was warranted and would be scheduled at a later date. Doc. 35.

16) On August 9, 2021, this Court scheduled an evidentiary hearing on October 21, 2021, regarding equitable tolling during Norgard's representation. Doc. 47.

17) On September 22, 2021, CHU-M filed Petitioner's Opposed Motion to Continue Limited Evidentiary Hearing Currently Scheduled for October 21, 2021 (Doc. 48). Petitioner's motion argued, in part, "neither Mr. Norgard's conduct nor Petitioner's related conduct can be meaningfully understood without the context of Petitioner's mental status during that period, and that none of this Court's questions can be fully answered without such context." Doc. 48 at 7.

18) On October 7, 2021, this Court denied Petitioner's motion to continue. Doc 49.

19) On October 21, 2021, a limited evidentiary hearing on equitable tolling

during Norgard's representation was held. Petitioner renewed his request to present the testimony of mental health experts to establish both the extraordinary circumstances and diligence prongs of the equitable tolling inquiry. Doc. 67 at 134-135.

20) On October 28, 2021, Petitioner filed an unopposed request for briefing following the limited evidentiary hearing. Doc. 63.

21) This Court denied Petitioner's request for briefing on October 28, 2021.

22) On November 18, 2021, this Court entered an order dismissing with prejudice Petitioner's petition as untimely and denying a certificate of appealability. Doc. 72. Judgment was entered dismissing the petition on November 19, 2021. Doc. 73.

II. Standard of Review

The decision to alter or amend judgment is committed to the sound discretion of the district judge. *Lawson v. Singletary*, 85 F.3d 502, 507 (11th Cir. 1996). A Rule 59 motion may be granted based upon newly discovered evidence or manifest errors of law or fact. *Arthur v. King*, 500 F.3d 1335 (11th Cir. 2007).

III. Mistakes of Fact or Law

a. Mistakes of Fact and Law Regarding Norgard's Testimony

i. This Court made a mistake of fact in determining that Norgard was an experienced attorney for purposes of equitable tolling

This Court's order dismissing the petition (Doc. 72) makes several references to Norgard being an experienced registry attorney. However, Norgard's experience as a

Florida criminal trial lawyer, or non-capital postconviction attorney[1], is irrelevant to the question of equitable tolling of the federal habeas corpus deadline. The evidence presented at the evidentiary hearing established Norgard had no federal habeas corpus experience, and extremely limited capital postconviction experience.

Norgard testified Petitioner's case and the case of Marvin Jones were the first capital postconviction cases he handled before both the state circuit courts and the Florida Supreme Court. EH transcript at 67. As pointed out by Respondents, Marvin Jones' federal habeas petition was due on May 25, 2006. *See Jones v. Sec'y, Dept. of Corr.*, 3:18-cv-00168-TCJ-PDB (M.D. Fla. February 7, 2018) (Doc. 5). Norgard never filed a federal habeas petition on Jones' behalf. This Court determined Petitioner's federal habeas deadline was August 3, 2006. Norgard never filed a federal habeas petition.

When Petitioner's petition was due, Norgard was not an experienced federal habeas practitioner. In fact, his only federal habeas experience to-date was missing the federal habeas deadline in *Jones*. The first federal habeas petitions Norgard filed, *Chavez*[2], on February 9, 2010; *Bolin*[3], on July 16, 2010; and *Stewart*[4], on January 6, 2011, were all dismissed as untimely filed because the underlying state postconviction

[1] The deadlines for non-capital postconviction motions under Florida Rule of Criminal Procedure Rule 3.850 differ from those in capital postconviction cases under Rule 3.851, and there is no corresponding statute for non-capital cases to Section 27.711(2), which requires capital postconviction attorneys to represent defendants in all subsequent stages of litigation including federal habeas corpus.

[2] *Chavez Sec'y, Dep't Corr.*, 1:10-cv-20399-UU (S.D. Fla. February 9, 2010) (Doc. 1).

[3] *Bolin v. Sec'y, Dep't Corr.*, 8:10-cv-01571-JDW-E_J (M.D. Fla. July 16, 2010) (Doc. 1).

[4] *Stewart* v. Sec'y, *Dep't Corr.*, 8:11-cv-00044-JDW-AAS (M.D. Fla. January 6, 2011) (Doc. 1).

motions were filed after the AEDPA statute of limitation had lapsed. Norgard and his law firm filed Bolin's state postconviction motion after federal deadline, while unrelated lawyers filed the late state postconviction motions in *Chavez* and *Stewart*. Of the first three cases in which Norgard was responsible for timely filing federal habeas petitions, *Jones*, *Miller*, and *Bolin*, Norgard missed all three federal habeas deadlines. Even still, Norgard had never filed even an untimely federal habeas petition until *Chavez* on February 9, 2010, more than three and a half years after Petitioner's petition was due. Norgard did not file a timely federal habeas petition in any case until August 12, 2013, in *Long v. Sec'y, Dep't Corr.*, 8:13-cv-02069-MSS-AEP (M.D. Fla. August 12, 2013). This is not the record of an experienced federal habeas practitioner.

Norgard's experience in state capital postconviction was no more extensive. *Jones* and Petitioner were Norgard's first two capital postconviction cases. But Norgard did not file the initial postconviction motions in either case, and therefore was not responsible for tolling the federal habeas deadline. The initial state postconviction motion in *Jones* was filed September 16, 1998, by attorney Gregory C. Smith, and the Petitioner's initial postconviction motion was filed by Heidi Brewer before Norgard was appointed. *See Jones v. State*, 1993-cf-2757 (Fla. 4th Cir. Ct. Sept. 16, 1998) (Doc. 547). The state postconviction motions in *Chavez* and *Stewart* also were not filed by Norgard. The first case in which Norgard was responsible for timely filing a state postconviction motion was *Bolin*, and he filed the state postconviction motion after the federal habeas deadline, resulting in Bolin's federal habeas petition being dismissed. Norgard's experience in both state and federal court does not support this Court's

finding "[h]e was appointed registry counsel, versed in the deadlines and procedure." Doc. 72 at 45. Rather, the evidence proves Norgard was an attorney with a proclivity for never filing federal habeas corpus petitions, failing to timely file federal habeas petitions, and failing to toll the AEDPA statute of limitations by properly filing a state postconviction motion prior to the expiration of the AEDPA statute of limitations.

ii. This Court made manifest errors of law or fact in finding that Norgard's testimony was unrebutted

This Court (Doc. 72) found that "Norgard's testimony that Petitioner decided to forego his federal remedies and reported his decision to Mr. Norgard at the state court evidentiary hearing and during a post-mandate phone conversation before the limitation period expired essentially went unrebutted[5]," and "Petitioner continued to have a functioning attorney of record, even though Petitioner had told counsel to stand down as far as pursuing federal remedies and further appeals." Doc. 72 at 27, 42. These findings were based upon several mistakes of fact or law.

Petitioner presented documentation from multiple sources that casts serious doubt on whether the conversations Norgard claims to have had with Petitioner ever took place. Norgard testified he had ten visits or phone calls with Petitioner between August 5, 2004 and August 9, 2013, and one additional phone call he is certain Petitioner refused. The Department of Corrections (DOC) records only document two of those visits/calls, a September 30, 2011 call, and a May 3, 2012 visit. Both occurred

[5] This Court in a footnote noted that it did not find the absence of telephone calls in the records of the Florida Department of Corrections to mean that such calls did not occur.

after the AEDPA statute of limitations elapsed. Norgard is alleging that for unknown reasons, DOC failed to document 80% of his calls/visits. The DOC records have indicia of reliability. The records correspond exactly with the billing records of investigator Rosalie Bolin, accurately documenting every visit she billed for. EH exhibits 14, 16(f). Additionally, DOC documented 25 visits by Norgard's co-counsel/predecessor counsel Heidi Brewer and her co-counsellors, investigators, and experts from May 31, 2001 through June 4, 2004. There is simply no reasonable explanation why the DOC records would capture 25 visits over a three-year period by Heidi Brewer and her colleagues and exactly match investigator Bolin's billing records, but only document two out of eight calls/visits with Norgard over a nine-year period.

Other evidence corroborates these calls and visits did not take place. Norgard did not bill for any of the calls or visits he alleges occurred. EH exhibit 16. In fact, Norgard did not bill for any work on Petitioner's case whatsoever after his December 1, 2005 oral argument before the Florida Supreme Court. As this Court pointed out, "As for billing, Mr. Norgard explained that anything he did in preparation for the federal habeas he would not have billed to the state; therefore, he did not submit any bills for his work post mandate." Doc. 72 at 23. But this explanation does not square with the evidence and is based upon mistakes of fact.

The visits/calls Norgard testified occurred, but DOC had no record of, include the August 5, 2004 visit that would have occurred during state proceedings while Norgard was actively billing on the case. It also would have been the first time Norgard spoke to Petitioner after the evidentiary hearing where he met Petitioner for the first

time. It strains credulity to believe Norgard exclusively discussed federal matters, and not the pending appeal before the Florida Supreme Court. Norgard also did not bill for the alleged March 6, 2006 call, which would have been the first time Norgard spoke to Petitioner after the December 1, 2005 oral argument, but before the appeal was denied on March 23, 2006. Again, Norgard asks the Court to believe he did not bill for this meeting because it involved exclusively federal matters, despite the recent Florida Supreme Court oral arguments and its pending decision.

The list of calls/visits DOC failed to document also includes the alleged April 26, 2006 post-mandate call. This would have been the first time Norgard spoke to Petitioner after his appeal was denied and was within the 90-day timeframe for seeking certiorari to the United States Supreme Court. Section 27.711(f)(g) specifically allows compensation for work done following the denial by the Florida Supreme Court and for work done on writs of certiorari. Norgard's explanation rings hollow; if he was only discussing federal matters during these calls/visits, when was he discharging all his other professional responsibilities to Petitioner?

Norgard's billing records provide additional support to the fact the visits and calls he alleged did not occur. EH Exhibit 16(g) indicates Norgard began paying for file storage at an off-site location for Petitioner's file beginning in February 2006, with a notation "(rent began)" next to February 2006. Norgard testified he began storing the files off site as soon as he got them from Heidi Brewer in October 2004. EH transcript at 99. Norgard attempted to give several contradictory explanations for why the storage receipts conflicted with his testimony, but none of the explanations could

logically explain why the receipts noted rent began in February 2006. The simplest explanation is the explanation supported by all of the other evidence, including the call/visit logs, other billings records, and Norgard's failure to file anything in federal court: Norgard stopped working on the case entirely after the oral argument on December 1, 2005, and shortly thereafter sent the files to storage in February 2006.

Norgard's testimony that the reason he did not file the federal habeas petition was because Petitioner instructed him not to is also rebutted by the procedural history of the case. Norgard did not only testify Petitioner instructed him not to file a federal habeas petition. On cross examination, the following exchange occurred:

> Q. At any time did the petitioner ever communicate to you that he wanted you to file a petition in federal habeas?
>
> A. The opposite. He basically threatened to get rid of me as counsel and move forward as a death volunteer if I filed anything.

EH transcript at 120. Norgard indicated the discussion regarding appeals occurred during a break in the hearing when the judge gave Norgard time to speak to Petitioner after Petitioner stated at the evidentiary hearing, "I want to cancel these proceedings and go back to prison. I want to drop all my appeals." But Norgard did not ask the Court to dismiss the state postconviction proceedings, as was Petitioner's right under *Durocher v. Singletary*, 623 So. 2d 482 (1993). This right to waive postconviction proceedings has been acknowledged by the Eleventh Circuit Court of Appeals in *Sanchez-Velasco v. Sec'y Dept. Corr.*, 287 F.3d 1015, 1020–21 (11th Cir. 2002).

Not only did Norgard not move to dismiss postconviction proceedings, as was Norgard's duty if Petitioner maintained his desire to do so, but Norgard proceeded to

represent Petitioner in an appeal before the Florida Supreme Court. Norgard filed an initial brief, a reply brief, a request for oral argument, and conducted the oral argument. EH exhibit 15. On March 17, 2005, Norgard also filed a state petition for habeas corpus on Petitioner's behalf at the Florida Supreme Court and presented oral argument in support of it. *See Miller v. McDonough*, 926 So. 2d 1243 (Fla. 2006).

Norgard's actions are incongruent with his testimony that Petitioner would discharge him as counsel and volunteer for death "if I filed anything." It stretches the imagination to believe that during the recess where Norgard was given the opportunity to discuss with Petitioner his desire to end postconviction proceedings and waive all appeals, Petitioner would have ultimately instructed Norgard to continue with the in-progress evidentiary hearing, file a notice of appeal and litigate his appeal at the Florida Supreme Court, file a state habeas petition at the Florida Supreme Court and give oral arguments, but *not* file a federal habeas petition with a deadline more than three years away. Not only is such a scenario fanciful, but also it directly conflicts with Norgard's testimony that Petitioner supposedly instructed him not to file *anything* and that "We talked him out of that by getting him to agree we could just send him back to prison, and we'd just do what we needed to do." EH transcript at 121.

Norgard testified he tried to have Petitioner evaluated by a mental health expert, but Petitioner refused and Petitioner "didn't want to even sign the 3.851." EH transcript at 121, 86. But the evidence established Petitioner signed the 3.851 on September 27, 2001, and Petitioner later met with Dr. Charles Golden on January 23, 2002, and submitted himself for a PET-scan on October 10, 2002. *See State v. Miller*,

Verification, 1997-cf-6680 (Fla. 4th Cir. Ct. Sept. 27, 2001); EH exhibit 7-8. The PET-scan required Petitioner to be transported from Raiford, FL to Orlando, FL, a more than 5-hour round-trip. *State v. Miller*, Order to Transport Defendant for Medical Testing, 1997-cf-6680 (Fla. 4th Cir. Ct. Oct. 4, 2002). In fact, the evidence establishes a history of Petitioner voluntarily meeting with mental health experts dating back to 1983. EH exhibits 6-8. Contrary to this Court's findings, Norgard's evidentiary hearing testimony was not un-rebutted. Every single piece of documentary evidence, and the actions of Norgard himself, point to Norgard having ceased all representation of Petitioner following the denial of Petitioner's Florida Supreme Court appeal. There is no reason why the testimony of a severely mentally ill man should be required where such extensive and consistent evidence exists from a wide variety of credible sources.

b. <u>This Court committed a mistake of law or fact by failing to grant Petitioner an evidentiary hearing on equitable tolling due to his mental illness</u>

Ultimately, whether equitable tolling is warranted is a decision that rests on facts, not allegations. *Downs v. McNeil*, 520 F.3d 1311, 1325 (11th Cir. 2008). In *Ata v. Scutt*, the Sixth Circuit Court of Appeals reversed and remanded the district court's dismissal of the petitioner's habeas petition for an evidentiary hearing on equitable tolling due to mental illness based upon allegations that he "had been hospitalized on numerous occasions for paranoid schizophrenia," and "has been and continues to be medicated by the Michigan Department of Corrections[] for paranoid schizophrenia and other psychoses." 662 F.3d 736 (6th Cir. 2011). The Sixth Circuit held the first step in the analysis is to determine whether the petitioner's allegations, accepted as

true, show he is mentally incompetent and that his mental incompetence prevented him from timely filing his petition[6]. *Ata*, 662 F.3d at 743 (citing *McSwain v. Davis,* 287 Fed.Appx. 450,458 (6th Cir. 2008) (quoting *Schriro v. Landrigan,* 550 U.S. 465, 474 (2007)). Applying this test, the Sixth Circuit found the allegations that the petitioner had been hospitalized for paranoid schizophrenia and was being medicated by the department of corrections were sufficient to justify an evidentiary hearing.

Petitioner has made sufficient allegations to warrant an evidentiary hearing on whether his mental illness is grounds for equitable tolling. In his petition (Doc. 15), Petitioner made the following allegations:

> One indication that equitable tolling is warranted stems from the fact that Miller has significant mental health issues which impact his ability to communicate with counsel. Miller has been diagnosed with a number of disorders throughout his life, including a mixed personality disorder with features of schizoid personality, schizophrenia, and brain damage. A recent mental health examination confirms that Miller has paranoid schizophrenia, with a history of pervasive hallucinations and delusions dating back to at least the early 1980s. As is typical in schizophrenia and schizotypal disorders, Miller suffers from a language disorder. He, like many individuals with schizophrenia, often does not want to communicate. When forced to do so, Miller does not communicate well. It is likely that Miller would have acquiesced to what his attorneys wanted him to do, simply to end the interaction and return to his solitude. This tendency would be particularly pronounced under stress. At Miller's best, he is low-functioning, and in many ways presents with symptoms appearing similar to a severe form of autism. He is paranoid and withdrawn. The rest of the time, he presents with active schizophrenia and psychosis in the form of delusions and hallucinations. These symptoms would have made effective communication virtually impossible between Miller and his defense counsel.

Doc. 15 at 10-11.

[6] The *Schriro* Court also held that "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing. 550 U.S. at 474. That provision does not apply here because the record is silent on why a petition was not filed and because the conduct giving rise to tolling in this case occurred after the state proceedings concluded.

Petitioner's Memorandum of Law in Support of Habeas Corpus Petition (Doc. 24), alleged "Miller suffers from severe schizophrenia and other mental health conditions that rendered him incompetent and unable to communicate with his attorneys or make rational decisions regarding his legal rights." (Doc. 24 at 7). Further, Petitioner's Reply in Support of 28 U.S.C. § 2254 Petition (Doc. 33), alleged,

> Miller has specifically alleged that his longstanding mental illness—characterized by delusions, religious preoccupations, and hallucinations—rendered him unable to effectively communicate with counsel or assist in pursuing his legal rights. See, e.g., Regnier report ("Attachment 1") at 3-7, 14-21 (diagnosing Miller with multiple mental health disorders including schizoaffective disorder and schizotypal personality disorder, and finding he was likely incompetent for much of his legal process).

Doc. 33 at 6.

This Court misapplied the law in denying Petitioner an evidentiary hearing on equitable tolling due to mental illness. *Shriro*, *Downs*, and *Ata* establish the district court is to take Petitioner's allegations as true in deciding whether a nexus exists between his mental illness and the untimely filing of his federal habeas petition. Petitioner has made specific allegations that he suffers from severe mental illness and that his mental illness prevented him from timely filing his petition. This Court is required to accept those allegations as true. By denying an evidentiary hearing, this Court has prohibited Petitioner from establishing those allegations as facts. While *Schriro* does allow a petitioner's dismissal if the state court record refutes the allegations, that provision is inapplicable here. The state court record cannot refute Petitioner's allegations that his mental illness, *during the period of time when his federal habeas petition was ripe for review*, prevented him from timely filing a petition, because the state postconviction

proceedings concluded before the AEDPA statute of limitations had expired.

Norgard's testimony at the limited evidentiary hearing that he did not file the habeas petition at Petitioner's request does not change the calculus. First, the very heart of Petitioner's allegations is his mental illness prevented him from effectively communicating and assisting Norgard, and any alleged instruction not to pursue federal habeas would have been a product of his mental illness. Norgard himself acknowledged, "I felt that all of his desire to do any of those things was because of the mental health issues…[t]hings such as wanting to be a death volunteer, things such as waiving his appeal." EH transcript at 38.

Next, Norgard's testimony is only one side of the coin. While Norgard believed Petitioner was competent to waive appeals, Petitioner has alleged he was not, and has supported that allegation with the report of licensed psychologist Dr. Eddy Regnier and the contemporaneous report of Dr. Charles Golden, who found Petitioner "has a detachment from the real world." EH exhibit 8 at 4. Norgard's testimony to the contrary merely highlights a disputed fact. This disputed fact must be resolved by taking testimony from both Norgard and Petitioner's experts.

This is especially true given Norgard's testimony that he spoke to Petitioner, at most, 1) at the state evidentiary hearing where he first met Petitioner, years before the federal habeas petition was ripe for review; 2) an alleged visit on March 5th, 2004 that was not documented in DOC's call and visitation logs, approximately a year before the petition would have been ripe for review; 3) an alleged phone call on March 6, 2006, which was at most 30 minutes long, is not reflected in DOC's logs, and for which

Norgard testified, "On that one I'm fairly sure I talked to him" (EH transcript at 74); and 4) an alleged April 26, 2006 phone, of at most 30 minutes, is not reflected in DOC's logs, and for which Norgard testified in response to a question of whether he knew if Petitioner answered that call, "There's no indication that call was refused." (EH transcript at 75). Norgard could not pinpoint when he discussed the federal habeas petition with Petitioner, and could not testify with certainty that he spoke to Petitioner at all after Petitioner's claims were fully exhausted for federal review.

c. This Court made several mistakes of fact and law by focusing on mental health evidence that pre-dated the period when Petitioner's federal habeas petition was due, and preventing Petitioner from presenting evidence of his mental health during the relevant period

This Court correctly recognized, "For purposes of equitable tolling, this Court looks to the period and the actions of the attorney 'who represented petitioner at the time when [Petitioner's] federal habeas petition was due to be filed.' *Christeson v. Roper*, 574 U.S. 373, 382 (2015) (per curiam) (Alito, J., dissenting)." (Doc. 72 at 39). However, this Court makes several crucial mistakes of facts and law in applying this principle to Petitioner's case.

i. The Time When Petitioner's Federal Habeas Petition Was Due

Petitioner's conviction became final on January 22, 2001. This Court previously found the AEDPA statute of limitations ran from that date until Petitioner filed a state motion for postconviction relief on October 2, 2001. Petitioner, however, could not have filed a fully exhausted federal habeas petition during the time period between January 22, 2001 and October 2, 2001.

This Court's order denying the petition critically overlooks the importance of the United States Supreme Court's decision in *Rose* v. *Lundy*, 455 U. S. 509 (1982). In *Lundy*, the Supreme Court imposed a requirement of "total exhaustion" and directed federal courts to effectuate that requirement by dismissing mixed petitions without prejudice and allowing petitioners to return to state court to present the unexhausted claims to that court in the first instance. *Rose*, 455 U.S. at 522. Petitioner's claims were not fully exhausted until the Florida Supreme Court affirmed the denial of his rule 3.851 motion for postconviction relief on March 23, 2006. The Supreme Court later endorsed a stay and abeyance procedure whereby a petitioner could file a mixed petition in the district court, and request a stay and abeyance while he exhausted the unexhausted claims in state court. *Rhines v. Weber*, 544 U.S. 269 (2005). *Rhines*, however, was not decided until March 30, 2005, and therefore, had Petitioner filed a federal habeas petition prior to March 30, 2005 containing the unexhausted claims raised in his state postconviction motion, controlling United States Supreme Court precedent would have mandated dismissal of the petition.

Because of *Lundy* and *Rhines*, the relevant inquiry into the nexus between Petitioner's mental illness and his ability to timely file a federal habeas petition should focus on Petitioner's mental illness during the period in which he was procedurally capable of filing a federal habeas petition after *Rhines* was decided on March 30, 2005.

ii. <u>This court did not allow Petitioner to present any evidence of Petitioner's mental illness during the relevant period</u>

This Court recognized in its order, "As noted in repeated orders of the Court,

the conduct of Mr. Norgard and the related conduct of Petitioner were to be the focus of the evidentiary hearing. (Docs. 44, 46, 47). Because Norgard did not have Petitioner evaluated by any mental health professionals during his decade of representation and because of the limited nature of the evidentiary hearing, Petitioner was limited to presenting mental health evidence that was developed prior to Norgard's appointment. This necessarily restricted Petitioner's ability to prove a causal connection between his mental illness and the late filing of his petition. Petitioner was prepared to present evidence through the testimony of expert witnesses to establish the nexus between his mental illness and his failure to timely file his federal habeas petition.

iii. The evidence relied upon to deny equitable tolling did not conclusively rebut Petitioner's allegations of mental illness during the time the petition was due, because it was limited to evidence of Petitioner's mental health prior to the time his petition was due

This Court stated in its order denying the petition, "Ms. Brewer was having issues with Petitioner being reluctant to sign and submit a Rule 3.851 motion, and during this particular time period, Petitioner was seen by a mental health expert three times." Doc. 72 at 25. This is based upon a mistake of fact. Petitioner only met with one mental health expert during postconviction, Dr. Charles Golden. Dr. Krop did not conduct any new interviews or testing after Petitioner's trial in 1997. Dr. Wu interpreted the results of a PET-scan of Petitioner's brain, but he did not conduct an interview or evaluation of Petitioner[7]. The only mental health expert conducted a

[7] At the state evidentiary hearing, Dr. Wu was asked: "Q. Have you ever sat in the same room and talked to Mr. Miller? A. I did talk to him briefly in – when he was obtaining the PET scan…I mean I

mental health evaluation of Petitioner during postconviction proceedings was Dr. Charles Golden, who stated repeatedly in his report Petitioner was detached from reality. EH exhibit 8.

This Court's order dismissing the petition relied most heavily upon the opinions of Dr. Harry Krop. Dr. Krop testified at trial that he evaluated Petitioner on October 29, 1997, and November 26, 1997. EH exhibit 6 at 407. This Court noted in its order, "Of import, at the state-court evidentiary hearing, Dr. Krop testified his opinion had not changed from when he testified in 1997 or 1998 to date." However, the significance of Dr. Krop's postconviction testimony was based upon a mistake of fact. Norgard acknowledged at the November 4-5, 2003 state evidentiary hearing that Dr. Krop did not conduct any additional testing during the state postconviction proceedings.

> THE COURT: Has Dr. Krop done any recent testing?
>
> MR. NORGARD: No, sir.
>
> THE COURT: Is he relying strictly on what was done prior to trial?
>
> MR. NORGARD: Yes.

Postconviction ROA, Volume X at 1685.[8] The fact Dr. Krop's opinion had not changed between 1997 and 2003 is hardly surprising, given Dr. Krop had not seen Petitioner in 6 years, and the only new evidence he reviewed were the results of a PET-Scan. Dr. Wu acknowledged PET-Scans are primarily used to corroborate results from

---

didn't conduct a several hour long interview with him. It was more, you know, a brief chat with him, see if he had any questions about the procedure, if there was anything I could explain to him." Postconviction ROA at 1666-67.

[8] This Court took judicial notice of Petitioner's state proceedings in case no. 97-CF-6680. (Doc. 35).

neuropsychological testing, not for purposes of primary diagnosis. Postconviction ROA, Volume IX at 1637-38, 1653. Whether Petitioner's mental illness had progressed or whether he was presently competent was impossible for Dr. Krop or Dr. Wu to know in the absence of new neuropsychological testing.

This Court's order dismissing the petition additionally cited postconviction testimony from Debra Lee regarding a November 22, 1996 diagnosis; evidence of a 1983 involuntary commitment; a North Carolina Division of Mental Health, Mental Retardation and Substance Abuse Services report dated September 3, 1983; a second involuntary commitment in North Carolina on July 16, 1986; and records from November 1996 which included an Axis II schizoid personality disorder diagnosis. All of these referenced evaluations of Petitioner occurred between 1983 and 1997, between 8 to 22 years before Petitioner's federal habeas claims were ripe for review.

While Petitioner's long history of documented mental illness is important to evaluating Norgard's conduct, and was presented for this purpose at the limited evidentiary hearing, it is not dispositive of whether Petitioner suffered from mental illness during the time period when his federal habeas petition was due, and whether that mental illness had a nexus to Petitioner's ability to timely file a petition. Mental illness is not static. Whether Petitioner's mental illness in 1983 or 1997 would have prevented him from filing a habeas petition is irrelevant.

The January 23, 2002 evaluation by board certified psychologist and neuropsychologist Charles Golden was the most contemporaneous evaluation conducted to Petitioner's federal habeas due date. EH exhibit 8. Dr. Golden found:

> He therefore, has a detachment from the real world and tends to engage in a world of fantasy. His relations with other people are fragmented and generally poor. He does not understand how or why other people behave and lacks the ability to form true relationships.
> [ ]
> Mr. Miller has poor ties with reality and difficulty developing accurate abstractions especially when emotional material is involved. He is unable to perceive the world as other people do, leading to multiple misunderstandings with others.
> [ ]
> The test results show he is an individual with significant social and interpersonal difficulties. The client is someone who lacks appropriate ability to process information form (sic) the environment in an accurate and conventional manner. Mr. Miller is someone who does not live in a reality based world but in one that is fantasy oriented.

Additionally, Petitioner attached to Petitioner's Reply in Support of 28 U.S.C. § 2254 Petition the report of licensed psychologist Eddy Regnier. Dr. Regnier found,

> The psychological evaluation of Mr. Miller did produce data that indicates the presence of severe mental health problems that has affected his life ever since he was in his late teens. Mr. Miller reports at least two psychotic episodes that lasted for a period of six or more months during which time he experienced altered mental status. Through much of his legal proceedings he seemed to harbor under a delusion/psychosis that God would protect him. He appeared to suffer from schizoaffective disorder that at times due to his psychotic symptoms affected his decision making.
>
> Mr. Miller appears to have been experiencing a longstanding period of altered mental status characterized by religious preoccupations, social isolation and auditory hallucinations that has impacted his capacity to understand the consequences of his actions in not assisting counsel with pursuing his legal defense at trial and throughout the appellate process.
> [ ]
> Mr. Miller appears to suffer from mental health problems. Throughout his trial and appeals process, Mr. Miller has been by reason of mental infirmity, disease, or defects unable to act reasonably with his defense. When Mr. Miller refused or failed to participate in his legal defense, he was likely responding to delusional ideas or religious beliefs, and was in a psychotic state that prevented him from making rational decisions with regard to his legal defense.

Despite not having Petitioner examined by any mental health experts during his approximately 10 years of representation, Norgard acknowledged he believed

Petitioner had undiagnosed major mental illness. While being asked at the October 21, 2021 evidentiary hearing to review records that were in his possession at the November 4-5, 2003 evidentiary hearing that indicated Petitioner's mental status was consistent with an individual with schizoid personality disorder and schizophrenia, as well as records that diagnosed Petitioner with personality disorder, mixed, with avoidant, schizoid, paranoid, and borderline features, Norgard testified:

> A. From my standpoint, the simplest way I can put it is I think that it wasn't -- you know, there's an Axis I of adjustment disorder, which very honestly what I know about adjustment disorder, that makes no sense to me**. I believe he had a chronic mental health issue that never -- over time was never fully examined and diagnosed. I think he had a major Axis I mental health diagnosis** and not just adjustment disorder. That's a temporary -- that can be a temporary thing only, to a situation. I feel that certainly -- I felt his mental illnesses were worse than that as described in this report. (Emphasis added).
>
> [ ]
>
> Q. All right. And your opinion is that Mr. Miller's mental health was worse than the mental health professionals diagnosed?
>
> A. Yeah. I don't think adjustment disorder is his main issue. I really don't.

EH Transcript at 51-52.

Only the evidence of Petitioner's mental health during the period he was required to assist his counsel in the preparation of his federal habeas petition is relevant to the issue of equitable tolling. That evidence established three things. First, Petitioner's counsel Norgard believed Petitioner suffered from "a major Axis I mental health diagnosis" that was never fully examined or diagnosed, and Petitioner suffered from more severe mental health problems than acknowledged by prior experts. Second, the expert hired by Norgard's co-counsel, Dr. Golden, found Petitioner "has a detachment from the real world and tends to engage in a world of fantasy," "has

poor ties with reality," and "does not live in a reality based world." Finally, the mental health expert retained by Petitioner's federal habeas counsel, Dr. Regnier, found "the presence of severe mental health problems," "at least two psychotic episodes that lasted for a period of six or more months," that he "appeared to suffer from schizoaffective disorder," and that "by reason of mental infirmity, disease or defects unable to act reasonably with his defense." It should be stressed that the conclusions of Dr. Golden and Dr. Regnier, as well as Norgard's belief that Petitioner suffered from undiagnosed major mental illness, do not conflict with the opinions of Dr. Krop or any of the other earlier mental health evidence. Rather, it is evidence of an agreement by everyone who evaluated Petitioner that Petitioner's mental health significantly progressed in the years since Dr. Krop's diagnoses.

IV. Newly Discovered Evidence

Attached to this motion is the December 16, 2021 psychological evaluation of licensed psychologist Dr. Eddy Regnier (attached as "Appendix A"). This report is updated based upon Dr. Regnier's ongoing evaluation and testing, including information from an interview with Petitioner on October 10, 2021. Most significantly, Dr. Regnier's updated evaluation diagnosed Petitioner with Schizoaffective Disorder, bipolar type, a condition recognized as a Serious Mental Illness ("SMI"). Appendix A at 16, 4. Along with the prior diagnosis of Major Depression, recurrent, severe, schizoaffective disorder is the second SMI with which Petitioner has been diagnosed. Dr. Regnier's October 7, 2019 evaluation had diagnosed R/O (rule out) schizoaffective disorder. R/O is commonly used by psychologists to indicate the

presence of symptoms consistent with the diagnosis, but the need for more evaluation or testing for a definitive diagnosis.

A diagnosis of Schizoaffective disorder requires the finding that the patient suffers from:

> A. An uninterrupted period of illness during which there is a major mood episode (major depressive or manic) concurrent with Criterion A of schizophrenia.
>
> a. Criterion A of schizophrenia requires
>
> i. Two of more of the following, each present for a significant portion of time during a 1-month period. At least one of these must be (1), (2), or (3):
>
> 1. Delusions
> 2. Hallucinations
> 3. Disorganized speech (e.g. frequent derailment or incoherence)
> 4. Grossly disorganized or catatonic behavior
> 5. Negative symptoms (i.e. diminished emotional expression or avolition).
>
> ii. Delusions or hallucinations for two or more weeks in the absence of a major mood episode (depressive or manic) during the lifetime duration of the illness.
>
> iii. Symptoms that meet criteria for a major mood episode are present for the majority of the total duration of the active and residual portions of the illness.
>
> iv. The disturbance is not attributable to the effects of a substance (e.g., a drug abuse or medication) or another medical condition.

As Dr. Regnier points out, schizoaffective disorder is defined by many of the same features as schizophrenia, including hallucinations, delusions, impairments to occupational and social functioning, and anosognosia (poor insight). *Id.* at 4. The main distinction is schizoaffective involves the concurrent diagnosis of a major mood episode, in Petitioner's case, major depression. *Id.* Importantly, one of the psychotic episodes that formed the basis of Dr. Regnier's schizoaffective disorder diagnosis

occurred "[i]n the early to mid-2000s." *Id.* at 7. This is significant, first, because it indicates a progressive worsening of Petitioner's condition in the years after Dr. Krop's evaluation. Dr. Krop could not have diagnosed Petitioner with schizoaffective disorder when he evaluated Petitioner in 1997, because some of the psychotic episodes critical to the diagnosis had not yet occurred. Second, Petitioner's psychotic symptoms in the early to mid-2000s are corroborated by Dr. Golden's evaluation from 2002, which repeatedly noted a "detachment from the real world," and test results consistent with individuals with schizoid/schizophrenic disorders. EH exhibit 8 at 2, 4.

Dr. Regnier also states, "[i]n most cases MMI/SMI can't be identified simply by looking at someone," and many of the symptoms laypeople look for are actually side effects of the medications typically used to treat MMI/SMI, not the mental illness itself. Appendix A at 4. Dr. Regnier also points out that schizoaffective disorder is often misdiagnosed by clinicians. *Id.* It is no surprise that Norgard, someone with no psychological training who spoke to Petitioner at most on a few brief occasions, primarily over the phone, would not have been in a position to recognize Petitioner's ongoing serious mental illness. Based on the findings of Dr. Regnier, and corroborated by the contemporaneous findings of Dr. Golden, during the critical period when Petitioner's federal habeas petition was due, Petitioner was not only suffering from two Serious Mental Illnesses, but was additionally actively psychotic. Petitioner should be given the opportunity to present this evidence through the testimony of mental health experts, rather than the Court dismissing the petition on the "expert" opinion of a layman (Norgard), this Court's observations of Petitioner, and mental

health records that pre-date the relevant period of time by between 8 and 22 years.

WHEREFOR, Petitioner respectfully requests this Court grant reconsideration, withdraw its order dismissing the petition, and schedule an evidentiary hearing on Petitioner's mental status during the relevant period. Alternatively, Petitioner requests this Court reconsider its order denying a certificate of appealability, as the decision to deny equitable tolling at this stage of the proceedings is debatable by jurists of reason.

Local Rule 3.01(g) Certification

Petitioner has conferred with counsel for Respondents who oppose this motion.

Respectfully submitted this 17th day of December, 2021,

A. FITZGERAL HALL, ESQ,
FEDERAL DEFENDER

CAROL A. WRIGHT, ESQ.
CHIEF, CAPITAL HABEAS UNIT

/s Gregory W. Brown
Gregory W. Brown, Esq.
Assistant Federal Defender
Florida Bar # 086437
Office of the Federal Public Defender
Capital Habeas Unit
Middle District of Florida
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Tel: 813-228-2715
Email: greg_brown@fd.org
Secondary Email: FLM_CHU@fd.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December 2021, a true and correct copy of the foregoing was furnished by using the CM/ECF system with the Clerk of the Court, which will send notice of the electronic filing to Office of the Attorney General, Charmaine M. Millsaps, Assistant Attorney General, at charmaine.millsaps@myfloridalegal.com; Office of the Attorney General at capapp@myfloridalegal.com and to all interested parties of record.

Respectfully submitted,

/s Gregory W. Brown
Gregory W. Brown, Esq.
Assistant Federal Defender
Capital Habeas Unit

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAVID MILLER, JR.,
Petitioner,

v.

Case No. 3:17-cv-00932-BJD-JBT
DEATH PENALTY CASE

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.
_____/

ATTACHMENT "1"

Assessment and Psychotherapy Services, Inc.

Eddy Regnier, M.S.W., M.A., Ph.D., Licensed Psychologist PY4639

2155 Main Street • Sarasota, Florida 34237 Tel: (941) 365-2962 Fax (941) 952-9705

Confidential Forensic Psychological Evaluation
(For Professional Use Only)

Federal Public Defender
Capital Habeas Unit
Attn: Greg Brown, Esquire
227 N. Bronough St., Ste. 4200
Tallahassee, FL 32301

Re: David Miller, Case No. 3:17-CV-932

Sex: Male
Marital Status: Single
DOB: September 6, 1959 (62 years old)
Race and Ethnicity: African-American

Evaluator: Eddy Regnier, MSW, MA, Ph.D.
Dates of Evaluations: September 28, 2018 and September 30, 2019; and October 10, 2021
Date of Report: December 16, 2021

Reason for Referral:
Mr. David Miller was again referred for a psychological evaluation in order to determine if the presence of major Mental illnesses may have interfered with his ability to rationally participate in his defense at trial and, following his conviction, to file appeals in his death penalty case.

The psychological evaluation was conducted at the Union Correctional Institution in Starke, Florida, where Mr. Miller is being held. Conditions were adequate to secure valid results. Mr. Miller required no special techniques in order to conduct the interview. Findings of this evaluation will be provided only to defense counsel.

Informed Consent and Procedures:
Mr. Miller was again notified about the purpose of this evaluation and the associated limits on his confidentiality. Mr. Miller seemed to understand the limits of his confidentiality and gave a written informed consent to participate in the evaluation. Mr. Miller was seen on three separate occasions to complete this evaluation. The first meeting was performed in September 28, 2018 and occurred over a day period with break for lunch.

The second meeting was performed in September 30, 2019 over the course of a morning from 9:00 am to 12:00pm. The third meeting was held on October 10, 2021 and lasted over the course of a day period with an hour break for lunch.

During the first meeting Mr. Miller was socially withdrawn, guarded and slow to participate. During this most recent meeting, he was socially engaging, smiled

frequently and responded to the undersigned favorably. It should be noted that during the second meeting, when probing questions resulted in disclosure of information about his mental functioning, Mr. Miller ended the meeting and asked that the undersigned not return in the afternoon. During the course of preparing this report, the following procedures were used:

Methodology:

In order to arrive at conclusions contained in this report, a total of 16 hours in face-to face meetings were held with Mr. Miller that included administration of psychological tests that permitted direct observation of his behavior under different environmental conditions (how he responded to stress, how he handled failure/success, manage calm moments and probing questions. In addition, many hours were spend going over his prior psychological evaluations completed in the past, careful review of his charges, and any records that could shed information of his functioning before, and during his trial. The following records were reviewed to complete this report:

Records Reviewed:

Referral for Mental Health Evaluation
Review of Correspondence from Katherine Blair, Esq.
Dorothea Dix Hospital in Fayetteville, North Carolina (1986)
Reynold Mental Health
Forsyth-Stokes Mental Health Center, Winston Salem, North Carolina
Wilkes Correctional Center Records
Veteran Administration Medical Records (1996)
North Carolina Division of Mental health and Substance Abuse Services
Dr. Harry Knop Ph.D. Neuropsychologist, Defense Retained Trial Psychologist
Dr. Charles Golden Ph.D. Defense retained Post Conviction Psychologist (3/20/03)
Johnny Legrand MA, Veteran Administration, Social Worker
Richard Turner MSW, Veteran's Administration Therapist
Dr. Lawrence Holder MD, State Retained Post Conviction Doctor
Dr. Joseph Wu, MD,

Direct Clinical Examination:

Clinical History of David Miller
Psychosocial History of David Miller
Mental Status Examination of David Miller
Behavioral Observation of David Miller

Psychological Tests Administered:

Personality Assessment Inventory (PAI)
Millon Clinical Multiaxial Inventory-IV (MCMI-IV)

Mental Status Examination:

During the first two meetings Mr. Miller presented as withdrawn, emotionally distant and avoided direct eye contact, however at the time of the final meeting he warmed up slowly, and over time became socially engaging. He was fully alert and oriented to time, person, and place. He was cooperative with the

evaluation. His speech was goal-directed and easy to understand. He talked in a soft voice that was easy to understand. His gait and posture were normal. His attention span and concentration were average. He had no difficulty completing serial sevens. He seemed to be of average intelligence. His mood was euthymic and his affect was congruent. He denied any prior diagnosis of a mood disorder. He denied any current history of homicidal or suicidal ideations. He explained that in the past he had thought of suicide and had made an attempt because he wanted to join God. He also admitted that he has twice been convicted of murder. He described having auditory hallucinations in the past, but denied any current problems with perceptual disturbances. He said when he was very young he frequently heard voices demeaning him stating that he is no good. He denied any history of headaches, confusion, seizures, memory problems, and syncope. His judgment was fair.

Background Information

History of Criminal Charges:

Mr. Miller said that he has spent most of his adult life in prison and at the age 62, all he knows is incarceration. He admitted to a history of prior arrests and defending against criminal charges. He said he was first sent to prison on February 6, 1986, at the age of 26, after he was convicted on a second degree murder charge in North Carolina. Records from the North Carolina case indicate that the court ordered psychiatric treatment for Mr. Miller in the time leading up to his trial, as he displayed "bizarre" behavior. According to these records, Mr. Miller had inexplicably shot the victim with little provocation and immediately turned himself in to law enforcement with no insight into why he had shot the victim.

Mr. Miller was originally sentenced to serve 25-year in prison, but he was released on probation after serving only seven and a half years in prison. He said he was out of prison for approximately four years, and was homeless for most of this time before he was re-arrested for the first degree murder charge for which he is currently incarcerated and facing a death sentence. He said initially he was close to God and they were in communication (auditory hallucinations) and at that time he felt that he should be punished for what he did and accepted his fate. He said that he made some early mistakes in his case and now it is too late to ask the court to review his case and correct past legal errors. Now he has changed his mind, as communications from God has stopped, and he wants to defend himself.

Mr. Miller was arrested in May 1997 on a charge of murder. He was convicted in 1998 in Duval County and sentenced to death. Since July 1998, Mr. Miller has been held on Death Row at Union Correctional Facility for a total of 22-years. Mr. Miller reported using multiple drugs and drinking earlier on the day that the crime occurred. In fact, he had a substantial polysubstance dependence problem that included abuse of Valiums, Quaaludes, Cocaine, and alcohol. Mr. Miller reports a "blackout" state immediately prior to committing the murder. He turned himself in to the authorities two and a half months later

in Baton Rouge, Louisiana, despite not being a suspect in the case at that time. Mr. Miller turned himself in because he believed members of the victim's family to be following him (possible early signs of mental disorder in the form of paranoia/delusions, and he believed he that had been fleeing them throughout the state of Florida all the way to Louisiana.

Mr. Miller said that he jumped onto moving trains in order to flee his perceived persecutors, but eventually became so paranoid that he could not outrun them, because they were part of an elaborate network causing death to following him wherever he went. Although Mr. Miller had been abusing multiple drugs such as cocaine, and alcohol before and after commission of the murder, no toxicology tests were performed that could have been introduced at trial to mediate his sentence.

Definition of Major Mental Illness:

Major Mental illness (MMI)/Serious Mental Illness (SMI) is defined as someone over 18-years of age that is diagnosed with a psychobiological problem that causes mental, behavioral, or emotional disorder resulting in serious functional impairment that substantially interferes with major life activities. MMI, SMI includes mental disorders such as Schizophrenia, Schizoaffective Disorder, Autistic Spectrum Disorder, severe Bipolar Disorder, Major Depressive Disorder and any of 300 mental disorders that is sufficiently severe to cause impairment in major life activities. According to the National Institute of Mental Health (NIMH) Major Mental Illness is relatively rare occurring in only about 5% of the general population of people 18 years or older.

In most cases MMI/SMI can't be identified by simply looking at someone. In fact, the early cinematic views of the chronically mentally Ill showing then with twisted bodies, odd facial appearance, and rocking behavior were more a depiction of how long term use of psychoactive medications change physical appearance (Tardive Dyskinesia) in the mentally ill than manifestation of the mental disorder. Mr. Miller has apparently suffered from serious mental Illness over the course of his life, but was spared the consequences of physical changes of Tardive Dyskinesia because he was not afforded extended psychiatric care of taking neuroleptics/antipsychotics medications. Thus, it is difficult for the general pollution to discern who is truly mentally ill by simply looking at behavior. A quite person who is simply sitting and an agitated person's behavior may both be manifestation of mental illness.

Mr. Miller's Psychiatric History:

Mr. Miller did not self-report a history of psychiatric illness or mental health treatment despite having been asked about his mental health background. However, Mr. Miller's records indicate that he had received treatment at Dorothea Dix Hospital in Raleigh, the Salsbury Veterans' Association Hospital, the Bethesda Center in Winston-Salem, Schulbacher, Forsyth Stokes Mental Health Hospital, North Carolina Division of Mental Health, and Wilkes Correctional Center. These hospitalizations established that his mental ill was at times sufficiently severe that he was unable to care for himself and required inpatient treatment.

Over the years since his early 20s he has been described in various mental health records as carrying a number of diagnoses that include the following: Depression with suicide; Withdrawn with psychomotor retardation; Adjustment disorder with mixed disturbance of emotions and conduct; Intermittent Explosive disorder; Alcohol use disorder, Cocaine dependence, Cannabis dependence; Personality disorder with mixed avoidant and schizoid; Schizoid personality disorder; Schizophrenia; Paranoia; Passive dependent; poor reality testing; wants to minimize environmental contact; Schizophrenia spectrum disorder and Frontal lobe neuropsychological deficits and Encephalopathy secondary to frontal lobe injury that may have been inflicted when he was a child. All of these diagnoses seem to fit a definition of major mental disorders. The Center for Mental Health Services (CMHS), National Institute of Mental Health NIMH, define mental illness as functional impairment that substantially interfere with or limit a person from performing major life activities (CMHS 1999, FN).

Psychiatric records indicated that Mr. Miller had engaged in suicidal wrist-cutting behaviors, and was taken for alcohol treatment in his early to mid 20s. In September 9, 1983, he was admitted to the North Carolina Division of Mental Health and Substance Abuse Services after what appeared to have been a psychotic episode that took place in his mother's home. Mr. Miller engaged in bizarre behavior including chasing his younger brother with a knife, and then nearly attempting suicide with his mother's .22 caliber gun. During this episode, Mr. Miller's mother pointed a gun at him to get him to leave. He said that he was not afraid as he had been when his father threatened him earlier. He felt sure that his mother would not have shot him, however after this incident he changed his views about his mother and went to live in the woods alone where he felt the most secure.

Substance Use History:

Mr. Miller also has a long history of polysubstance abuse with serious consequences. He admitted to a lengthy history of polysubstance abuse and alcohol dependence, beginning in his teenage years. Mr. Miller said that in the past, he has taken other people's prescription medications to get high and for their calming effects. He took Quaaludes when he could obtain them, but usually, they were financially prohibitive. When Mr. Miller was previously incarcerated, he used to ingest another inmate's Thorazine, a sedating antipsychotic agent. However, he reported that the Thorazine slowed him down too much, so he stopped self-medicating with it. Mr. Miller's prescription drug of choice was Valium, an antianxiety agent that calmed him down. During his first hospitalization he was treated with Navane (Thiothixene) an antipsychotic medication.

Prior to Mr. Miller's crime and subsequent arrest, he abused alcohol and any sedating agents he could find. He took acid, but ultimately became too fearful of having a "bad trip" and discontinued its use. Mr. Miller has taken speed, but considered it his "opposite" because it exacerbated bad feelings in him. Instead, Mr. Miller routinely sought "downers" with calming and sedating effects. He consistently abused crack cocaine and alcohol in the time period

leading up to this crime. There were days that he drank all day, and was under the influence of crack and alcohol on the night of the crime. I believe that during this period of his life Mr. Miller had experienced an acute psychotic break and was attempting to self medicate his symptoms with street drugs and alcohol.

History of Psychotic Episodes:

Mr. Miller reports longstanding religious beliefs that impacted his behavior leading up to trial, and throughout his appeals. Unlike culturally appropriate religious beliefs, Mr. Miller's beliefs are bizarre, irrational, and seem manifestations of a mental illness. His earliest memory of his pervasive beliefs began in the mid-1980s, when he started to believe death was chasing him. Distressed, Mr. Miller isolated himself in his room at the boarding house in which he was staying, and began to pray by repeating psalms. Mr. Miller stated that Psalms 14 and 51 both say the same thing: "The fool sayeth that there is no God, but Jesus is real and our savior." After repeating these words multiple times, he fell asleep in peace. He woke up and no longer believed death to be chasing him, and attributed this lessening of fear and anxiety to God. However, he continued to experience paranoia, and in my clinical opinion experienced a brief psychotic episode.

When Mr. Miller was in jail awaiting trial for the current offense, he reported a voice taking residence in his head (auditory Hallucination). The voice possessed his body, talked to him daily, and he believed it to be the Holy Spirit. The voice told him to read the Bible, and told him, "I don't think you should defend yourself." Mr. Miller began to believe he was disobeying the voice of God by allowing his attorneys to defend him, which caused him to feel strong guilt. His lawyers noted that Mr. Miller "seemed far away" at times". He did not want to die, but felt he needed to concentrate only on God and not his legal defense in order to follow the voice's commands. The voice led Mr. Miller to believe that if God chose to deliver him from harm, it would be done, and he should simply focus on God instead of anything related to the legal process. Mr. Miller said that he was so convinced of his spiritually that he was prepared to "die".

This period of hyper-focus on spirituality and disinterest in his legal defense lasted approximately six months, and then Mr. Miller "started slacking off" and began to intermittently participate in his legal process. When asked about the change in behavior, he said the hyper religious arousal he had been experiencing simply dissipated over time and he lost the feeling that God was inside of his body. He said he thought the wicked ways of the world had corrupted him and God left. (It is well established that symptoms of mental illness waxes and wanes over time with peek periods and low periods when the infected person return to a prodromal level (pre-psychotic level of functioning).

For the past 22-years, Mr. Miller has continued this pattern of religious preoccupation, adherence to the commands of auditory hallucinations, and consequent disinterest in his legal proceedings followed by lessening of his acute symptoms. (For example, during his last appointment with the undersigned, in October 2021, he was functioning in the prodromal phase of

his illness and presented as being socially responsive.) However this should not be confused with the acute phase of his psychosis when he is hyper focused on his delusions and hallucinations to the exclusion of other interests. At one point after he was convicted and sentenced to death, Mr. Miller felt so confident about his spirituality that he was "ready to die." He believes there was a predetermination for him to have a bad lawyer at trial so that he would suffer a negative outcome, and that the predetermination was such that, "Now even Johnny Cochran could not help me." At other points, when Mr. Miller felt less confident in his spirituality, he becomes similarly preoccupied and distressed. He reports feeling guilty about not serving God well enough in prison or being dedicated enough to God. This pattern manifested by fluctuations in his motivation to participate in the legal process seems based on his mental status and not on objective reality. Sometimes, Mr. Miller is a passive observer who tells his lawyers "Just do what you want to do, if you want to defend me, defend me" but will not assist his attorneys. At other times, when religiously preoccupied, Mr. Miller is actively opposed to his lawyers' attempts to defend him as, "God is in charge".

In the early to mid-2000s, Mr. Miller was going through a delusional period when he felt close to and was communicating with Jesus Christ. He recalled the following, "I thought I was guilty and got the punishment I deserved." He believed only God could deliver him from harm, and that his legal defense was unimportant, and at any rate he did not understand legal jargon. He did not wish to argue with his attorneys by actively seeking to have them dismissed, but passively refused to participate or self-advocate during the process. He continued to experience auditory hallucinations throughout that period of time. He recalled that at one point, the voice of God told him to drop his appeals, so he attempted to do so. However, he filed the motion improperly, and sent it to the wrong Court. The State Attorney asked him, "Are you serious about dropping your appeals?" Mr. Miller "gave him no answer and looked at the State Attorney like he was crazy because he should have known that I was serious, as I filed my own motions." The Court did not press Mr. Miller about the issue, and he gave up because he did not understand how to properly file his motion.

Based on Mr. Miller's religious preoccupations, he remains ambivalent about exercising his legal rights. At times, he believes "Jesus has my back and it's for real. Jesus will help me with the fear of dealing with this situation." Mr. Miller looks at his impending death only through a religious lens. He states that he has "always been easy with death" but is troubled that the death house at Florida State Prison has no religious services or chapel. Mr. Miller is aware that men on death watch can have a pastor come to visit them, but does not trust the pastor because he believes the man is a prison guard first and Chaplain second. He states that this pastor previously refused to baptize him. Based on Mr. Miller's beliefs in predetermination, he now does not believe baptism to be necessary.

Additionally, Mr. Miller continues to exhibit bizarre behaviors in prison that suggest that he continue to have brief psychotic episodes. He recalled after he

learned about his mother's death, he was given a tray of food. He thought that something was wrong with the tray and did not eat. Later he changed his mind and decided to eat when an officer came to collect the tray. He said he was not himself and refused to give up the tray resulting in his being placed in the disciplinary wing. When discussing this incident again he said that sometimes people ejaculate, and smear feces on the food. He said at the time he thought something like that had happened to his food and then changed his mind. More recently, in October 21, he told the undersigned that he believes an officer at his detentions facility has a vendetta against him because several years ago he got sick and had an accident in the yard. According to him, this officer has been carrying this vendetta for several years now. He actually wants to file a formal complaint against this officer.

Psychosocial History Linked to Development of Psychiatric Illness

Family History:

Because psychosocial experiences play a significant role in the development of mental illness, it was necessary to obtain a detailed family history. Additionally, because Adverse Childhood Experiences (ACEs) is well known to cause mental illnesses, it was essential to understand how Mr. Miller's early life experiences helped to shape the genesis of his major mental illness. Mental illness runs on both sides of Mr. Miller's family indicating a biological/genetic predisposition to psychiatric disorders. During Mr. Miller's early childhood he was exposed to extreme violence, substance abuse, and the excesses of his parent's mental health problems. His troubled background is depicted in his family history.

Mr. Miller was born to David and Yvonne Scales, and has two living siblings. Mr. Miller also had two siblings who died at birth, and an elder sister (Valnice) who took her own life. Mr. Miller's parents are both deceased. Prior to their deaths, they divorced, and Yvonne married another man who was also an alcoholic. Although Mr. Miller has come to believe that his parents loved him, they never expressed love or affection to him. Only Willie Mae Down-Scales, a member of Mr. Miller's extended family, told him "I love you".

Significantly, Mr. Miller comes from a severely dysfunctional family characterized by his parents' severe mental health problems, substance abuse issues, and extreme violence towards their children. Both parents beat Mr. Miller and his siblings causing severe injuries. Mr. Miller's father frequently beat his siblings and him with tree limbs for minor infractions. The violence in the home was so severed that Mr. Miller believed that his father was capable of killing him on a whim. He said all his siblings were fearful of his father. As a child Mr. Miller was the victim of physical beatings, his parents threatened him with guns, and forced him to beat his siblings with electric cords. He also was forced to watch his father beat his mother with a crowbar, and watched his sibling being beaten.

Sexual assault also occurred in the family. As a child, Mr. Miller witnessed the rape of his sisters by a trusted family member, and there are significant

indicators that Mr. Miller was himself sexually assaulted by a family member, although he did not disclose that in our interview.

Mr. Miller's social and family history as described earlier suggests that he experienced multiple catastrophic Adverse Childhood Experiences (ACEs) that have a high correlation with the development of psychiatric illness. He was exposed to his parent's drunkenness that frequently resulted in violence against each other and the children. According to the ACE study children exposed to such severe trauma frequently develop psychiatric illnesses such as major depression, bipolar disorder, atypical psychosis and other mental heath problems.

Since Mr. Miller's childhood, multiple family members have been diagnosed with schizophrenia, including one of Mr. Miller's sisters, Valnice, who has since committed suicide. Valnice lived under delusions that people were out to kill her, and prior to her death lost custody of her son due to her symptoms. Mr. Miller's great-uncle was diagnosed with schizophrenia, and spent over two decades in the Cherry Hospital for the Criminally Insane in Goldsboro, NC after killing his three children, believing Jesus had commanded him to hide the children from Satan by drowning them in a well. Cherry Hospital was the only psychiatric hospital that accepted African American at that time. Additionally, Mr. Miller has two cousins on death row in other states. One, cousin in South Carolina, has been found incompetent to waive his appeals as a result of schizophrenia, (case number 367.S.C.389).

For a time Mr. Miller lived with his father and described conditions there as being extremely difficult. He stated that his father was a madman who was not afraid of anything. Reports indicate that Mr. Miller's father was pathologically religious, portrayed himself as a preacher and Biblical authority. He described several incidents of abuse. One example was when their father told the children to carry a jug of water to the tobacco field where the family worked. The children carried it part of the way, then their grandfather assisted them in carrying it the rest of the way. When they arrived at the tobacco field, their father was enraged that the children had not carried the jug the full distance. He grabbed a tree limb and beat Mr. Miller, his siblings, and his paternal cousin, Cedric Crawford. As was usually the case with his father's beatings, Mr. Miller and his sister Valnice were beaten more severely than the other children.

Mr. Miller recalled that his father always beat the children "butt naked". If the children ran away, did not hold still during the beatings, or refused to strip naked for the beatings, his father would beat them more savagely. When Mr. Miller was eleven years old, he witnessed the rape of his two sisters by older paternal cousins. Mr. Miller reported the rape to his father, and was beaten for reporting the incident.

Mr. Miller was beaten by his father at least once per week, for approximately ten minutes at a time. The beatings began so early in Mr. Miller's childhood that he grew up having no idea that such behavior from a parent toward a child

was abnormal. His father favored the use of tree branches and electrical cords for beatings, and Mr. Miller's mother did not intervene because if she attempted to protect her children, she would be beaten as well.

Mr. Miller's parents routinely engaged in violent acts against one another, including threatening one another with firearms. Mr. Miller recounted one instance in which his mother expressed a desire to go to work, but his father would not let her leave the home. Mr. Miller's mother pulled a pistol on her husband/his father, who ran and retrieved a shot gun to threaten his wife in retaliation. Mr. Miller also recounted incidents in which his father beat his mother in the head, with an iron poker, and numerous times with his closed fists. Reports from Mr. Miller's extended family indicate that Yvonne's two stillbirths may have been the result of beatings by her husband. When Mr. Miller recounted these episodes of familial violence, he displayed little to no affect or emotion. However, he also seemed preoccupied with these two stillbirth sibling and attempted to reconstruct why they died.

As mentioned above, Mr. Miller and his elder sister, Valnice, received the brunt of their father's violence. Valnice sometimes attempted to run away from the beatings. When she did, Mr. Miller's father would find Valnice, tie her down while naked, and beat her with a vengeance. Mr. Miller believes that the worst beatings were reserved for acts of defiance, and his father considered running away from a beating to be an act of defiance. Mr. Miller felt very sorry for his sister, because she was seriously injured by the beatings. But Mr. Miller fared no better with their father, and sometimes was beaten to the point that he believed he would die from his injuries.

Mr. Miller was not only beaten by his father, but also by other members of the family. One such beating was prompted when Mr. Miller was 14-years old and forgot his paycheck at work. His mother forced his grandfather to beat him for his forgetfulness. Mr. Miller was particularly humiliated by this beating, and took the act to mean that his mother did not love him any longer. At another time he forgot his paycheck at work, his mother told him, "I am going to the shed to get an ax to kill you". This was the first time Mr. Miller ran away from being punished. He hid in the woods by himself for hours. Eventually, his mother sent someone to get him. When he returned home, she did not get an ax or beat him. Yet, at another time, his mother beat him on the scrotum with a belt buckle. The beatings themselves, coupled with the uncertainty over when he would be beaten and why, kept him in a constant state of distrust, fear, and wariness.

Despite these early exposures to violence, Mr. Miller will not admit to being traumatized and refuses to characterize the beatings as abuse. He will only say that his feelings were hurt by the beatings because they did not represent being told "I love you". Mr. Miller's mother became increasingly abusive after her divorce from Mr. Miller's father, and coupled physical abuse with statements such as "You'll never amount to much" and "I'll send you off to a home". She forced her new husband to beat Mr. Miller.

Mr. Miller describes himself as a loner, who as a child often went into the woods so that he could be alone and away from people. He frequently played by himself, or would sit in his room and not talk to anyone for weeks at a time. (These symptoms are associated with the type of autistic symptoms seen in schizophrenia and other serious mental disorders.) Mr. Miller is more comfortable alone than with others, and has historically gone to great lengths to avoid groups of people. He avoids many routine aspects of community life; for example, he never celebrated his own birthday and does not know the birthdays of even those who are closest to him. He has never been married, has no children, and expressed that he has no desire to have a relationship with anyone or to be romantically involved. Mr. Miller stated that he simply wants to be left alone to live a solitary life. It should be noted that these signs of severe mental disorder would have gone unnoticed in this family where parent's mental illnesses, substance abuse and extreme violence were a normal part of life.

One of the few individuals Mr. Miller remains in contact with is his cousin Cedric, who is an ordained minister. Mr. Miller exchanges letters with Cedric, but does not like to do so, stating that he believes his cousin is too busy to have to read Mr. Miller's letters or write back. Prior to Cedric, Mr. Miller kept in some contact with another cousin, Boyd Howell, who killed himself while Mr. Miller was incarcerated in North Carolina.

Adverse Childhood Experiences (ACEs)

The Adverse Childhood Experiences (ACEs) study was conducted by the U.S. health maintenance organization Kaiser Permanente (KP) and the Centers for Disease Control (CDC). The study showed that there was strong association between abuse of children and health and social problems across the lifespan. The original ACE study was conducted at Kaiser Permanente from 1995 to 1997, and the data was obtained from over 17,000 Health Maintenance Organizations from Southern California. Over the last three decades, the study has been expanded adding a rich data base to the original study.

Educational and Employment History:

Mr. Miller reports childhood attendance at multiple schools. He attended Carver Elementary School, and "failed the first grade and was expelled. After bussing began, Mr. Miller attended Old Town School, but was spanked and expelled after pulling a prank that several other students also pulled but were not punished for. The prank involved pulling a chair out from under another student as they sat. Mr. Miller was so used to being physically assaulted and humiliated at home, physical discipline at school seemed "funny" in comparison. Next, Mr. Miller attended Skyland Elementary School, an all-black school with a poor reputation that has since closed. It appears that Mr. Miller returned to Old Town School for one year after Skyland.

After Mr. Miller's parents separated, he was moved to a fourth elementary school, Old Town, a predominantly white school. Later, he attended Northwest Junior High School for middle school. Mr. Miller self-reports that he did well academically at Northwest Junior High, likely a result of increasing maturation

and better treatment by staff. He attended Mount Tarver for ninth and tenth grade, and recalled that it was easier here than in elementary school to make acceptable grades if he wanted to; however, Mr. Miller states that he was not motivated to make grades. He attended North Forsyth High School for eleventh and twelfth grades, and did just enough to get by because he had learned not to have expectations and remain under the radar.

Following high school, Mr. Miller enlisted in the U.S. Navy in order to get away from his home and was accepted due to lowered standards for McNamara's 100,000rogram. Mr. Miller was assigned the duties of a Signal-Man. He reports that his duties included visual communication, Morse code, and light signal to communicate to other ships. Mr. Miller served for three years in the Navy, but was discharged for inability to adapt to military life. Mr. Miller was unable to articulate why he was discharged from the Navy. At the time, the US Navy had implemented Project Upgrade as a mechanism for discharging marginal performers from the Navy and to improve morale. Mr. Miller due to his undiagnosed mental illness would have likely been a high priority target for this program.

Mr. Miller struggled to find and maintain employment after his military discharge. The only positions he could obtain were those of manual labor, such as washing dishes, basic roofing, or putting rebar into concrete. He could not support himself financially through these positions, and was forced to return to live with his mother. Eventually, due to persecutorial delusions, Mr. Miller fled from North Carolina to Jacksonville, where he was transient and often lived on the streets or under the bridges. Throughout this time, Mr. Miller abstained from asking his family for money, because he believed God would provide if it was God's Will.

Medical History:

Dr. Knop, neuropsychologist diagnosed Mr. Miller with brain injury, Cognitive disorder, NOS. Dr. Lawrence Holder reviewed a PET brain scan sent to him in October 10, 2002, and concluded the images were normal PET brain scans. However Dr. Joseph Wu, MD ordered MRI/CAT Scans that revealed the presence of Encephalopathy. Encephalopathy is defined as disease or trauma that causes impairment in brain functions. Generally symptoms are varied and depend on the cause and severity. Common symptoms may include the following: Difficulty in thinking and concentrating; Impulsive behavior; Depression or apathy; Short-term memory loss; Difficulty planning and carrying out tasks; Emotional instability; Suicidal thoughts or behavior and mental impairment. It should be noted that these symptoms have been variously described in his medical records.

Psychological Test Results

Millon Clinical Multiaxial Inventory-IV (MCMI-IV):

The Millon Clinical Multiaxial Inventory-IV (MCMI-IV) is a psychological assessment tool intended to provide information on psychopathology, including specific psychiatric disorders outlined in the DSM-IV. It is intended for adults

(18 and over) with at least an 8th grade reading level that is currently seeking mental health services.

The Millon Clinical Multiaxial Inventory-IV (MCMI-IV) was administered and a report was generated with electronic means through PsychCorp. MCMI-IV reports are not normed on patients, such as Mr. Miller, who are in the early phases of assessment or psychotherapy for emotional discomfort or social difficulties. Respondents who do not fit this normative population or who have inappropriately taken the MCMI-IV for nonclinical purposes may have inaccurate reports. This is particularly so for individuals within the criminal justice system. The MCMI-IV report therefore cannot be considered definitive for diagnostic purposes. Rather, it is a helpful tool to be evaluated in conjunction with additional clinical data.

A distinct tendency toward avoiding self-disclosure is evident in Mr. Miller's response style. This nondisclosure may signify characterological evasiveness or an unwillingness to divulge matters of a personal nature, problematic or not. Also possible are broad deficits in introspectiveness and psychological mindedness, owing to emotional impoverishment or thought vagueness. Adjustments made to compensate for these response tendencies are likely to produce a valid profile, but some scores may have slipped beneath effective discriminatory range. On the basis of the test data (assuming denial is not present) it is reasonable to assume that Mr. Miller is exhibiting psychological dysfunction. Notably, Mr. Miller is likely to be underreporting the level of his dysfunction, which means his symptoms may be worse than reported.

Most characteristic of Mr. Miller's MCMI-IV profile are a self-protective aloofness, a depressive irritability, and a negativistic way of relating to others. He is behaviorally introversive and shy, but also edgy and pessimistic. He may relate to others in a colorless, constrained, and grim way that is heightened by a lack of social initiative and activity-oriented behavior. Most typically, he may display a generally flat and impoverished affect, although he may also be sulky and ill-tempered. He may experience ambivalent thoughts, especially concerning interpersonal matters. Easy fatigability and a general control over motoric expressiveness and spontaneity may also be evident.

Submerged beneath this introversive style may be anger and discontent that periodically surface openly into oppositional behavior. On rare occasions, he may be prone to abrupt, but fleeting, expressions of anger or even rage. Although he may prefer a peripheral role in social and family relationships, he has a strong, albeit conflictual, need to depend on others. His ambivalence may stem in part from a well-cloaked, if not denied, low sense of self-esteem as well as a long-term unwillingness to function in a socially responsible or competent manner. Accordingly, he will at times be self-belittling and may assume the self-image of a weak and ineffectual person. His occasional inefficiency is partly due to his restrained tempo and partly to his resentfulness toward others for what he sees as their unreasonable expectations of him.

Daily life for Mr. Miller is likely to be uneventful, with long periods of passivity and solitude often being punctuated with feelings of irritability and meaninglessness. Although he appears indifferent to his social surroundings, avoiding introspection, and generally disengaged from the subtleties of emotional life, much of this coexists with stronger, cloaked feelings. His thought processes will tend to be unfocused, especially in relation to the more intimate aspects of social and personal relations but, as noted, this may overlie deeper but guarded negative emotions. As a result, his social communications are often strained, cranky, and self-conscious. Quite possibly, his hesitation to express warmer and more positive affect may stem from some intrinsic inability to experience pleasure. This finding supports Mr. Miller's disclosure to the undersigned regarding his preference to be alone and to avoid social interactions.

Mr. Miller has a propensity to feel depressed, morose, and erratically moody and complaining. Beneath his apathetic exterior are intense feelings of discontent and anger that may periodically be displayed in passive-aggressive, petulant, and fault-finding behavior. On the other hand, he is self-deprecating, self-punitive, and disposed to constant but quiet worrying and perhaps isolated drinking.

It is likely that Mr. Miller has learned to prefer a simple, repetitive, and dependent life patter in which he can avoid self-assertion, abdicate autonomous responsibilities, and ignore normal social relationships and conventional aspirations. Disengaged from and uninterested in most rewards of an active social life, he may alternately appear apathetic and asocial, or touchy and argumentative. By significantly restricting his social and emotional involvements, he may have unintentionally perpetuated his life pattern of cheerless and fractious isolation.

By examining the elevated Grossman Facet Scale scores for the Clinical Personality Patterns and Severe Personality Pathology scales, it is possible to identify a patient's most troublesome or clinically-significant functional and structural domains (e.g., self-image, interpersonal conduct). A careful analysis of Mr. Miller's facet scale scores suggests the following characteristics are among his most prominent personality features. Most notable are his failures to constrain or postpone the expression of offensive thoughts or malevolent actions, deficits in guilty feelings due to lack of emotional awareness, and a consequent disinclination to refashion his repugnant impulses in sublimated form. The features and dynamics of the following clinical syndromes appear worthy of description and analysis. They may arise in response to external precipitants but are likely to reflect and accentuate several of the more enduring and pervasive aspects of this man's basic personality makeup.

Mr. Miller's MCMI-IV responses suggest that he either has abused or is currently abusing prescription medications, illicit drugs, or both. (Because he has been incarcerated for an extended period of time with no evidence to the contrary, this reference is likely related to his past history of drug abuse.) Irritable, negative, and hostile in the past, he may use drugs not only to help

him unwind his tensions and undo his conflicts, but also to serve as a statement of resentful independence from the constraints of social convention and expectation.

In addition to liberating his feelings of ambivalence toward himself and others, drugs remove whatever remnants of guilt he may experience over discharging his less charitable impulses and fantasies. Defiant and resentful acts of hostility such as these may often have self-destructive undertones, which may be evident during periods of heavy use when he exhibits a careless indifference to the consequences of his behavior.

Personality Assessment Inventory (PAI):

Personality Assessment Inventory (PAI), created by Leslie Morey (1991, 2007), PhD, is a self-report 344-item personality test that evaluates a respondent's personality and psychopathology. Each item is a statement about the respondent that he/she rates with a 4-point scale (1-"Not true at all, False," 2-"Slightly true," 3-"Mainly true," and 4-"Very true"). The PAI covers constructs most relevant to a broad-based assessment of mental disorders.

The Personality Assessment Inventory (PAI) was administered, hand scored, and a narrative report was generated by electronic means through Psychological Assessment Resources, Inc. (PAR). For purposes of accuracy, the PAI provides a number of validity indices that are designed to give an assessment of factors that could distort the results of testing. Such factors could include failure to complete test items properly, carelessness, reading difficulties, confusion, exaggeration, malingering, or defensiveness. For this protocol, the number of uncompleted items is within acceptable limits.

Also evaluated is the extent to which Mr. Miller attended appropriately and responded consistently to the content of test items. The respondent's scores on these scales suggest that he did attend to item content in responding to PAI items; however, there appear to be some inconsistent responses to similar items, and this inconsistency could affect test results. Thus, the interpretive hypotheses that follow in this report should be reviewed cautiously.

The degree to which response styles may have affected or distorted the report of symptomatology on the inventory is also assessed. Certain of these indicators fall outside of the normal range, suggesting that Mr. Miller may not have answered in a completely forthright manner; the nature of his responses might lead the evaluator to form a somewhat inaccurate impression of him based upon the style of responding described below. This underscores the importance of multiple evaluations over time to generate an accurate picture of Mr. Miller's functioning, as well as to make any appropriate diagnoses.

With respect to positive impression management, Mr. Miller's pattern of responses suggests that he tends to portray himself as being relatively free of common shortcomings to which most individuals will admit, and appears

reluctant to recognize minor faults in himself.[1] Given this apparent tendency to repress undesirable characteristics, the interpretive hypotheses in this report should be reviewed with caution. Although there is no evidence to suggest an effort to intentionally distort the profile, the results may underrepresent the extent and degree of any significant findings in certain areas due to his tendency to avoid negative or unpleasant aspects of himself. Put plainly, Mr. Miller may well be functioning at a lower level than this evaluation reveals.

Despite the level of defensiveness noted above, there are some areas where Mr. Miller described problems of greater intensity than is typical of defensive respondents. These areas could indicate problems that merit further inquiry. These areas include: drug abuse or dependence; poor interpersonal rapport; alcohol abuse and dependence; unsupportive family or friends; history of antisocial behavior (not the same as antisocial personality); poor control over anger; unhappiness; and feelings of helplessness. With respect to negative impression management, there is no evidence to suggest that Mr. Miller was motivated to portray himself in a more negative or pathological light than the clinical picture would warrant.

The PAI clinical profile is also marked by a significant elevation on the DRG scale, indicating that the content tapped by this scale may reflect a particular area or difficulty for Mr. Miller. He indicates that his use of drugs has been sufficient to have had negative consequences on his life. Problems associated with drug use appear to be noteworthy, including strained interpersonal relationships, vocational and/or legal problems, and possible medical complications. Mr. Miller reports that alcohol use has caused occasional problems in his life. These problems may involve difficulties in interpersonal relationships, problems on the job, and/or the use of alcohol to reduce stress.

Diagnosis: DSM-V

History of Major Depressive Disorder, Recurrent, Severe, in full remission
Schizoaffective Disorder, Bipolar Type
Schizotypal Personality Disorder
Polysubstance Dependence, in remission secondary to incarceration
Alcohol Dependence, in remission due to incarceration
Post Traumatic Stress Disorder
Victim of physical and emotional abuse as a child

Summary and Findings:

Mr. David Miller was referred for a psychological evaluation in order to determine if he suffered from mental health problems that likely interfered with his ability to participate with filing and pursuing appeals of his death sentence.

---

[1] This could be due to any number of causes, including but not limited to ongoing trauma from Mr. Miller's history of childhood abuse, as he was savagely beaten and degraded by adult caretakers when he exhibited what those adults perceived as flaws. This again underscores the need for continued evaluation over time, so that this clinician may develop a rapport and trust with Mr. Miller and reach the most accurate conclusion regarding his condition.

Mr. Miller was arrested in May 1997 on a charge of murder, and later convicted. He had previously been convicted on a charge of murder, which appears to have taken place during a psychotic episode as he described to the undersigned and supported by mental health records. Mr. Miller was convicted of the 1997 offense in 1998 and later sentenced to death. Since July 1998, he has been held on Death Row awaiting his execution.

Ever since Mr. Miller's conviction and sentencing, he has failed to participate in his statutory appeals process. He indicated that he believed then and still believe now that God will deliver him in his own time and he did not need to worry about the appeals process. Currently, he appears to function in the prodromal phase of his mental illness and feels that he does want to proceed with his appeal. Now that he is not psychotic he understands that he put himself in a difficult situation by failing to request and participate in the appeal process.

His explanation that the cause of his failure, in the past, to file or assist with his appeals is that he was hearing voices from God (psychotic process) that offered him protection. He also describes being socially isolated, preferring to be alone than with others. At certain points, he avoided discussions about his appeals with his attorneys believing that God would protect him from harm and that any participation in the legal process would signal a distrust of God's plan and result in incurring God's disfavor. At other times, because of his preoccupation with religious themes, he believed that he deserved punishment.

At the time of my first interview with Mr. Miller, because of his continued religious preoccupation and hearing voices from God, he expressed ambivalence about pursuing his appeals and a stay of execution. However during my last visit with him at the jail he expressed a desire to proceed with his appeal.

Mr. Miller appears to have a genetic and social predisposition to mental illness, which was exacerbated by a dysfunctional family environment. Seymour Kety et al, Adopted Away Studies (1968 1975 and 1994) showed that Schizophrenia is genetically linked. However, environment can mediate severity of outcome. Mr. Miller was exposed to his parents' poor mental health, his father's drinking, and their extreme violence towards him. Very good research shows that chronic exposure to Adverse Childhood Experiences (ACEs) frequently results in victims' later developing mental health problems and substance abuse issues that hinder their ability to cope with life. Individuals, who were exposed to ACEs, in the absence of effective treatment, frequently turn to alcohol and drugs to cope.

Mr. Miller described a life of catastrophic abuse followed by mental health problems manifested by social isolation, grandiose delusions of being in communications with God, and auditory hallucinations involving being directed by God. On the day of the murder that led to his conviction, he was in a fugue state that he described as a "blackout" and is consistent with psychosis. He spontaneously turned himself in to the authorities two months later in Baton Rouge, Louisiana. At the time of the crime and the following months prior to his arrest, Mr. Miller was abusing multiple drugs such as cocaine, and alcohol

continuously, but no toxicology tests were performed that could have been used at trial to mediate his sentence.

Psychological tests administered to Mr. Miller were valid but showed a tendency to underreport psychiatric symptoms, also known as "faking good". Thus, his symptoms are likely worse than reflected in this report. Despite Mr. Miller's tendency to downplay his mental impairments, his MCMI-IV and PAI were consistent with his social history, showing signs of social isolations, mood disorders, poor social support, anxiety, poor anger management, alcohol and substance abuse. As a result of observations, clinical and social history, and testing, Mr. Miller appears to fit the following clinical diagnoses that would support severe mental health problems.

Diagnostic Categories that Apply to Mr. Miller

Major Depressive Disorder 396.36 (F33.42)

- Diagnostic Criteria:

A. Major Depressive Disorder is characterized by discrete episodes of at least 2 weeks' duration (although most episode last considerably longer) involving clear cut changes in affect, cognition, and neurovegetative functions and inter episode remission. Five (or more of the following symptoms have been present during the same 2-weeks period and represent a change from previous functioning; at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure.

1. Depressed mood most the day, nearly every day, as indicated by either subjective report (e.g. feels sad, empty, hopeless) or observation made by others) e.g. appears tearful. In children and adolescent can be irritable mood.
2. Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective accounts or observations.
3. Significant weight loss or decrease or increase in appetite.
4. Insomnia or hypersomnia nearly every day.
5. Psychomotor agitation or retardation nearly every day (observed by others
6. Fatigue or loss of energy nearly every day
7. Feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day.
8. Diminished ability to think or concentrate, or indecisiveness, nearly every day
9. Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or suicide attempt or a specific plan.

B. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
C. The episode is not attributed to the physiological effects of a substance or to another medical condition.

Schizotypal Personality Disorder 301.22(F21)

- Diagnostic Criteria:

A. A pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationships as well as by cognitive or perceptual distortions and eccentricities of behavior, beginning by early adulthood and present in a variety of contexts, as indicated by five or more of the following:

1. Ideas of reference are generally defined as a false belief that random events in the world relates to a person personal experience. (Excluding delusions of reference).

2. Odd beliefs or magical thinking that influences behavior and is inconsistent with subcultural norms (e.g., superstitiousness, belief in clairvoyance, telepathy, or "sixth sense"; in children and adolescents, bizarre fantasies or preoccupations).

3. Unusual perceptual experiences, including bodily illusions.

4. Odd thinking and speech (e.g., vague, circumstantial, metaphorical, overelaborate, or stereotyped).

5. Suspiciousness or paranoid ideation.

6. Inappropriate or constricted affect.

7. Behavior or appearance that is odd, eccentric, or peculiar.

8. Lack of close friends or confidants other than first degree relatives.

9. Excessive social anxiety that does not diminish with familiarity and tends to be associated with paranoid fears rather than negative judgments about self.

B. Does not occur exclusively during the course of schizophrenia, a bipolar disorder or depressive disorder with psychotic features, another psychotic disorder or autism spectrum disorder.

- Diagnostic Features:

The essential feature of schizotypal personality disorder is a pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationships as well as by cognitive or perceptual distortions and eccentricities of behavior. This pattern begins by early childhood and is present in a variety of contexts.

- Additional Information:

Schizotypal personality disorder may coexist with schizophrenia and/or schizoaffective disorder a comorbid diagnosis of schizotypal personality disorder is appropriate when the behavioral criteria do not exclusively occur during the symptomatic periods of schizophrenia or schizoaffective disorder. Schizotypal personality disorder may manifest earlier than schizophrenia or schizoaffective disorder. Children with schizotypal personality disorder will typically appear solitary, odd and eccentric; have poor peer relationships, social anxiety, hypersensitivity, peculiar thoughts and language, and bizarre fantasies; underachieve in school; and attract teasing. Schizotypal personality disorder is easily misdiagnosed and requires a culturally competent evaluation to differentiate bizarre beliefs from uncommon but culturally appropriate beliefs.

Schizoaffective Disorder, Bipolar Type 295.70(F25.0)

- Diagnostic Criteria:

A. An uninterrupted period of illness during which there is a major mood episode (major depressive or manic) concurrent with Criterion A of schizophrenia.[2] Note: The major depressive episode must include Criterion A1 (depressed mood). Additionally, this subtype applies if a manic episode is part of the presentation. Major depressive episode may also occur.

B. Delusions or hallucinations for two or more weeks in the absence of a major mood episode (depressive or manic) during the lifetime duration of the illness.

C. Symptoms that meet criteria for a major mood episode are present for the majority of the total duration of the active and residual portions of the illness.

D. The disturbance is not attributable to the effects of a substance (e.g., a drug of abuse or medication) or another medical condition.

- Diagnostic Features:

The diagnosis of schizoaffective disorder involves features of schizophrenia and a mood disorder (in Mr. Miller's case, depression and hypomania). For a diagnosis of schizoaffective disorder, Criterion A for

---

[2] Two or more of the following, each present for a significant portion of time during a 1-month period. At least one of these must be (1), (2), or (3):

1. Delusions
2. Hallucinations
3. Disorganized speech (e.g., frequent derailment or incoherence)
4. Grossly disorganized or catatonic behavior
5. Negative symptoms (i.e., diminished emotional expression or avolition)

schizophrenia must be met. Criterions B[3] and F[4] may be met. In addition to meeting Criterion A for schizophrenia, there is a major mood episode. Because loss of interest or pleasure is common in schizophrenia, for a diagnosis of schizoaffective disorder, depressive type, the major depressive episode must include pervasive depressed mood not simply diminished interest or pleasure. If the mood symptoms are present for only a relatively brief period, the diagnosis is schizophrenia, not schizoaffective disorder.

To separate schizoaffective disorder from a depressive disorder with psychotic features, delusions or hallucinations must be present for at least two weeks in the absence of the depressive episode. The symptoms must not be attributable to the effects of a substance or other medical condition.

- Additional Information:

Schizoaffective disorder is approximately one-third as common as schizophrenia, and is defined by many of the same features, including hallucinations, delusions, impairments to occupational and social functioning, and anosognosia (poor insight). There is a high co-morbidity with substance abuse. Like schizophrenia, schizoaffective disorder has a high genetic correlation. The risk is increased among individuals who have a first-degree relative with schizophrenia, bipolar disorder, or schizoaffective disorder.

Onset may occur as early as adolescence, but typically occurs in young adulthood. The expression of psychotic symptoms varies across the lifespan of the illness, and diagnosis of schizoaffective disorder versus schizophrenia is based on the proportion of mood symptoms present with psychotic illness. Thus, a diagnosis of schizoaffective disorder may change to schizophrenia if an individual begins displaying fewer depressive symptoms in conjunction with psychotic symptoms (and vice versa).

Schizoaffective disorder is easily misdiagnosed, particularly when the patient and clinician do not share the same cultural and economic background.

---

[3] For a significant portion of the time since the onset of the disturbance, level of functioning in one or more major areas, such as work, interpersonal relations, or self-care, is markedly below the level achieved prior to the onset (or when the onset is in childhood or adolescence, there is failure to achieve expected level of interpersonal, academic, or occupational functioning).

[4] If there is a history of autism spectrum disorder or a communication disorder of childhood onset, the additional diagnosis of schizophrenia is only made if prominent delusions or hallucinations, in addition to the other required symptoms of schizophrenia, are also present for at least 1 month.

Posttraumatic Stress Disorder 309.81(F43.10)

- Abbreviated[5] Diagnostic Criteria:

A. Exposure to actual or threatened death, serious injury, or sexual violence.

B. Presence of one or more intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred.

C. Persistent avoidance of stimuli associated with the traumatic event(s), beginning after the traumatic event(s) occurred.

D. Negative alterations in cognitions and mood associated with the traumatic event(s), beginning or worsening after the traumatic events occurred.

E. Marked alterations in arousal and reactivity associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred.

F. Duration of the disturbance (criteria B, C, D, E) is more than one month.

G. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

H. The disturbance is not attributable to the physiological effects of a substance or other medical condition.

- Diagnostic Features:

The essential feature of posttraumatic stress disorder (PTSD) is the development of characteristic symptoms following exposure to one or more traumatic events. The clinical presentation varies. In some individuals, fear-based symptoms predominate; in others, anhedonia or dysphoric mood states predominate; in others, excessive reactivity and seemingly unprovoked aggression may appear. These symptoms must not be attributable to another psychiatric diagnosis (i.e. anhedonia must be over and above what would be expected from Mr. Miller's co-morbid schizoaffective disorder or schizotypal personality disorder).

- Additional Information:

The onset and severity of PTSD is impacted by risk factors and protective factors. These can be divided into three categories: pre-traumatic, peri-traumatic, and posttraumatic. Individuals with comorbid psychological

[5] For brevity, sub indicators of this diagnosis have been omitted; however, the undersigned noted in Mr. Miller's history the presence of all requisite diagnostic criteria.

conditions, lower socioeconomic status, who belong to a cultural minority group, and who are exposed to multiple traumas are especially at risk. Children whose trauma is perpetrated by a caregiver are also particularly at risk.

Legal Implications:

Pursuant to the provisions of Fla. R. Cr. P. 3.216, the psychological evaluation of Mr. Miller did produce data that indicates the presence of SMI/MMH that has affected his life ever since he was in his late teens. Mr. Miller reports at least two psychotic episodes that lasted for a period of six or more months during which time he experienced altered mental status and impaired functioning. Through much of his legal proceedings he seemed to harbor under a delusion/psychosis that God would protect him. He appeared to suffer from schizoaffective disorder that at times due to his psychotic symptoms affected his decision making. As a result of observations and evaluation results the following conclusions were made to a reasonable degree of psychological certainty:

1. Mr. Miller appears to have been experiencing a longstanding period of altered mental status characterized by religious preoccupations, social isolation and auditory hallucinations that has impacted his capacity to understand the consequences of his actions in not assisting legal counsel with pursuing his legal defense at trial and throughout the appellate process. The waxing and waning nature of Mr. Miller's mental illness created a rare and devastating situation in which it was difficult to determine if he was being passive or being uncooperative. I.e. At first he declined the plea offer of 25-years, then apologizes and accepts the offer and then does not participate with his defense.

2. Mr. Miller appears to suffer from mental health problems. Throughout his trial and appeals process, Mr. Miller has been by reason of mental infirmity, disease or defects unable act reasonably with his defense. When Mr. Miller refused or failed to participate in his legal defense, he was likely responding to delusional ideas of religious beliefs, and was in a psychotic state that prevented him from making rational decisions with regard to his legal defense.

3. At the time of the crime for which Mr. Miller is on death row, Mr. Miller may have been unable to understand the full consequences of his behavior as a result of mental infirmity, disease, or defect. More evaluation will be necessary to explore this likelihood.

Recommendations:

Given findings from this report, it is recommended that Mr. Miller should be afforded an opportunity to pursue his appeals, as his failure in the past to attend to participate in the process appears to be the result of severe mental health problems as outlined in the report.

Thank you for this referral, and please do not hesitate to call should you have any further questions.

Eddy Regnier, MSW, MA, Ph.D.,
Licensed Psychologist
Florida License No.: PY4639

APPENDIX A-24

March 16, 2022, Petitioner/Appellant's Application to Eleventh Circuit for Certificate of Appealability

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 22-10657-P

DAVID MILLER, JR.

Petitioner/Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

Respondents/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA (JACKSONVILLE DIVISION)

PETITIONER/APPELLANT'S APPLICATION FOR CERTIFICATE OF APPEALABILITY AND MEMORANDUM OF LAW

A. Fitzgerald Hall, Esq.,
Federal Defender

Marie F. Donnelly, Esq.,
Chief, Capital Habeas Unit

Gregory W. Brown, Esq.,
Assistant Federal Defender
Capital Habeas Unit
Florida Bar # 086437
400 N. Tampa Street, Suite 2600
Tampa, Florida 33602
Tel: 813-228-2715
Email: greg_brown@fd.org
Secondary Email: FLM_CHU@fd.org

PETITIONER/APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

David Miller, Jr. v. Secretary, Florida Department of Corrections
Appeal No. 22-10657-P

In compliance with 11th Cir. R. 26.1-1, counsel for Petitioner/Appellant hereby certifies that the following persons, partnerships, or firms may have an interest in the outcome of this case:

Anderson, Christopher J. (State postconviction counsel for Petitioner/Appellant)

Anstead, Honorable Harry L. (Florida Supreme Court Justice)

Backhus, Terry L. (Former Federal Habeas Counsel for Petitioner/Appellant)

Bateh, George Z. (Assistant State Attorney)

Bell, Honorable Kenneth B. (Florida Supreme Court Justice)

Blair, Katherine A. (Former Federal Habeas Counsel for Petitioner/Appellant)

Brewer, Heidi P. (Former state postconviction counsel for Petitioner/Appellant)

Brown, Gregory W. (Attorney for Petitioner/Appellant)

Butterworth, Robert A. (Florida Attorney General during direct appeal)

Canady, Honorable Charles T. (Florida Supreme Court Justice)

Cantero, Honorable Raoul (Florida Supreme Court Justice)

Chipperfield, Allen (Trial counsel for Petitioner/Appellant)

Davis, Honorable Brian J. (Federal Habeas Judge, Federal Middle District of Florida)

Donahue, Jennifer A. (Former Assistant Attorney General)

Eler, Refik W. (Trial Counsel for Petitioner/Appellant)

French, Curtis M. (Assistant Attorney General during direct appeal)

Daniels, Nancy A. (Direct appeal counsel for Petitioner/Appellant)

Floyd, Albert (Deceased victim)

Fullwood, Linda (Victim)

Gunn, Sean T. (Former Federal Habeas Counsel for Petitioner/Appellant)

Harding, Honorable Major B. (Florida Supreme Court Justice)

Kennett, Michael (Assistant Attorney General, Attorney for Respondent/Appellees)

Labargo, Honorable Jorge (Florida Supreme Court Justice)

Lawson, Honorable Alan (Florida Supreme Court Justice)

Lewis, Honorable R. Fred (Florida Supreme Court Justice)

Moody, Ashley (Florida Attorney General)

Nolas, Billy H. (Former Federal Habeas Counsel for Petitioner/Appellant)

Martin, Tennie (Attorney for Petitioner/Appellant)

McClain, W.C. (Direct appeal counsel for Petitioner/Appellant)

Millsaps, Charmaine (Assistant Attorney General, Attorney for Respondent/Appellee)

Norgard, Robert A. (Former state postconviction counsel for Respondent/Appellant)

Pariente, Honorable Barbara J. (Florida Supreme Court Justice)

Polston, Honorable Ricky (Florida Supreme Court Justice)

Shaw, Honorable Leander J. (Florida Supreme Court Justice)

Siegel, Stephen W. (Assistant State Attorney)

Tassone, Frank (Former state postconviction counsel for Petitioner/Appellant)

Taylor, Honorable L. Haldane (Trial Judge, Circuit Court for the 4th Judicial Circuit)

Toomey, Honorable Joel B. (Magistrate Judge, Federal Middle District of Florida)

Quince, Honorable Peggy A. (Florida Supreme Court Justice)

Well, Honorable Charles T. (Florida Supreme Court Justice)

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Petitioner/Appellant, by and through undersigned counsel, pursuant to Fed. R. App. P. 22 (b), files this Application for a Certificate of Appealability in the above-styled cause, and states:

Relevant Procedural History

1) Petitioner/Appellant's conviction and sentence of death became final on January 22, 2001.

2) No attorney appeared on Petitioner's behalf in state postconviction proceedings until May 14, 2001 and no pleadings were filed on Petitioner's behalf in postconviction proceedings until August 8, 2001.

3) A properly filed initial amended state postconviction motion was deemed filed on October 2, 2001.

4) 253 days of the AEDPA statute of limitations elapsed before the state postconviction filing statutorily tolled the limitations period and Petitioner/Appellant was without any counsel for 112 of the 253 days.

5) On September 30, 2003, Attorney Robert Norgard ("Norgard") entered a notice of appearance as co-counsel in Petitioner's state postconviction proceedings.

6) The circuit court denied the amended motion on April 23, 2004.

7) On June 15, 2004, Norgard was appointed as lead counsel.

8) The Florida Supreme affirmed the denial of the amended postconviction motion on March 23, 2006, and the mandate issued on April 13, 2006.

9) The AEDPA statute of limitations was set to run out on August 3, 2006. No federal habeas petition was filed before that date.

10) Under Section 27.711(2), Florida Statutes, an attorney appointed to represent a defendant in state postconviction proceedings is obligated to represent the defendant throughout all subsequent stages of litigation including federal habeas.

11) On August 27, 2013, more than seven years after the AEDPA statute of limitations period expired, Norgard moved to withdraw, having never sought appointment as federal habeas counsel and having never filed any pleadings on Petitioner/Appellant's behalf in federal court.

12) Norgard never had petitioner evaluated by a mental health professional during nearly ten years of representation.

13) On August 24, 2017, the district court appointed the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Florida ("CHU-N") as Petitioner's federal habeas counsel. Doc. 3.

14) On January 30, 2019, CHU-N filed Petitioner's § 2254 petition (Doc. 15).

15) On April 8, 2019, CHU-N filed a memorandum of law arguing

Petitioner was entitled to equitable tolling based upon Petitioner's mental illness during the period his AEDPA statute of limitations was running compounded by the egregious failures of Petitioner/Appellant's state postconviction counsel. Doc. 24.

16) On July 8, 2018, Respondents/Appellees filed Respondents' Response Brief to Petition for Writ of Habeas Corpus, where they alleged, "Respondents believe that Petitioner's original state postconviction counsel, Mr. Robert Norgard, Esq., intentionally missed the federal habeas deadline in this case and others in order to avoid his clients' inclusion on the list of defendants eligible for a death warrant." Doc. 29 at 25.

17) On March 16, 2021, the district court discharged CHU-N as Petitioner/Appellant's federal counsel based upon a conflict of interest and appointed CHU-M as substitute conflict-free federal habeas counsel. The court further ordered, based on Respondents/Appellees' allegation that Norgard intentionally missed the federal habeas deadline, that a limited evidentiary hearing on equitable tolling during Norgard's representation was warranted. Doc. 35.

18) In the March 16, 2021 Order, the district court outlined the scope of the limited evidentiary hearing:

> Numerous questions are raised by Respondents' contention that Mr. Norgard intentionally missed the federal habeas deadline, including but not limited to: (1) did Mr. Norgard intentionally miss the federal habeas deadline; (2) if Mr. Norgard intentionally missed the deadline, did Mr. Norgard discuss his strategy with Petitioner and did Petitioner agree with the strategy to attempt to delay the scheduling of his execution

> date by failing to timely file a federal petition or agree to some other strategy not yet revealed; (3) did Mr. Norgard negligently miss the deadline; (4) did Mr. Norgard's conduct amount to abandonment of the attorney-client relationship; (5) was there severance of the agency relationship; (6) did Mr. Norgard purposely act adversely to Petitioner's interests by acting or failing to act for the purpose of advancing Norgard's own interests or those of a third party; and (7) did Mr. Norgard take actions that were contrary to Petitioner's instructions and adverse to his interests....
>
> Whether Petitioner is entitled to equitable tolling of the period when Petitioner was represented by Mr. Norgard is a primary issue in this case. Therefore, the Court will conduct a limited evidentiary hearing addressing the conduct of Mr. Norgard, including the questions outlined above, and addressing whether Petitioner was informed of Mr. Norgard's strategy (if one existed) and agreed with an intentional strategy of not filing a timely federal petition or acquiesced in counsel's decision or some similar strategy as yet unrevealed. The parties shall prepare for this limited evidentiary hearing accordingly.

Doc. 35 at 10-12.

19) On July 26, 2021, Respondents/Appellees' filed Respondents' Motion to Determine Waiver of Privilege and Motion to Call Additional Witnesses at Evidentiary Hearing. Doc. 45.

20) Respondents asked for permission to present the testimony of other attorneys that represented petitioner during the AEDPA limitations period regarding their conversations with Norgard and whether a strategy existed to intentionally miss the deadline. Doc. 45 at 4.

21) On July 27, 2021, the district court denied Respondents' motion (Doc. 45), stating: "As the Court stated in previous orders, the Court is going to schedule a **limited evidentiary hearing** addressing the conduct of Mr. Norgard and the

related conduct of Petitioner. *See* Orders (Docs. 35 & 41). Respondents' attempt to broaden the scope of this limited hearing will not be entertained at this juncture[.]" Doc. 46 at 1 (emphasis in original).

22) On August 9, 2021, the district court scheduled a limited evidentiary hearing on October 21, 2021, regarding equitable tolling during Norgard's representation. Doc. 47.

23) On September 22, 2021, CHU-M filed Petitioner's Opposed Motion to Continue Limited Evidentiary Hearing Currently Scheduled for October 21, 2021 (Doc. 48). Petitioner's motion argued, in part,

> This Court's order to address the conduct of Mr. Robert Norgard, Esquire and the related conduct of Petitioner at the October 21, 2021 evidentiary hearing does not appear to encompass evidence of Petitioner's mental status, through the testimony of expert witnesses and documentary evidence. To the extent that it does encompass such evidence, counsel for Petitioner does not anticipate being prepared to address Petitioner's mental status as it relates to equitable tolling by the October 21, 2021 evidentiary hearing[.]
>
> This Court has made it abundantly clear that it wishes to limit the October 21, 2021 evidentiary hearing to testimony regarding Mr. Norgard's conduct and the Petitioner's related conduct. Based on CHU-M's ongoing investigation, the Petitioner believes that neither Mr. Norgard's conduct nor Petitioner's related conduct can be meaningfully understood without the context of Petitioner's mental status during that period, and that none of this Court's questions can be fully answered without such context."

Doc. 48 at 7.

24) On October 7, 2021, the district court denied Petitioner's motion

to continue stating,

> As previously stated, the Court is conducting a **limited evidentiary hearing** addressing the conduct of Mr. Norgard and the related conduct of Petitioner. *See* Orders (Docs. 35, 41, 46, 47). Petitioner's request to continue the limited evidentiary hearing until March of 2022 is due to be denied.

Doc. 49 at 1 (emphasis in original).

25) On October 7, 2021, Petitioner filed an exhibit list for the October 21, 2021 limited evidentiary hearing, which included mental health records that were in Norgard's possession during his representation of Petitioner/Appellant. Doc. 51.

26) On October 20, 2021, Respondents/Appellees filed a Motion to Strike the Exhibits for Evidentiary Hearing, arguing in part,

> [N]one of the questions posed by this Court to be explored at the limited evidentiary hearing tomorrow relate to the diligence prong, so Petitioner's mental status is not relevant at this point in time at the limited evidentiary hearing.
>
> This Court previously declined to expand the evidentiary hearing to include diligence. The exhibits undermine this Court's order. Because the exhibits are intended to prove matters which are outside the scope of the current evidentiary hearing, the exhibits should be stricken without prejudice to refile the exhibits at any later evidentiary hearing exploring lack of diligence.

Doc. 60[1].

[1] Petitioner/Appellant disputes Respondents/Appellees' assertion that mental illness is only relevant to the diligence prong of equitable tolling. Multiple courts, including this Court, have held that under certain circumstances mental impairment entitles a petitioner to equitable tolling, not just that mental impairment may establish the diligence prong. *See Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009); *see*

27) On October 21, 2021, a limited evidentiary hearing on equitable tolling during Norgard's representation was held. At this hearing, Petitioner/Appellant renewed his request to present the testimony of mental health experts to establish both the extraordinary circumstances and diligence prongs of the equitable tolling inquiry. Doc. 67 at 134-135.

28) On November 18, 2021, the district court entered an order dismissing with prejudice Petitioner's petition as untimely, and denying a certificate of appealability. Doc. 72. Judgment was entered dismissing the petition on November 19, 2021. Doc. 73.

The October 21, 2021 Limited Evidentiary Hearing

The district court scheduled and held a limited evidentiary hearing on October 21, 2021, "addressing the conduct of Mr. Norgard and the related conduct of Petitioner." Efforts by both parties to expand the scope of the limited evidentiary hearing were denied by the district court, including requests by Petitioner/Respondents for permission to present evidence regarding Petitioner/Appellant's mental status during the time that his petition was due to be filed. Docs. 45, 46, 47, 48. Although the court permitted Petitioner/Appellant to present mental health records in Norgard's possession during his representation of

---

also Bolarinwa v. Williams, 593 F.3d 226 (2d Cir. 2010); *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001); *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2013).

Petitioner/Appellant to prove Norgard's knowledge of Petitioner/Appellant's longstanding mental health issues, Petitioner/Appellant was not permitted to present any evidence regarding Petitioner/Appellant's mental status during the time the petition was due. The record established that Norgard did not have Petitioner/Appellant evaluated by any mental health professionals during his nearly ten years of representation, and therefore, the only mental health evidence presented at the limited evidentiary hearing pre-dated Petitioner/Appellant's mental status during the period the petition was due to be filed. The relevant facts established at the limited evidentiary hearing were as follows:

1) Norgard first appeared as Petitioner/Appellant's state postconviction co-counsel on October 6, 2003.

2) Petitioner/Appellant's state postconviction evidentiary hearing was held on November 4-5, 2003.

3) Norgard spoke with Petitioner/Appellant for the first time at the evidentiary hearing.

4) Norgard conducted nearly the entirety of the state postconviction evidentiary hearing. *See* App. (Doc. 32), attach. 38, p. 113-attach. 40, p. 30.

5) All of the evidence presented at the state postconviction evidentiary hearing was developed prior to Norgard's involvement in the case. Doc. 67 at 39.

6) Norgard presented the testimony of Dr. Harry Krop at the

postconviction evidentiary hearing, the same psychologist who was Petitioner/Appellant's only mental health witness at Petitioner/Appellant's trial. *See* App. (Doc. 32), attach. 40, pp. 80-119.

7) Norgard also presented the testimony of Dr. Joseph Wu, who reviewed a PET-Scan of Petitioner/Appellant's brain. *See* App. (Doc. 32), attach. 40, pp. 14-63.

8) A psychological report by Dr. Charles Golden was in Norgard's possession at the time of evidentiary hearing, but neither Dr. Golden's testimony nor his report were presented at the state hearing. Doc. 67 at 55-57.

9) Norgard testified that he did not file Petitioner/Appellant's §2254 petition because Petitioner/Appellant allegedly threatened to waive all appeals and volunteer for death if Norgard filed anything. Doc. 67 at 120.

10) Norgard denied that his failure to file Petitioner/Appellant's §2254 petition had anything to do with an intentional strategy to keep Petitioner/Appellant from proceeding to clemency. Doc. 67 at 109. The allegation of such a strategy by Respondents/Appellees was the basis on which the district court ordered a limited evidentiary hearing, and the purported focus of the hearing.

11) Norgard testified that at a visit on August 9, 2013, seven years after the AEDPA statute of limitations had expired, Petitioner/Appellant was unequivocal about his desire to waive appeals and volunteer for death if Norgard pursued any

appellate remedies. However, Norgard testified that during all previous conversations, Petitioner/Appellant was equivocal about his desire to waive appellate remedies. Doc. 67 at 128.

12) Norgard was aware from the beginning of his representation that "clearly mental health issues were a major issue in Mr. Miller's life." Doc. 67 at 36.

13) Norgard testified that had Petitioner/Appellant attempted to waive his appeals or become a death volunteer, "I would have requested a mental health evaluation for that." Doc. 67 at 38.

14) Norgard was in possession of extensive mental health records that were presented at Petitioner/Appellant's trial, as well as further mental health evidence developed by his co-counsel. Doc. 67 at 44-57.

15) Norgard was aware from reviewing Petitioner/Appellant's mental health records from trial that Petitioner/Appellant had been involuntarily committed on multiple occasions and that Petitioner/Appellant had attempted suicide. Doc. 67 at 49.

16) Norgard was aware from reviewing Petitioner/Appellant's mental health records from trial that Petitioner/Appellant had been diagnosed with personality disorder, mixed, with avoidant, schizoid, paranoid, and borderline features and had testing consistent with schizoid personality disorder and schizophrenia dating back to March 24, 1986. Doc. 67 at 50. Eh exhibit (Doc. 61) 6

at 151-53.

17) Norgard was aware from reviewing Petitioner/Appellant's mental health records from trial that with regards to psychological testing of Petitioner/Appellant, "Diagnosis of schizoid personality and schizophrenia are the most commonly found with this described profile." Doc. 67 at 50. Eh exhibit (Doc. 61) 6 at 151.

18) Norgard was aware from Dr. Joseph Wu's report that Petitioner/Appellant suffered from encephalopathy, a damage or disease of the brain, and that his PET-scan was consistent with schizophrenia spectrum disorder. Doc. 67 at 54-55.

19) Norgard was aware from Dr. Charles Golden's evaluation that Petitioner/Appellant's neuropsychological testing was consistent with individuals with schizoid/schizophrenic disorders. Norgard was aware that Dr. Golden found that Petitioner/Appellant "has poor ties with reality and difficulty developing accurate abstractions, especially when emotional material is involved. He is unable to perceive the world as other people do, leading to multiple misunderstanding with others." Norgard was aware that Petitioner/Appellant "is someone who does not live in a reality-based world but in one that is more fantasy oriented." Doc. 67 at 55-57.

20) Norgard testified that he believed that Petitioner/Appellant's mental

health condition was worse than what had been diagnosed by the mental health professionals. "I believe he had a chronic mental health issue that never—over time was never fully examined and diagnosed. I think he had a major Axis I mental health diagnosis and not just adjustment disorder." Doc. 67 at 50-51.

21) Norgard believed that with regards to Petitioner/Appellant's "wanting to be a death volunteer, things such as waiving his appeal," "I felt that all of his desire to do any of those things was because of the mental health issues." Doc. 67 at 38.

22) Despite Norgard's testimony that Petitioner/Appellant threatened to waive all appeals and volunteer for death if Norgard filed "anything," Norgard represented Petitioner/Appellant on a subsequent appeal of the denial of his state postconviction motion, filed extensive briefing, filed a petition for writ of habeas corpus before the Florida Supreme Court, and conducted oral arguments on the appeal and state habeas petition. *See* Doc. 67 at 120; Eh exhibit (Doc. 61) 15.

23) Norgard testified that Petitioner was in the custody of the Florida Department of Corrections ("FDOC") at all times during his representation, except for a brief period during the November 4-5, 2003 state evidentiary hearing.

24) Norgard did not meet with or speak with Petitioner/Appellant at the Duval County Jail during his November 4-5, 2003 incarceration there.

25) Call and visitation logs from FDOC established that during the nearly

ten years Norgard represented Petitioner/Appellant, the only calls or visits between Norgard and Petitioner appellant were as follows: a September 21, 2011 call that lasted at most thirty minutes; a May 3, 2012 phone call that lasted at most thirty minutes; and an August 9, 2013 visit that lasted at most thirty minutes. *See Eh* exhibit (Doc. 61) 14, Doc. 67 at 85.

26) All of the calls/visits documented by the Florida Department of Corrections occurred after Petitioner/Appellant's AEDPA statute of limitations had expired.

27) Norgard testified that the FDOC records were incorrect. Norgard testified that based upon his office records, FDOC's call/visitation log failed to document an August 5, 2004 visit; a March 6, 2006 phone call; an April 26, 2006 phone call; a March 16, 2007 phone call; a July 20, 2009 phone call; a November 30, 2009 phone call; an August 5, 2010 phone call; a September 22, 2011 phone call; and a May 3, 2012 phone call. All phone calls were a maximum of thirty minutes. Doc. 67 at 73-76.

28) Of the calls/visits that Norgard alleged FDOC failed to document, all but three occurred after the statute of limitations had run.

29) Norgard could not recall the specific conversations of any of the three alleged calls/visits that occurred prior to the statute of limitations running, but insisted that he discussed the petition with Petitioner/Appellant prior to the deadline.

When asked if he knew for certain whether Petitioner/Appellant actually accepted the calls, Norgard's response was, "There is no indication that call was refused." Doc. 67 at 75.

30) Norgard could not explain why FDOC's records captured twenty-five calls/visits of his predecessor counsel and her team over a three-year period, but only managed to capture three calls/visits of him over his nearly ten years of representation. Doc. 67 at 80-81.

31) Norgard indicated that he billed in six minute intervals, and that it was his practice to bill for any calls or visits of any duration. Doc. 67 at 92.

32) All of the bills that Norgard submitted to the state court for legal fees and cost reimbursement were submitted into evidence. Eh exhibit (Doc. 61) 16.

33) Norgard's bills established that he routinely billed for phone calls lasting six minutes or less. Eh exhibit (Doc. 61) 16.

34) The bills Norgard submitted did not bill for any of the calls/visits that he alleges occurred but were not documented by FDOC.

35) The bills Norgard submitted on behalf of his investigator Rosalie Bolin, contained notations for calls/visits that exactly matched FDOC's call/visitation records for Rosalie Bolin. Eh exhibits (Doc. 61) 14, 16.

36) Norgard's bills also established that he began paying file storage fees at an offsite storage facility for Petitioner/Appellant's records in February 2006, two

months after he presented oral arguments in the case before the Florida Supreme Court, and before the period when Petitioner/Appellant's petition was due. Eh exhibit (Doc. 61) 16.

37) Norgard acknowledged that Section 27.711(2), Florida Statutes requires state postconviction counsel to represent clients in all subsequent stages of litigation including federal habeas proceedings. Doc. 67 at 30.

38) Norgard testified that Petitioner/Appellant's case, and the case of Marvin Jones, were the first two capital postconviction cases that he participated in as counsel. Doc. 67 at 105.

39) Norgard failed to ever file a § 2254 petition in both Petitioner/Appellant's and Jones's cases.

40) The next capital postconviction case Norgard appeared in *State v. Bolin*, the § 2254 petition was also dismissed as untimely due to Norgard's failure to timely file a state postconviction motion or § 2254 petition. Eh exhibit (Doc. 61) 20.

41) The first case where Norgard timely filed a § 2254 petition was Bobby Joe Long, which was filed on August 12, 2013, seven years after Petitioner/Appellant's petition was due. Doc. 67 at 117; *Long v. Sec'y, Fla. Dept. of Corr.*, 8:13-cv-02069, Doc. 1 (M.D. Fla. Aug. 12, 2013).

42) Of the first three cases in which Norgard was responsible for timely filing a federal habeas petition, Norgard failed to timely file a petition in all three

cases.

Standard of Review

A COA should issue if the petitioner makes "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *see Barefoot v. Estelle*, 463 U.S. 880 (1983). "A Petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolutions of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id*. Thus, "[t]he COA inquiry asks only if the district court's decision [is] debatable." *Miller El*, 537 U.S. at 348. "To obtain a COA when the district court has denied a habeas petition on procedural grounds without reaching the merits of the underlying constitutional claim, the petitioner must show (1) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," and (2) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Lamarca v. Sec'y, Dept. of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (quoting *Slack v. McDaniel*, 529 U.S. 473, 478 (2000)).

The question of whether a COA should issue is not the same as whether the issues to be raised in the appeal would prevail on the merits. *Barefoot*, 463 U.S. at 893 n.4. Under 28 U.S.C. § 2253, a petitioner seeking a COA "need only

demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El*, 537 U.S. at 327. As the United States Supreme Court explained:

> We look to the district court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. . . . [A] COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. . . . It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor'. *Barefoot*, supra, at 893, n.4. . . . '[I]ssuance of a COA must not be pro forma or a matter of course. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El, 537 U.S. at 336-338.

I. Jurist of Reason Would Find the District Court's Procedural Ruling Dismissing the Petition Debatable

a. The District Court's Order Dismissing the Petition

Petitioner/Appellant's petition was dismissed on procedural grounds because it was filed outside of the AEDPA statute of limitations. Petitioner/Appellant raised below that he was entitled to equitable tolling because his mental illness prevented him from timely filing the petition and that the egregious conduct of Petitioner/Appellant's state postconviction attorney compounded the impediment to filing. The district court treated the inquiries into equitable tolling due to mental

illness and equitable tolling due to attorney misconduct as two separate inquiries, despite the necessary entanglement between the two. In rejecting tolling due to mental illness, the district court highlighted repeatedly the fact that Petitioner/Appellant was represented by counsel. Doc. 72 at 18, 27, 45, 47, 58. In rejecting tolling due to attorney misconduct, the district court focused on the instructions not to file allegedly given by a severely mentally ill man. Doc. 72 at 30, 40, 42, 44. But whether Petitioner/Appellant's mental illness prevented him from timely filing his federal habeas petition is informed by his counsel's failure to investigate his mental illness and at most extremely infrequent client consultations. Likewise, whether Norgard's conduct amounted to abandonment is informed by Petitioner/Appellant's severe mental illness, Norgard's failure to have Petitioner/Appellant evaluated, and Norgard's failure to seek judicial review of Petitioner/Appellant's competency to waive federal habeas proceedings.

Moreover, the equitable tolling analysis in this case must also consider whether Petitioner/Appellant was competent to waive his federal habeas proceedings, given that Petitioner/Appellant's desire to waive was the main reason Norgard gave for failing to timely file the petition. The district court concluded that it could determine Petitioner/Appellant's competency to waive federal habeas proceedings from Norgard's testimony alone. "There is no evidence that Petitioner was unable to communicate with Mr. Norgard." Doc. 72 at 45. "Here too there is

no evidence that Petitioner's mental impairment prevented him from conferring with counsel and making litigation decisions." Doc. 72 at 46. "There is no evidence that Petitioner was unable to understand his legal rights or act upon them." Doc. 72 at 47. As outlined in further detail below, the lack of evidence of Petitioner/Appellant's mental illness and its effect on his ability to file a timely file a federal habeas petition resulted from the district court scheduling a limited evidentiary hearing expressly limited to Norgard's conduct.

Additionally, the district court implicitly found that an attorney can waive federal habeas rights on behalf of a client, even when that attorney believes his client suffers from major chronic mental health issues that have never been fully examined, without having his client examined by a mental health professional or obtaining a judicial finding of competency to waive. Norgard had testified at the evidentiary hearing that, "I believe he had a chronic mental health issue that…over time was never fully examine or diagnosed. I think he had a major Axis I mental health diagnosis…" Doc. 67 at 51. The district court order suggests that it is strategically permissible for an attorney to unilaterally effectuate a waiver of federal habeas proceedings by failing to file a petition, without any involvement of mental health professionals or any court, in order to "keep a lid on" his client's desire to waive proceedings. *See* Doc. 72 at 25.

Jurists of reason could debate the district court's ruling on both equitable tolling due to mental illness and equitable tolling due to attorney abandonment, particularly when due consideration is given to how one informs the other.

b. Jurists of Reason Could Disagree with the District Court's Denial of Petitioner/Appellant's Request for an Evidentiary Hearing on the Issue of Equitable Tolling Due to Mental Disability

This Court has held that a Petitioner's mental incapacity may under certain circumstances justify equitable tolling of the AEDPA statute of limitations. *Hunter v. Ferrell*, 587 F.3d 1304 (11th Cir. 2009); *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir.2005), *aff'd*, 549 U.S. 327 (2007). Other circuits have reached the same result. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); Nara v. Frank, 264 F.3d 310, 320 (3d Cir. 2001), overruled in part on other grounds by, *Carey v. Saffold*, 536 U.S. 214 (2002); *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999); *Ata v. Scutt*, 662 F.3d 736 (6th Cir. 2011) *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2013).

Representation by counsel does not preclude equitable tolling based on mental illness. *See Milam v. Harrington*, 953 F.3d 1128, 1132-33 (9th Cir. 2020); *Riva v. Ficco*, 615 F.3d 35, 43-44 (1st Cir. 2010) (where the First Circuit faulted a district court's "failure to consider whether the counseled filings enjoyed the petitioner's effective participation" and remanded "for further development of the record with a view toward determining whether the petitioner's mental illness so severely impaired

his ability effectively to pursue legal relief, either on his own behalf or through counsel."); *Stiltner v. Hart*, 657 F. App'x 513, 523-26 (6th Cir. 2016) (awarding equitable tolling to a petitioner unable "to monitor the legal assistance provided for him by a fellow prisoner or an attorney to make sure that they met the relevant deadline"); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (awarding equitable tolling to Title VII plaintiff whose "mental illness . . . precluded her from exercising an agency relationship with the attorney who handled her EEOC case"). At the summary judgment stage, the only question is whether the petitioner has presented sufficient evidence to create a factual issue as to a causal connection between his mental incapacity and his inability to file a timely §2254 petition. *Hunter*, 587 F.3d at 1308.

Whether equitable tolling is warranted is a decision that rests on facts, not allegations. *Downs v. McNeil*, 520 F.3d 1311, 1325 (11th Cir. 2008). In *Ata v. Scutt*, the Sixth Circuit Court of Appeals reversed and remanded the district court's dismissal of the petitioner's habeas petition for an evidentiary hearing on equitable tolling due to mental illness based upon allegations that he "had been hospitalized on numerous occasions for paranoid schizophrenia," and "has been and continues to be medicated by the Michigan Department of Corrections[] for paranoid schizophrenia and other psychoses." 662 F.3d 736 (6th Cir. 2011). The Sixth Circuit held the first step in the analysis is to determine whether the petitioner's allegations,

accepted as true, show he is mentally incompetent and that his mental incompetence prevented him from timely filing his petition. *Ata*, 662 F.3d at 743 (citing *McSwain v. Davis*, 287 F. App'x 450, 458 (6th Cir. 2008) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007))) [2]. The Sixth Circuit found the allegations that the petitioner had been hospitalized for paranoid schizophrenia and was being medicated by the department of corrections were sufficient to justify an evidentiary hearing.

Petitioner has made sufficient allegations to warrant an evidentiary hearing on whether his mental illness is grounds for equitable tolling. In his petition (Doc. 15), Petitioner alleged:

> One indication that equitable tolling is warranted stems from the fact that Miller has significant mental health issues which impact his ability to communicate with counsel. Miller has been diagnosed with a number of disorders throughout his life, including a mixed personality disorder with features of schizoid personality, schizophrenia, and brain damage. A recent mental health examination confirms that Miller has paranoid schizophrenia, with a history of pervasive hallucinations and delusions dating back to at least the early 1980s. As is typical in schizophrenia and schizotypal disorders, Miller suffers from a language disorder. He, like many individuals with schizophrenia, often does not want to communicate. When forced to do so, Miller does not communicate well. It is likely that Miller would have acquiesced to what his attorneys wanted him to do, simply to end the interaction and return to his

[2] *Schriro* also held that "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing. 550 U.S. at 474. That provision does not apply because the record is silent on why a petition was not filed and because the conduct giving rise to tolling in this case occurred after the state proceedings concluded.

> solitude. This tendency would be particularly pronounced under stress. At Miller's best, he is low-functioning, and in many ways presents with symptoms appearing similar to a severe form of autism. He is paranoid and withdrawn. The rest of the time, he presents with active schizophrenia and psychosis in the form of delusions and hallucinations. These symptoms would have made effective communication virtually impossible between Miller and his defense counsel.

Doc. 15 at 10-11.

Petitioner's Memorandum of Law (Doc. 24), alleged "Miller suffers from severe schizophrenia and other mental health conditions that rendered him incompetent and unable to communicate with his attorneys or make rational decisions regarding his legal rights." Doc. 24 at 7. Further, Petitioner's Reply in Support of 28 U.S.C. §2254 Petition (Doc. 33), alleged,

> Miller has specifically alleged that his longstanding mental illness—characterized by delusions, religious preoccupations, and hallucinations—rendered him unable to effectively communicate with counsel or assist in pursuing his legal rights. See, e.g., Regnier report ("Attachment 1") at 3-7, 14-21 (diagnosing Miller with multiple mental health disorders including schizoaffective disorder and schizotypal personality disorder, and finding he was likely incompetent for much of his legal process).

Doc. 33 at 6.

Jurists of reason could disagree with the district court's failure to conduct an evidentiary hearing or any other fact finding on Petitioner/Appellant's allegations that he suffered from severe mental illness during the period his §2254 petition was

due to be filed and that that mental illness prevented him from effectively communicating with his counsel or otherwise timely filing his petition.

i. The limited evidentiary hearing on the issue of equitable tolling during Attorney Norgard's representation was expressly limited to Respondents/Appellees allegations of an intentional strategy to avoid clemency and other attorney misconduct, and did not allow Petitioner/Appellant an opportunity to present evidence of Petitioner/Appellant's mental illness during the relevant period

The district court correctly recognized, "For purposes of equitable tolling, this Court looks to the period and the actions of the attorney 'who represented petitioner at the time when [Petitioner's] federal habeas petition was due to be filed.' *Christeson v. Roper*, 574 U.S. 373, 382 (2015) (per curiam) (Alito, J., dissenting)." Doc. 72 at 39. However, jurists of reason could disagree on whether the district court erred in relying on mental health evidence that significantly predated the period when the petition was due, and by preventing Petitioner/Appellant from presenting mental health evidence regarding the relevant period.

1. <u>The time when Petitioner/Appellant's federal habeas petition was due</u>

As the district court correctly noted, the relevant time period for purposes of equitable tolling was between April 13, 2006, when Petitioner/Appellant's postconviction appeal became final and August 3, 2006, when the statute of limitation expired. ("[T]his Court's focus will be on a very precise period of time: that period after the mandate issued on April 13, 2006 and the one-year limitation

period expiring 112 days later, on Thursday, August 3, 2006.") Doc. 72 at 16.

2. The district court did not allow Petitioner/Appellant to present any evidence of Petitioner's mental illness during the relevant period

The district court recognized in its order dismissing the Petition, "As noted in repeated orders of the Court, the conduct of Mr. Norgard and the related conduct of Petitioner were to be the focus of the evidentiary hearing." (Docs. 44, 46, 47)." Doc. 72. Because Norgard did not have Petitioner/Appellant evaluated by any mental health professionals during his decade of representation and because of the limited nature of the evidentiary hearing, Petitioner/Appellant was limited to presenting mental health evidence that was developed prior to Norgard's appointment. This necessarily restricted Petitioner/Appellant's ability to prove a causal connection between his mental illness and the late filing of his petition. Petitioner/Appellant requested to present evidence through the testimony of expert witnesses to establish the nexus between his mental illness and his failure to timely file his federal habeas petition.

3. The evidence relied upon to deny equitable tolling did not conclusively rebut Petitioner/Appellant's allegations of mental illness during the time the petition was due, because it was limited to evidence of Petitioner's mental health prior to the time his petition was due

The district court stated in its order denying the petition, "Ms. Brewer was having issues with Petitioner being reluctant to sign and submit a Rule 3.851 motion,

and during this particular time period, Petitioner was seen by a mental health expert three times." Doc. 72 at 25. This was based upon a mistake of fact. Mental health records contained within the record and records presented at the limited evidentiary hearing were presented for the purpose of showing Norgard's knowledge of Petitioner/Appellant's mental illness. These records established that psychologist Dr. Harry Krop testified at Petitioner/Appellant's trial and postconviction evidentiary hearing, that Dr. Joseph Wu testified at Petitioner/Appellant's postconviction evidentiary hearing, and that psychologist Dr. Charles Golden submitted an evaluation to Petitioner/Appellant postconviction counsel.

Contrary to the district court's findings, this did not establish that Petitioner/Appellant "was seen by a mental health expert" three times during the relevant period. Petitioner only met with one mental health expert during postconviction, Dr. Charles Golden. Dr. Krop did not conduct any new interviews or testing after Petitioner's trial in 1997. Dr. Wu interpreted the results of a PET-scan of Petitioner's brain, but did not conduct an interview or evaluation of Petitioner[3]. The only mental health expert who conducted a mental health evaluation

[3] At the state evidentiary hearing, Dr. Wu was asked: "Q. Have you ever sat in the same room and talked to Mr. Miller? A. I did talk to him briefly in – when he was obtaining the PET scan…I mean I didn't conduct a several hour long interview with him. It was more, you know, a brief chat with him, see if he had any questions about the procedure, if there was anything I could explain to him." *See* App. (Doc. 32), attach. 43, pp. 124-125.

of Petitioner/Appellant during postconviction proceedings was Dr. Charles Golden, who stated repeatedly in his report Petitioner was detached from reality. Eh exhibit (Doc. 61) 8.

The district court's order dismissing the petition relied most heavily upon the opinions of Dr. Harry Krop. Dr. Krop testified at trial that he evaluated Petitioner on October 29, 1997, and November 26, 1997. Eh exhibit (Doc. 61) 6 at 407. The district court noted, "Of import, at the state-court evidentiary hearing, Dr. Krop testified his opinion had not changed from when he testified in 1997 or 1998 to date." Doc. 72. However, the court's conclusion regarding the significance of Dr. Krop's postconviction testimony was based upon a mistake of fact. Norgard acknowledged at the November 4-5, 2003 state evidentiary hearing that Dr. Krop did not conduct any additional testing during the state postconviction proceedings.

> THE COURT: Has Dr. Krop done any recent testing?
> MR. NORGARD: No, sir.
> THE COURT: Is he relying strictly on what was done prior to trial?
> MR. NORGARD: Yes.

See App. (Doc. 32), attach. 40, p. 75. The fact Dr. Krop's opinion had not changed between 1997 and 2003 is hardly surprising, given Dr. Krop had not seen Petitioner/Appellant in six years, and the only new evidence he reviewed were the results of a PET-Scan. Dr. Wu acknowledged PET-Scans are primarily used to

corroborate results from neuropsychological testing, not for purposes of primary diagnosis. *See* App. (Doc. 32), attach. 43, pp. 95-96., 111. Whether Petitioner's mental illness had progressed or whether he was presently competent was impossible for Dr. Krop or Dr. Wu to know without new psychological/neuropsychological testing.

The other mental health evidence cited in the district court's order dismissing the petition included postconviction testimony from Debra Lee regarding a November 22, 1996 diagnosis; evidence of a 1983 involuntary commitment; a North Carolina Division report dated September 3, 1983; a second involuntary commitment in North Carolina on July 16, 1986; and records from November 1996 which included an Axis II schizoid personality disorder diagnosis. All these referenced evaluations of Petitioner occurred between 1983 and 1997, between eight to twenty-two years before Petitioner's federal habeas claims were ripe for review.

While Petitioner/Appellant's long history of documented mental illness is important to evaluating Norgard's conduct, and was presented for this purpose at the limited evidentiary hearing, it is not dispositive of whether Petitioner suffered from mental illness during the time period when his federal habeas petition was due. Mental illness is not static. Whether Petitioner's mental illness in 1983 or 1997 would have prevented him from filing a habeas petition is irrelevant.

The January 23, 2002 evaluation by board certified psychologist/

neuropsychologist Charles Golden was the most contemporaneous evaluation conducted to Petitioner/Appellant's federal habeas due date. Eh exhibit (Doc. 61) 8. Dr. Golden found:

> He therefore, has a detachment from the real world and tends to engage in a world of fantasy. His relations with other people are fragmented and generally poor.
>
> [ ]
>
> Mr. Miller has poor ties with reality and difficulty developing accurate abstractions especially when emotional material is involved. He is unable to perceive the world as other people do, leading to multiple misunderstandingswith others.
>
> [ ]
>
> Mr. Miller is someone who does not live in a reality based world but in one that is fantasy oriented.

The only other evidence of Petitioner/Appellant's mental status during the relevant period was a psychological evaluation by psychologist Dr. Eddy Regnier which was attached to Petitioner/Appellant's Reply in Support of 28 U.S.C. § 2254 Petition. Dr. Regnier found,

> The psychological evaluation of Mr. Miller did produce data that indicates the presence of severe mental health problems that has affected his life ever since he was in his late teens. Mr. Miller reports at least two psychotic episodes that lasted for a period of six or more months during which time he experienced altered mental status. Through much of his legal proceedings he seemed to harbor under a delusion/psychosis that God would protect him. He appeared to suffer from schizoaffective disorder that at times due to his psychotic symptoms affected his decision making.
>
> Mr. Miller appears to have been experiencing a longstanding period of

> altered mental status characterized by religious preoccupations, social isolation and auditory hallucinations that has impacted his capacity to understand the consequences of his actions in not assisting counsel with pursuing his legal defense at trial and throughout the appellate process.
>
> [ ]
>
> Throughout his trial and appeals process, Mr. Miller has been by reason of mental infirmity, disease or defects unable to act reasonably with his defense. When Mr. Miller refused or failed to participate in his legal defense, he was likely responding to delusional ideas or religious beliefs, and was in a psychotic state that prevented him from making rational decisions with regard to his legal defense.

Despite Dr. Regnier's specific findings that Petitioner/Appellant was suffering from major mental illness including delusions/psychosis during the relevant period, and that he was in a psychotic state that led him to refuse or otherwise fail to assist his postconviction counsel, the district court's only mention of Dr. Regnier is two sentences of the 67-page order dismissing the petition. That brief passage merely rejects one sentence from the petition that alleged Dr. Regnier's findings were consistent with other evidence that Petitioner/Appellant suffers from schizophrenia. It makes no mention of Dr. Regnier's findings that Petitioner/Appellant was in a psychotic state and suffering from delusions during the relevant period.

Despite not having Petitioner examined by any mental health experts during his approximately ten years of representation, Norgard acknowledged he believed Petitioner had undiagnosed major mental illness.

> A. From my standpoint, the simplest way I can put it is I think that it wasn't -- you know, there's an Axis I of adjustment disorder, which

> very honestly what I know about adjustment disorder, that makes no sense to me**. I believe he had a chronic mental health issue that never -- over time was never fully examined and diagnosed. I think he had a major Axis I mental health diagnosis** and not just adjustment disorder. That's a temporary -- that can be a temporary thing only, to a situation. I feel that certainly -- I felt his mental illnesses were worse than that as described in this report.
> [ ]

Doc. 67 at 51-52 (emphasis added).

Only the evidence of Petitioner's mental health during the period he was required to assist his counsel in the preparation of his federal habeas petition is relevant to the issue of equitable tolling. That evidence established three things. First, Petitioner/Appellant's counsel Norgard believed Petitioner/Appellant suffered from "a major Axis I mental health diagnosis" that was never fully examined or diagnosed, and Petitioner/Appellant suffered from more severe mental health problems than acknowledged by prior experts. Second, the expert hired by Norgard's co-counsel, Dr. Golden, found Petitioner "has a detachment from the real world and tends to engage in a world of fantasy," "has poor ties with reality," and "does not live in a reality based world." Finally, the mental health expert retained by Petitioner/Appellant's federal habeas counsel, Dr. Regnier, found "the presence of severe mental health problems," "at least two psychotic episodes that lasted for a period of six or more months," that he "appeared to suffer from schizoaffective disorder," and that "by reason of mental infirmity, disease or defects unable to act reasonably with his defense."

b. Jurists of Reason Could Disagree with the District Court's Findings that Petitioner/Appellant is not Entitled to Equitable Tolling During the Duration of Attorney Robert Norgard's Representation Due to Attorney Misconduct/Abandonment

i. <u>The district court erred in finding that Norgard was an experienced attorney at the time he represented Petitioner/Appellant</u>

The district court rrder (Doc. 72) makes several references to Norgard being an experienced attorney. Doc. 72 at 18, 27, 45, 47, 58. The district court's order dismissing the petition (Doc. 72) stated:

> The Court credits the testimony of Mr. Norgard. He is an officer of the Court. He testified under oath he was very experienced counsel at the time of Petitioner's state court evidentiary hearing. See Hardwick v. Benton, 318 F. App'x 844, 846 n. 2 (11th Cir. 2009) (per curiam) ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.")

Rather than evaluate Norgard's testimony on the merits, the district court granted Norgard's testimony double deference, first because of his status as an officer of the court, and second because of his self-proclaimed expertise as a postconviction attorney[4]. Had the district court properly analyzed Norgard's testimony as it would

[4] Indeed, rather than being doubly deferential, courts should evaluate attorney testimony denying claims of misconduct skeptically, for the same reasons that attorneys are conflicted from raising equitable tolling based upon their own conduct. *See Christeson v. Roper*, 574 U.S. 373, 378 (2015) (Recognizing inherent conflict of interest in attorney presenting equitable tolling argument based upon their own conduct due to "interest in avoiding damage to [his] own reputation"). While substitution of counsel may cure the conflict, it does not dissipate the lawyers' interest in avoiding damage to his own reputation.

have that any other witness, the district court would have come to the inescapable conclusion that Norgard's testimony that he was an experienced registry attorney was refuted by the evidence.

Norgard's experience as a Florida criminal trial lawyer, or non-capital postconviction attorney[5], is irrelevant to the question of equitable tolling of the federal habeas corpus deadline. The evidence presented at the evidentiary hearing established Norgard had no federal habeas corpus experience, and extremely limited capital postconviction experience during his representation of Petitioner/Appellant.

Norgard testified Petitioner/Appellant's case and the Jones case were the first capital postconviction cases he handled before both the state circuit courts and the Florida Supreme Court. Doc. 67 at 67. As pointed out by Respondents/Appellees, Marvin Jones' federal habeas petition was due on May 25, 2006. *See Jones v. Sec'y, Dept. of Corr.*, 3:18-cv-00168-TCJ-PDB (M.D. Fla. February 7, 2018) (Doc. 5). The district court determined Petitioner/Appellant's federal habeas deadline was August 3, 2006. Norgard never filed a federal habeas petition in either case.

When Petitioner/Appellant's petition was due, Norgard was not an

[5] The deadlines for non-capital postconviction motions under Florida Rule of Criminal Procedure Rule 3.850 differ from those in capital postconviction cases under Rule 3.851, and there is no corresponding statute for non-capital cases to Section 27.711(2), which requires capital postconviction attorneys to represent defendants in all subsequent stages of litigation including federal habeas corpus.

experienced federal habeas practitioner. In fact, his only federal habeas experience to-date was missing the federal habeas deadline in *Jones*. The first federal habeas petitions Norgard filed, *Chavez*[6], on February 9, 2010; *Bolin*[7], on July 16, 2010; and *Stewart*[8], on January 6, 2011, were all dismissed as untimely because the underlying state postconviction motions were filed after the AEDPA statute of limitation had lapsed. Norgard and his law firm filed Bolin's state postconviction motion after federal deadline, while unrelated lawyers filed the late state postconviction motions in *Chavez* and *Stewart*. Of the first three cases in which Norgard was responsible for timely filing federal habeas petitions, *Jones*, *Miller*, and *Bolin*, Norgard missed all three federal habeas deadlines. Norgard had never filed even an untimely federal habeas petition until *Chavez* on February 9, 2010, more than three and a half years after Petitioner's deadline. Norgard did not file a timely federal habeas petition in any case until August 12, 2013, in *Long v. Sec'y, Dep't Corr.*, 8:13-cv-02069-MSS-AEP (M.D. Fla. August 12, 2013). This is not the record of an experienced federal habeas practitioner.

Norgard's experience in state capital postconviction was no more extensive.

---

[6] *Chavez Sec'y, Dep't Corr.*, 1:10-cv-20399-UU (S.D. Fla. February 9, 2010) (Doc. 1).
[7] *Bolin v. Sec'y, Dep't Corr.*, 8:10-cv-01571-JDW-E_J (M.D. Fla. July 16, 2010) (Doc. 1).
[8] *Stewart* v. Sec'y, *Dep't Corr.*, 8:11-cv-00044-JDW-AAS (M.D. Fla. January 6, 2011) (Doc. 1).

Jones and Petitioner/Appellant were Norgard's first two capital postconviction cases. But Norgard did not file the initial postconviction motions in either case, and therefore was not responsible for tolling the federal habeas deadline. Petitioner/Appellant's initial postconviction motion was filed by Heidi Brewer before Norgard was appointed. *See Jones v. State*, 1993-cf-2757 (Fla. 4th Cir. Ct. Sept. 16, 1998) (Doc. 547). The state postconviction motions in *Chavez* and *Stewart* also were not filed by Norgard. The first case in which Norgard was responsible for timely filing a state postconviction motion was *Bolin*, and he filed the state postconviction motion after the federal habeas deadline, resulting in Bolin's federal habeas petition being dismissed. Norgard's experience in both state and federal court does not support this Court's finding "[h]e was appointed registry counsel, versed in the deadlines and procedure." Doc. 72 at 45. Rather, the evidence proves Norgard was an attorney with a proclivity for never filing federal habeas corpus petitions, failing to timely file federal habeas petitions, and failing to toll the AEDPA statute of limitations by properly filing a state postconviction motion prior to the expiration of the AEDPA statute of limitations.

ii. The district court erred in finding that Norgard's testimony was unrebutted

The district court found that "Norgard's testimony that Petitioner decided to forego his federal remedies and reported his decision to Mr. Norgard at the state

court evidentiary hearing and during a post-mandate phone conversation before the limitation period expired essentially went unrebutted," and "Petitioner continued to have a functioning attorney of record, even though Petitioner had told counsel to stand down as far as pursuing federal remedies and further appeals." Doc. 72 at 27, 42.

First and foremost, Norgard's testimony was rebutted by Norgard's testimony. Norgard testified that during an August 9, 2013 visit, Petitioner/Appellant unequivocally threatened to waive his appeals and volunteer for death if Norgard filed anything. Doc. 67 at 73 ("[O]n the meeting of August 9, 2013, he was unequivocal in this request that I pursue him being a death volunteer. I felt that created an issue for me in terms of representing him, and I moved to withdraw.") But with regard to every previous contact with Petitioner/Appellant, including critically each contact that allegedly occurred before the statute of limitations Norgard testified that Petitioner/Appellant was equivocal. Doc. 67 at 86. Significant evidence exists, as discussed below, that disputes that Norgard maintained contact with Petitioner/Appellant after the state court denied the postconviction appeal. But even assuming such contacts occurred, by Norgard's own testimony, Petitioner/Appellant was equivocal about his desire to drop his appeals and volunteer for death. With such equivocation, Norgard had a responsibility to timely file a federal habeas petition.

Petitioner/Appellant presented documentation from multiple sources that proves that the conversations Norgard claims to have had with Petitioner/Appellant never took place. Norgard testified he had ten visits or phone calls with Petitioner/Appellant between August 5, 2004 and August 9, 2013, and one additional phone call he is certain Petitioner/Appellant refused. Doc. 67 at 74. FDOC records only document two of those visits/calls; a September 30, 2011 call and a May 3, 2012 visit. Both occurred after the AEDPA statute of limitations elapsed. Norgard is alleging that for unknown reasons, FDOC failed to document 80% of his calls/visits.

The FDOC records have indicia of reliability. The records correspond exactly with the billing records of investigator Rosalie Bolin, accurately documenting every visit she billed for. Eh exhibits (Doc. 61) 14, 16(f). Additionally, FDOC documented twenty-five visits by Norgard's predecessor counsel Heidi Brewer and her team from May 31, 2001 through June 4, 2004. There is no reasonable explanation why the FDOC records would capture twenty-five visits over a three-year period by Heidi Brewer and her colleagues and exactly match investigator Bolin's billing records, but only document two out of eight calls/visits with Norgard over a ten-year period.

Other evidence corroborates these calls and visits did not take place. Norgard did not bill for any of the calls or visits he allegedly made. Eh exhibit (Doc. 61) 16.

In fact, Norgard did not bill for any work on Petitioner/Appellant's case whatsoever after his December 1, 2005 oral argument before the Florida Supreme Court. The district court found, "As for billing, Mr. Norgard explained that anything he did in preparation for the federal habeas he would not have billed to the state; therefore, he did not submit any bills for his work post mandate." Doc. 72 at 23. But this conclusion does not square with the evidence and is based upon mistakes of fact.

The visits/calls Norgard testified occurred, but FDOC had no record of, include the August 5, 2004 visit that would have occurred during state proceedings while Norgard was actively billing on the case. It also would have been the first time Norgard spoke to Petitioner/Appellant after the evidentiary hearing. It strains credulity to believe Norgard exclusively discussed federal matters at this visit, and not the pending appeal before the Florida Supreme Court. Norgard also did not bill for the alleged March 6, 2006 call, which would have been the first time Norgard spoke to Petitioner/Appellant after the December 1, 2005 oral argument, but before the appeal was denied on March 23, 2006. Norgard's contention that he did not bill for this meeting because it involved exclusively federal matters is illogical, considering the recent Florida Supreme Court oral arguments and its pending decision.

The list of calls/visits also includes the alleged April 26, 2006 post-mandate call. This would have been the first time Norgard spoke to Petitioner/Appellant after

his appeal was denied and was within the 90-day timeframe for seeking certiorari to the United States Supreme Court. Section 27.711(f)(g), Florida Statutes specifically allows compensation for work done following the denial by the Florida Supreme Court and for work done on writs of certiorari. Norgard's explanation rings hollow; if he was only discussing federal matters during these calls/visits, when was he discharging all his other professional responsibilities to Petitioner/Appellant?

Norgard's billing records provide additional support that the alleged visits and calls never happened. Evidentiary hearing exhibit (Doc. 61) 16(g) indicates Norgard began paying for file storage at an off-site location for Petitioner's file beginning in February 2006, with a notation "(rent began)" next to February 2006. Norgard testified he began storing the files off site as soon as he got them from Heidi Brewer in October 2004. Doc. 67 at 99. Norgard attempted to give several contradictory explanations for why the storage receipts conflicted with his testimony, but none of the explanations could logically explain why the receipts noted rent began in February 2006. The simplest explanation is the one supported by all of the other evidence, including the call/visit logs, other billings records, and Norgard's failure to file anything in federal court: Norgard stopped working on the case entirely after the oral argument on December 1, 2005, and shortly thereafter sent the files to storage in February 2006.

Norgard's testimony that the reason he did not file the federal habeas petition

was because Petitioner/Appellant instructed him not to is also rebutted by the procedural history of the case. On cross examination, the following exchange occurred:

> Q. At any time did the petitioner ever communicate to you that he wanted you to file a petition in federal habeas?
>
> A. The opposite. He basically threatened to get rid of me as counsel and move forward as a death volunteer if I filed anything.

Doc. 67 at 120. "From the time of the evidentiary hearing through that last call, he would not hear anything about **any further appeals**[.]" Doc. 67 at 23 (emphasis added). Norgard indicated the discussion regarding appeals occurred during a break in the hearing when the judge gave Norgard time to speak to Petitioner/Appellant after Petitioner/Appellant stated at the evidentiary hearing, "I want to cancel these proceedings and go back to prison. I want to drop all my appeals." But after speaking with Petitioner/Appellant, Norgard did not ask the Court to dismiss the state postconviction proceedings, as was Petitioner's right under *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993) if he insisted on dropping his appeals.

Not only did Norgard not move to dismiss postconviction proceedings, as was Norgard's duty if Petitioner/Appellant actually desired to do so, but Norgard proceeded to represent Petitioner/Appellant in an appeal before the Florida Supreme Court. Norgard filed an initial brief, a reply brief, a request for oral argument, and conducted the oral argument. Eh exhibit (Doc. 61) 15. On March 17, 2005, Norgard

also filed a state petition for habeas corpus on Petitioner/Appellant's behalf at the Florida Supreme Court and presented oral argument in support of it. *See Miller v. McDonough*, 926 So. 2d 1243 (Fla. 2006).

Norgard's actions are incongruent with his testimony that from the state evidentiary hearing, Petitioner/Appellant would "not hear anything about any further appeals" and would discharge him as counsel and volunteer for death "if I filed anything." It stretches the imagination to believe that during the recess where Norgard was given the opportunity to discuss with Petitioner/Appellant his desire to end postconviction proceedings and waive all appeals, Petitioner/Appellant would have ultimately instructed Norgard to continue with the in-progress evidentiary hearing, file a notice of appeal and litigate his appeal at the Florida Supreme Court, file a state habeas petition at the Florida Supreme Court and give oral arguments, but *not* file a federal habeas petition with a deadline more than three years away. Not only is such a scenario fanciful, but also it directly conflicts with Norgard's testimony that Petitioner/Appellant supposedly instructed him not to file *anything* and that "**We talked him out of that** by getting him to agree we could just send him back to prison, and we'd just do what we needed to do." Doc. 67 at 121 (emphasis added). One of the things he would have needed to do was timely file a federal petition.

Norgard testified he tried to have Petitioner/Appellant evaluated by a mental

health expert but Petitioner/Appellant refused and Petitioner "didn't want to even sign the 3.851." Doc. 67 at 121, 86. But the evidence established Petitioner signed the 3.851 on September 27, 2001, and Petitioner/Appellant later met with Dr. Charles Golden on January 23, 2002, and submitted himself for a PET-scan on October 10, 2002. *See State v. Miller*, Verification, 1997-cf-6680 (Fla. 4th Cir. Ct. Sept. 27, 2001); Eh exhibits (Doc. 61) 7-8. The PET-scan required Petitioner/Appellant to be transported from Raiford, FL to Orlando, FL, a more than 5-hour round-trip drive. *See* App. (Doc. 32), attach. 29, pp. 18-20. The evidence establishes a history of Petitioner/Appellant voluntarily meeting with mental health experts dating back to 1983. Eh exhibits (Doc. 61) 6-8. Contrary to the district court's findings, Norgard's evidentiary hearing testimony was not un-rebutted. Every single piece of documentary evidence, and the actions of Norgard himself, point to Norgard having ceased all representation of Petitioner/Appellant following the denial of Petitioner's Florida Supreme Court appeal. Moreover, Norgard's testimony is rebutted by Norgard's own testimony that up until an August 6, 2013 meeting, Petitioner/Appellant was equivocal about his desire to waive proceedings.

iii. The district court erred in finding that Norgard could strategically waive Petitioner/Appellant's federal habeas rights without consulting a mental health professional or any court in order to keep a lid on Petitioner/Appellant's alleged desire to waive proceedings

The district court accepted Norgard's testimony that failing to file the petition

was done in part to "keep a lid on Petitioner's desire to be a death volunteer." Doc. 72 at 25. Norgard testified that he was trying to prevent further steps in the Florida death penalty process:

> Q. [T]he process from trial to execution would be the trial, the direct appeal, state postconviction, state postconviction appeal, 2254 petition, Eleventh Circuit appeal, state clemency review, and then the signing of a warrant, correct?
>
> A Yes, sir.
>
> Q. And you were trying to prevent further steps in that process, correct?
>
> A. Yes, sir.

Doc. 67 at 129-130. The idea that failing to file a petition would help Petitioner/Appellant fly under the radar, or would prevent further steps in the Florida death penalty process, is illogical. There is no mechanism legal in Florida for an inmate to volunteer for death and initiate the signing of a warrant by the Governor.

The closest analogue to volunteering is contained in Fla.R.Crim.P. 3.851(i), which allows a defendant to waive state postconviction proceedings after the defendant is examined by no fewer than two experts to determine his competency to do so. But by the time Petitioner/Appellant's federal habeas petition was due, Petitioner/Appellant had already completed state postconviction proceedings under rule 3.851. The next step in the legal process was federal habeas, and thus the idea that failing to file a petition would stop the remainder of the process, including clemency proceedings and the signing of a warrant, is not believable. This is

especially troubling given the district court's finding that the state's theory that Norgard failed to file the petition because of an intentional strategy to keep Petitioner/Appellant from proceeding to clemency was "non-sensical" given the Florida Clemency rules specifically instruct that an inmate's clemency investigation is to commence upon failure to file a timely federal habeas petition[9]. Doc. 72 at 28 n. 10. The only thing Norgard achieved was ensuring that Petitioner/Appellant's case would skip federal habeas review, and proceed directly to clemency, the very thing Norgard claimed he was trying to avoid.

Had Norgard followed Petitioner/Appellant's alleged instructions to waive state postconviction proceedings, under Florida law Petitioner/Appellant would have been evaluated by no fewer than two mental health experts to determine whether he was competent to do so, and the state postconviction court would have been required to find that Petitioner/Appellant was knowingly and voluntarily waiving his right to state postconviction. Likewise, the United States Supreme Court has held that to dismiss federal habeas proceedings, the district court must make a judicial determination and submit a report as to "whether [the Petitioner] has capacity to appreciate his position and make a rational choice with respect to continuing or

[9] "An investigation shall commence immediately upon any failure to timely file the initial motion for postconviction relief in state court, and any appeal therefrom, or the initial petition for writ of habeas corpus in federal court, and any appeal therefrom…" Florida Rule of Executive Clemency 15(C); Doc. 66.

abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S. 312, 314 (1966). A waiver of proceedings in either state or federal court would have required a judicial determination of Petitioner/Appellant's competency to do so.

Instead, Norgard took matters in his own hands and made a strategic choice that accomplished nothing other than to expedite Petitioner/Appellant's death penalty proceedings without the required judicial finding of competency to do so. The district court order in this case endorses a procedure where lawyers unilaterally determine competency to waive federal habeas proceedings without notifying the court or having their client evaluated by mental health professionals. Allowing such a procedure leads to the manifestly unjust results in a case such as Petitioner/Appellant's. To challenge the validity of such a waiver unilaterally made by counsel, Petitioner/Appellant must attempt to reconstruct his mental status at the time that the petition was due to be filed, with a record that contains a seven-year hole where Norgard represented him on paper, but provided no legal services. The district court made this already difficult task impossible by limiting the evidentiary hearing to the testimony of Norgard and not allowing Petitioner/Appellant to present the testimony of any mental health professionals.

To make matters worse, Norgard himself testified that up until a visit on August 9, 2013, seven years after the petition was due, Petitioner/Appellant was equivocal about his desire to waive proceedings including federal habeas. Given such equivocation, Norgard was obligated to file a timely petition, or at least obtain a judicial finding that Petitioner/Appellant knowingly and voluntarily wished to waive federal habeas proceedings. At a minimum, jurists of reason would debate whether the district court erred in rejecting Petitioner/Appellant's claim of equitable tolling due to attorney misconduct/abandonment.

II. Jurists of Reason Would Find It Debatable Whether Petitioner/Appellant's Petition States A Valid Claim of The Denial of A Constitutional Right

Petitioner/Appellant raised nine claims in his initial § 2254 petition for writ of habeas corpus. Each of Petitioner/Appellant's nine claims stated a valid claim of the denial of a constitutional right. The district court dismissed Petitioner/Appellant's petition on procedural grounds and did not reach the merits of any of Petitioner/Appellant's claims. A complete explanation of the constitutional basis for each of Petitioner/Appellant's claims is contained within Petitioner/Appellant's Petition (Doc. 15) and Memorandum of Law (Doc. 24). A summary of three of Petitioner/Appellant's claims is contained below to show that Petitioner/Appellant has stated a valid claim for the denial of a constitutional right.

CLAIM I MILLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS

Petitioner/Appellant's first claim in his petition revolves around trial counsel's failure to adequately investigate and present mitigating evidence. The claim is based on two components; an exhausted claim of ineffective assistance of counsel for failing to investigate and present mitigating evidence in violation of the Sixth Amendment, and an unexhausted claim of ineffective assistance of postconviction counsel where default can be excused under *Martinez v. Ryan, 566 U.S. 1* (2012). By its nature, and because the district court dismissed the petition of procedural grounds, the *Martinez* ineffective assistance of postconviction counsel claim has not been reviewed on the merits by any court.

The exhausted ineffective assistance of trial counsel component of claim one is based on three allegations that trial counsel failed 1) to obtain an adequate mental health evaluation; 2) to interview Debra Lee, a substance abuse counselor and social worker who had worked with Petitioner/Appellant for 18 months; and 3) to elicit adequate mitigating evidence from their expert Dr. Harry Krop. The unexhausted portion of the claim for which default can be excused under *Martinez* is based upon postconviction counsel's failures to investigate and present family history; present the testimony of Doctors Golden and Herkov, who both were retained to evaluate

Petitioner/Appellant by postconviction counsel; to present the testimony of Dr. Arthur Satterfield who treated Petitioner/Appellant in 1996; and to uncover and present a diagnosis of Petitioner/Appellant suffering from schizophrenia. Jurists of reason could debate whether Petitioner/Appellant states a valid claim for the denial of a constitutional right.

The Florida Supreme Court rejected Petitioner/Appellant's exhausted claim on the grounds that trial counsel acted reasonably given that his predecessor counsel had the case nearly prepared for trial and that trial counsel made reasonable tactical decisions with regards to which mitigating evidence to present. The state court's determination was contrary to and an unreasonable application of clearly established federal law and involved an unreasonable determination of the facts. The Florida Supreme Court's determination resembles more of "a post hoc rationalization of counsel's conduct than an accurate description of [] [his] deliberations prior to sentencing." *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003).

The evidence establishes that trial counsel only consulted with the sole mental health expert, Dr. Krop, for approximately thirty minutes before trial, and that this expert had been retained by previous conflicted counsel. *See* App. (Doc. 32), attach. 43, p. 165. Additionally, while trial counsel indicated that he relied upon the expertise of Dr. Krop in deciding which mitigating evidence to present, Dr. Krop testified in postconviction proceedings that he did not believe it was his role to

suggest to an attorney what types of mitigation should be presented. "[I]n terms of what areas that might be used as potential mitigation I really can't recall suggesting to an attorney what he or she should bring up or should not." *See* App. (Doc. 32), attach. 43, p. 168. Dr. Krop expressed surprise that certain information was not brought up by trial counsel. *See* App. (Doc. 32), attach. 43, p. 174 ("[A]nd at that point I did indicate that I was somewhat surprised that I was not asked to address that issue.").

The state supreme court's conclusion rested an unreasonable determination of the facts that Petitioner/Appellant's trial counsel had a strategy for failing to investigate and present additional mental health evidence. The finding that trial counsel's conduct was based on strategy is undermined by the fact that this same trial counsel has been found deficient on numerous occasions for nearly identical conduct. In *Douglas v. State*, 141 So. 3d 107, 117 (Fla. 2012), trial counsel was cited for failing to follow up on Dr. Krop's pretrial report and introduce his client's mental health records during the penalty phase. *Id*. at 120. The Florida Supreme Court concluded there were sufficient facts to place counsel on notice that further investigation of mental health mitigation was necessary, and counsel's failure to investigate this line of defense was not reasonable under prevailing professional norms. *Id*. at 121.

In *Shellito v. State*, 121 So. 3d 445, 456 (Fla. 2013), the Florida Supreme Court again found that Petitioner/Appellant's trial counsel rendered deficient performance at the penalty phase for not following up on his mental health expert's report. In *Bevel v. State*, 221 So. 3d 1168, 1180-81 (Fla. 2017), in which Petitioner/Appellant's trial counsel was the primary guilt phase counsel paired with an inexperienced penalty phase counsel, the Florida Supreme Court found that an unreasonable mitigation investigation had been conducted. And in *Spargo v. State*, 132 So. 3d 354, 356- 57 (Fla. 1st Dist. 2014), Petitioner/Appellant's trial counsel was yet again found to be deficient, this time for failing to adopt and present his client's motions to withdraw the plea.

Trial counsel's repeated instances of deficient performance led to a Harvard Law School/New York Times Magazine Report citing him as a prime example of unfair death sentences due to ineffective assistance of counsel. Emily Bazelon, *Where the Death Penalty Still Lives*, N.Y. Times Mag., Aug. 23. 2016. In 2016, the Florida Time Union published an article detailing four instances of Petitioner/Appellant's trial counsel being found ineffective within a four-year period. Andrew Pantazi, *Matt Shirk's top assistant has been 'ineffective' four times, raising questions among experts*, Fla. Times Union, Aug. 24, 2016, https://www.jacksonville.com/story/news/crime/2016/08/24/matt-shirks-top-assistant-has-been-ineffective-four-times-raising/15722013007/. Additionally, an

attorney and research fellow at Harvard University, published a story for Slate Magazine that lists Petitioner/Appellant's trial counsel as one of the worst defense attorneys in the country. Robert J. *Smith*, *The Worst Lawyers*, Slate Mag. (Nov. 4, 2015), https://slate.com/news-and-politics/2015/11/the-worst-defense-lawyers-for-death-penalty-cases-in-arizona-florida-louisiana.html.

As outlined in Petitioner/Appellant's Petition (Doc. 15) and Memorandum of Law (Doc. 24), extensive mitigation was available to trial counsel that was not presented, and additional mitigating evidence would have been discovered had trial counsel conducted any meaningful mitigation investigation instead of relying on the preliminary investigation conducted by Petitioner/Appellant's prior conflicted counsel. The state court's determination was contrary to and an unreasonable application of clearly established federal law and involved an unreasonable determination of the facts. Reasonable jurists would debate whether Petitioner/Appellant has stated a claim for the denial of a constitutional right.

CLAIM V MILLER'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE STATE COURT ERRED IN FAILING TO FIND MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE

At trial, evidence was presented by Petitioner/Appellant that he suffered an abusive home environment during his early childhood. This evidence included the fact that Petitioner/Appellant's father was an alcoholic and was physically abusive

to his wife and children. *See* App. (Doc. 32), attach. 23, pp. 102-104, 127-130, 189-190. During one incident of abuse, Petitioner/Appellant's father grabbed his mother and choked her *See* App. (Doc. 32), attach. 23, p. 128. She managed to get away from him, but he chased after her *See* App. (Doc. 32), attach. 23, p. 128. Petitioner/Appellant's mother escaped after shooting a firearm to keep his father away from her *See* App. (Doc. 32), attach. 23, p. 128. Petitioner/Appellant's father turned his anger toward the children, beating them all with an electrical cord *See* App. (Doc. 32), attach. 23, p. 129. Other incidents of abuse included Petitioner/Appellant's mother being hit with a soda bottle and the children being beaten with belts *See* App. (Doc. 32), attach. 23, pp. 104, 128. The children did not have a relationship with their father because he was an alcoholic and emotionally uninvolved with them *See* App. (Doc. 32), attach. 23, pp. 127-128. . Additionally, Petitioner/Appellant presented evidence that he suffered from long term drug and alcohol abuse. Petitioner/Appellant appeared to be a different person after he returned from the Navy. *See* App. (Doc. 32), attach. 23, pp. 110, 134-135, 193. His drug and alcohol use changed his personality. *See* App. (Doc. 32), attach. 23, pp. 110-112, 135-136.

Despite the fact Petitioner/Appellant's evidence of an abusive childhood and serious substance abuse issues was unrebutted, the trial court found that both were not mitigating and gave them no weight. The trial court erroneously failed to

consider valid mitigation, resulting in a fundamentally unfair trial and violating his right to due process under the Fourteenth Amendment. The Florida Supreme Court's decision rejecting Miller's claim on direct appeal review was contrary to or involved an unreasonable application of clearly established federal law, as well as an unreasonable determination of the facts. *See* 28 U.S.C. §2254(d). Where evidence is sufficient to support mitigation, Petitioner/Appellant's trial judge violated his federal Constitutional rights by failing to consider that mitigation. *See Parker v. Dugger*, 498 U.S. 308 (1991); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion). Jurists of reason would debate whether Petitioner/Appellant has stated a claim for the violation of a constitutional right.

CLAIM VII MILLER'S CONVICTION AND DEATH SENTENCE VIOLATE THE FEDERAL CONSTITUTION BECAUSE HE WAS NOT COMPETENT TO STAND TRIAL

Petitioner/Appellant's state conviction and death sentence violate the federal Constitution because Miller was not competent at the time of his trial. Petitioner/Appellant has put forth evidence establishing that Petitioner/Appellant has a long history of mental illness including auditory hallucinations, involuntary commitment, suicide attempts, and psychosis. Due to his incompetency during all critical stages of his trial and appeals process, Petitioner/Appellant's continued

confinement on death row violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Petitioner/Appellant's Petition (Doc. 15) references an evaluation by Dr. Eddy Regnier, and Petitioner/Appellant attached the report of Dr. Regnier to his Reply (Doc. 33). Dr. Regnier opined that throughout his trial, Petitioner/Appellant was unable to act reasonable with regard to his defense due to mental infirmity, disease or defects. Doc. 33-1 at 21. Petitioner/Appellant's petition alleges that the psychologist who examined Petitioner/Appellant at trial for competency, Dr. Krop, has asserted that he was unaware of the full range of information regarding Petitioner/Appellant's auditory hallucinations, religious preoccupation, and delusions. Dr. Krop stated that had he been aware of these facts, he would certainly have had concerns that Miller was incompetent to proceed, and would have recommended a renewed competency evaluation.

Criminal proceedings against an incompetent defendant violate due process. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This due process right cannot be waived. *Pate v. Robinson*, 383 U.S. 375, 384 (1966). At the time of Miller's trial, he did not have the capacity to consult with his counsel with a reasonable degree of understanding, and he did not have a rational and factual understanding of the legal proceedings to which he was subjected. *Dusky v. United States*, 362 U.S. 402 (1960). The evidence presented by Miller, taken as a whole, demonstrates his incompetency

by a preponderance of the evidence. *James v. Singletary*, 957 F.2d 1562 (11th Cir. 1992).

Petitioner/Appellant asserts in his petition that postconviction counsel's failure to raise this claim during state court litigation amounts to cause for overcoming procedural default under *Martinez*, and the error was prejudicial. Despite representing Petitioner/Appellant for nearly a decade and being aware of Petitioner/Appellant's longstanding and extensive mental illness, Petitioner/Appellant's state postconviction counsel never once had Petitioner/Appellant evaluated by a mental health professional. No court has ruled on the merits of this claim. Jurists of reason would debate whether Petitioner/Appellant has stated a claim for the denial of a constitutional right.

III. CONCLUSION

For the reasons set forth in this application for certificate of appealability, Petitioner/Appellant has established that jurists of reason would debate the district court's procedural ruling dismissing Petitioner/Appellant's § 2254 petition, and that jurists of reason would debate whether Petitioner/Appellant's states a claim for the denial of a constitutional right. This Court should therefore grant a certificate of appealability.

Respectfully submitted this 16th day of March 2022,

/s Gregory W. Brown
Gregory W. Brown, Esq.,
Assistant Federal Defender
Florida Bar # 086437
Office of the Federal Public Defender
Capital Habeas Unit
Middle District of Florida
400 N. Tampa Street, Suite 2600
Tampa, Florida 33602
Tel: 813-228-2715
Email: greg_brown@fd.org
Secondary Email: FLM_CHU@fd.org

/s Tennie B. Martin
Tennie B. Martin, Esq.,
Assistant Federal Defender
Arizona Bar # 016257
Office of the Federal Public Defender
Capital Habeas Unit
Middle District of Florida
400 N. Tampa Street, Suite 2600
Tampa, Florida 33602
Tel: 813-228-2715
Email: tennie_martin@fd.org
Secondary Email: FLM_CHU@fd.org

Counsel for the Petitioner/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of March, 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel for the Respondents/Appellees.

/s/Gregory W. Brown
Gregory W. Brown
Florida Bar No. 86437
Assistant Federal Defender
Capital Habeas Unit

CERTIFICATE OF COMPLIANCE

Petitioner/Appellant certifies that this pleading confirms with the type-volume and type-face limitations of Federal Rule of Appellate Procedure 32 and contains 12861 words, and was prepared in Microsoft Word in 14 pt. Times New Roman font excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

/s/Gregory W. Brown
Gregory W. Brown
Florida Bar No. 86437
Assistant Federal Defender
Capital Habeas Unit

APPENDIX A-25

May 31, 2022, Petitioner/Appellant's Motion for Reconsideration of Order Denying Certificate of Appealability

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 22-10657-P

DAVID MILLER, JR.

Petitioner/Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

Respondents/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA (JACKSONVILLE DIVISION)

PETITIONER/APPELLANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING A CERTIFICATE OF APPEALABILITY

A. FITZGERALD HALL, ESQ.,
FEDERAL DEFENDER

MARIE F. DONNELLY, ESQ.,
CHIEF, CAPITAL HABEAS UNIT

Gregory W. Brown, Esq.,
Assistant Federal Defender
Capital Habeas Unit
Florida Bar # 086437
400 N. Tampa Street, Suite 2600
Tampa, Florida 33602
Tel: 813-228-2715
Email: greg_brown@fd.org
Secondary Email: FLM_CHU@fd.org

PETITIONER/APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

David Miller, Jr. v. Secretary, Florida Department of Corrections
Appeal No.: 22-10657-P

In compliance with 11th Cir. R. 26.1-1, counsel for Petitioner/Appellant hereby certifies that the following persons, partnerships, or firms may have an interest in the outcome of this case:

Anderson, Christopher J. (State postconviction counsel for Petitioner/Appellant)

Anstead, Honorable Harry L. (Florida Supreme Court Justice)

Backhus, Terry L. (Former Federal Habeas Counsel for Petitioner/Appellant)

Bateh, George Z. (Assistant State Attorney)

Bell, Honorable Kenneth B. (Florida Supreme Court Justice)

Blair, Katherine A. (Former Federal Habeas Counsel for Petitioner/Appellant)

Brewer, Heidi P. (Former state postconviction counsel for Petitioner/Appellant)

Brown, Gregory W. (Attorney for Petitioner/Appellant)

Butterworth, Robert A. (Florida Attorney General during direct appeal)

Canady, Honorable Charles T. (Florida Supreme Court Justice)

Cantero, Honorable Raoul (Florida Supreme Court Justice)

Chipperfield, Allen (Trial counsel for Petitioner/Appellant)

Davis, Honorable Brian J. (Federal Habeas Judge,
Federal Middle District of Florida)

Donahue, Jennifer A. (Former Assistant Attorney General)

Eler, Refik W. (Trial Counsel for Petitioner/Appellant)

French, Curtis M. (Assistant Attorney General during direct appeal)

Daniels, Nancy A. (Direct appeal counsel for Petitioner/Appellant)

Floyd, Albert (Deceased victim)

Fullwood, Linda (Victim)

Gunn, Sean T. (Former Federal Habeas Counsel for Petitioner/Appellant)

Harding, Honorable Major B. (Florida Supreme Court Justice)

Kennett, Michael (Assistant Attorney General, Attorney for Respondent/Appellees)

Labargo, Honorable Jorge (Florida Supreme Court Justice)

Lawson, Honorable Alan (Florida Supreme Court Justice)

Lewis, Honorable R. Fred (Florida Supreme Court Justice)

Moody, Ashley (Florida Attorney General)

Nolas, Billy H. (Former Federal Habeas Counsel for Petitioner/Appellant)

Martin, Tennie (Attorney for Petitioner/Appellant)

McClain, W.C. (Direct appeal counsel for Petitioner/Appellant)

Millsaps, Charmaine (Assistant Attorney General,
Attorney for Respondent/Appellee)

Norgard, Robert A. (Former state postconviction counsel for Respondent/Appellant)

Pariente, Honorable Barbara J. (Florida Supreme Court Justice)

Polston, Honorable Ricky (Florida Supreme Court Justice)

Shaw, Honorable Leander J. (Florida Supreme Court Justice)

Siegel, Stephen W. (Assistant State Attorney)

Tassone, Frank (Former state postconviction counsel for Petitioner/Appellant)

Taylor, Honorable L. Haldane (Trial Judge, Circuit Court for the 4th Judicial Circuit)

Toomey, Honorable Joel B. (Magistrate Judge, Federal Middle District of Florida)

Quince, Honorable Peggy A. (Florida Supreme Court Justice)

Well, Honorable Charles T. (Florida Supreme Court Justice)

Motion for Reconsideration of Order Denying a Certificate of Appealability

COMES NOW Petitioner/Appellant, through undersigned counsel, and respectfully requests that this Court reconsider its May 10, 2022, Order denying Petitioner/Appellant's Application for Certificate of Appealability ("Order Denying COA"). In support thereof, Petitioner/Appellant states the following:

I. Summary of the Argument

This Court denied Petitioner/Appellant's Application for Certificate of Appealability because it found that

> Miller has failed to carry his burden to show that jurists of reason could find it debatable whether he is entitled to equitable tolling for the entire period between the expiration of the limitation period . . . and when Miller filed his petition. . . . To be sure, Miller offers arguments that attempt to cast doubt upon the reasoning of the district court, which relied only on the relationship between Miller and his attorney that led up to the . . . deadline. But Miller does not offer any reason why he is entitled to equitable tolling for the period after the withdrawal of his original attorney in 2013. During that period, Miller was represented by . . . multiple attorneys, including the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Florida, which was appointed on August 24, 2017.

Order Denying COA at 2-3.

This Court's Order Denying COA overlooks two critical facts. First, Miller did not address tolling due to attorney misconduct during the representation of Miller's attorneys subsequent to his initial state postconviction counsel Robert Norgard ("Norgard"), because the district court, upon appointing the Capital Habeas

Unit for the Middle District of Florida ("CHU-M"), ordered CHU-M to address tolling in a piecemeal fashion. The district court strictly limited the evidentiary hearing to only Norgard's conduct during his representation. Although the district court ordered CHU-M to "file a memorandum concerning equitable tolling of the limitation period during the period of CHU-N's representation of Petitioner in state court to the point of the filing of the Petition in this Court," Doc. 35 at 12-13, CHU-M's deadline for this memorandum was December 8, 2021. *See* Doc. 43. However, the district court dismissed Petitioner/Appellant's petition on November 18, 2021, approximately three weeks before Petitioner/Appellant's memorandum regarding tolling during CHU-N's representation was due. Therefore, Petitioner/Appellant's failure to "offer any reason why he is entitled to equitable tolling for the period after the withdrawal of his original attorney in 2013" resulted directly from the district court's decision to hold a limited evidentiary hearing on tolling during Norgard's representation, and then to deny the petition before Miller could present evidence entitling him to tolling subsequent to Norgard's withdrawal. Miller should not be penalized now because his counsel followed the instructions of the district court.

Secondly, Miller specifically alleged he was entitled to tolling of the statute of limitations due to his severe mental illness. Those allegations, which at the summary judgment stage the district court was required to accept as true, were not limited to the period Miller was represented by Norgard. No court has held that

allegations of equitable tolling due to mental illness must be accompanied by allegations of concurrent attorney misconduct. Even still, Petitioner/Appellant was prepared to present evidence that each of his subsequent attorneys engaged in abandonment and/or misconduct. Petitioner/Appellant was unable to do so because the district court denied the petition before giving substitute conflict-free counsel the opportunity to investigate and present such claims.

II. Argument

a. Miller's Failure To Address Tolling by Counsel Subsequent to Norgard's Representation Resulted from the District Court Ordering Miller To Address Only Norgard's Conduct.

CHU-M was appointed as substitute conflict-free federal habeas counsel on April 16, 2021. Doc. 35. In that same order, the district court acknowledged it would be scheduling a limited evidentiary hearing regarding tolling during Norgard's representation, and further ordered CHU-M to file a memorandum on tolling during CHU-N's representation by June 11, 2021. CHU-M advised the district court in a motion for extension of time it would not be possible to gather and review the records, investigate, and brief this issue of tolling in a twenty-four year old capital murder case, in the midst of a global pandemic, within the 56 days allocated. This was particularly true given the long documented severe mental illness from which Miller suffers. In the motion for extension, CHU-M advised the district court, "with the pending June 11, 2021 deadline, CHU-M has chosen to

prioritize obtaining, indexing, and reviewing CHU-N's file over those of Mr. Miller's earlier counsel." Doc. 40, at 5.

On May 24, 2021, the district court entered an order lifting the stay in the case. In the order listing the stay, the district court stated,

> In the motion, Petitioner states that 'CHU-M has chosen to prioritize obtaining, indexing, and reviewing CHU-N's file over those of Mr. Miller's earlier counsel.' Motion at 5. As expressed in the Court's Order (Doc. 35), Petitioner should prioritize preparing for an evidentiary hearing concerning Mr. Robert Norgard's conduct and his representation of Petitioner.

Doc. 41 at 1-2. The district court's order directing Miller to focus on Norgard's conduct and prepare for an evidentiary hearing was issued just 39 days after CHU-M had been substituted as counsel. On June 9, 2021, the district court granted Miller an extension until December 8, 2021, to file his brief regarding tolling during CHU-N's representation.

On July 14, 2021, the district court ordered the parties to confer and agree upon a date for the limited evidentiary hearing, and noted "[t]he Court intends that the focus of the hearing will be upon the questions set forth in its Order (Doc. 35 at 10-11).". Doc. 44 at 1. The questions the district court was referring to, as set out in Doc. 35, dealt exclusively with Norgard's conduct. The parties conferred and agreed to set the Norgard limited evidentiary hearing on October 21, 2021.

On July 26, 2021, Respondent/Appellees filed a motion requesting in part to broaden the scope of the limited evidentiary hearing to include the testimony of

Miller's other attorneys. Doc. 45 at 4. The district court denied the motion to broaden the scope of the evidentiary hearing emphasizing once more that, "the Court is going to schedule **a limited evidentiary hearing** addressing the conduct of Mr. Norgard and the related conduct of Petitioner." Doc. 46 at 1.

On September 22, 2021, Miller moved the district court to continue the October 21, 2021, limited evidentiary hearing. Miller moved to continue both because CHU-M had outstanding records requests and because CHU-M had discovered the basis of the hearing, Respondent/Appellee's assertion that Norgard had intentionally missed the federal habeas deadline to keep Miller off a warrant eligible list, was meritless and without evidentiary support. Doc. 48. The motion for continuance further asserted, "CHU-M's ongoing investigation suggests that Petitioner's case for equitable tolling will rely primarily on Petitioner's mental status at the relevant times, and much less on the conduct of Mr. Norgard or Petitioner. Additionally, Petitioner expects that the mental status evidence he intends to present is relevant to tolling not just during Mr. Norgard's representation, but also to the that of all subsequent attorneys." Doc. 48 at 6. On October 7, 2021, the district court denied Miller's motion for continuance, stating, "As previously stated, the Court is conducting a **limited evidentiary hearing** addressing the conduct of Mr. Norgard and the related conduct of Petitioner." Doc. 49 at 1.

A limited evidentiary hearing was conducted on October 21, 2021. Miller was prohibited from presenting substantive evidence of his mental illness or evidence regarding the conduct of his subsequent attorneys. Per the district court's orders, CHU-M focused its investigation and presentation on Norgard's conduct. The district court entered an order dismissing the petition as time barred on November 18, 2021. Doc. 72. The order found Miller had failed to prove his mental illness prevented him from timely filing his petition, despite the fact the district court specifically disallowed Miller from presenting evidence of his mental illness and the extent to which it prevented him from timely filing his petition. When the petition was dismissed, Miller still had 21 days remaining to file his memorandum regarding tolling during CHU-N's representation.

This Court denied a COA because Miller failed to establish he was entitled to tolling during the period following Norgard's withdrawal, including the period Miller was represented by CHU-N. Miller was prepared to present substantial evidence that he was abandoned by his subsequent counsel, and that his subsequent counsel engaged in misconduct warranting equitable tolling. Had Miller been given the opportunity to present his full case for equitable tolling, the astounding nature of the miscarriage of justice that occurred in. Miller's case would have come into focus.

b. Had the District Court Allowed Miller To Present Evidence Regarding Tolling Subsequent to Norgard's Withdrawal, Miller Would Have Established Each of His Subsequent Counsel Engaged in Abandonment/Misconduct Warranting Equitable Tolling.

Miller's application for COA thoroughly established the egregiously substandard representation provided by Petitioner/Appellant's state postconviction counsel Robert Norgard which amounted to an effective abandonment. This Court, however, found a COA should be denied due to Miller's failure to establish an entitlement to tolling during representation subsequent to Norgard's. But Miller's effective abandonment by counsel did not end with Norgard. Miller was prepared to offer evidence in the district court of attorney abandonment and/or misconduct for the representation subsequent to Norgard, but he was never permitted to do so. Although Miller briefly summarizes some of the available evidence below, this issue should be decided in the first instance by the district court.

In postconviction, Miller was initially represented by Capital Collateral Regional Counsel-North ("CCRC-N"), but that office was abolished by the State of Florida on June 30, 2003. Miller's case became part of an experiment by the Florida Legislature to determine whether money could be saved by appointing registry attorneys. *See* Section 27.709-10, Florida Statutes (2003). The registry attorney pilot program facilitated the appointment of Norgard to this case. In 2013, Florida ended the registry attorney pilot program based in part on statements from former

Florida Supreme Court Chief Justices Fred Lewis and Charles Canady that the CCRC structure was far superior to a system of registry attorneys.[1] Unfortunately for Miller, he bounced from one ineffective registry attorney to another.

Following Norgard's withdrawal on September 25, 2013, attorney Frank Tassone was appointed. Miller's trial lawyer, Refik Eler[2], was at the time of trial a partner in the law firm Tassone, Eler, Kuritz & Till. In fact, Tassone and Eler were law partners for 15 years between 1991-2006, encompassing the entire time Eler represented Miller at trial. Thus, Tassone represented an individual in state postconviction proceedings who had been represented by his own law firm at trial. Given postconviction representation necessarily involves investigating the ineffectiveness of the trial counsel—here, Tassone's own law firm—Tassone was laboring under a blatant conflict of interests.

This clear conflict of interests was not the only issue with Tassone's representation. In the fifteen months Tassone was Miller's postconviction counsel, the only pleading he filed was a motion to withdraw. Tassone never sought appointment in federal court. FDOC call and visitation records establish Tassone spoke to Miller by phone on one occasion, a 30-minute call of October 13, 2014.

[1] https://www.flsenate.gov/Session/Bill/2013/1510/Analyses/2013s1510.ap.PDF
[2] As described in Miller's Petition and Application for COA, Miller's trial counsel, Refik Eler, has been accused by multiple publications of being one of the nations' worst defense attorneys. Eler has been found to be ineffective in at least four murder cases.

Tassone moved to withdraw one week later. When Tassone finally moved to withdraw, he cited his inability "to give the necessary time to effectively pursue Mr. Miller's claims," rather than his obvious conflict of interests.

Following Tassone's withdrawal, the trial court appointed attorney Christopher Anderson on December 9, 2014. Miller was prepared to present evidence that Anderson abandoned him and committed misconduct during his representation. Like his predecessors, Anderson never appeared on behalf of Miller in federal court. FDOC's records do not reflect any visits/calls between Anderson and Miller until a June 12, 2017, joint visit with CHU-N chief Billy Nolas.

CHU-M's investigation suggests CHU-N only became involved in Miller's case because Anderson had failed to file any pleadings in the state trial court or Florida Supreme Court in light of the decisions in *Hurst v. Florida*[3] and *Hurst v. State*[4]. *Hurst v. Florida* was decided by the United States Supreme Court on January 12, 2016, and the Florida Supreme Court issued *Hurst v. Florida* on October 14, 2016. By June 2017, when Anderson and Nolas were meeting with Miller, the Florida Supreme Court had already issued 73 opinions either granting or denying relief based upon *Hurst.* Many more cases were in varying stages of litigation in various Florida courts on the *Hurst* issue. But a year and a half after the United

[3] 577 U.S. 92 (2016).
[4] 202 So.3d 40 (2016).

States Supreme Court struck down Florida's death penalty, Anderson had not filed anything in Miller's case.

Miller would also have presented evidence about potential misconduct committed by Anderson during his representation of Miller. Strong evidence suggests Anderson billed the courts for work that was done by CHU-N, while continuing to do essentially nothing on Miller's case.

On June 28, 2017, Miller filed a Petition for Writ of Habeas Corpus raising the *Hurst* issue in the Florida Supreme Court with Nolas listed in the signature block as consulting counsel. Nearly identical state habeas petitions were filed by Nolas on behalf of Jason Stephens on June 27, 2017; Stephen Booker on June 27, 2017; and Donald Bradley on June 29, 2017. Anderson had no involvement in any of these cases. In each of those cases, nearly identical responses to an order to show cause issued by the Florida Supreme Court were filed, and nearly identical replies to the State's response were filed.

While it is certainly not uncommon for defense lawyers to share pleadings and borrow from each other's work, the pleadings in these cases and Anderson's billing motions raise serious concerns about Anderson's conduct, including whether he was attempting to conceal his abandonment of Miller through exaggerated/fraudulent billing. CHU-M believes the evidence would show CHU-N, not Anderson, drafted the state habeas petition, response to order to show cause, and reply in support of the

response to the order to show cause. This assertion is also supported by the timing of Anderson's filings and billing records contained within the record on appeal in this case. For instance, a bill[5] submitted by Anderson in Miller's case claims he spent 7.2 hours preparing a reply in support of response to order to show cause on November 4, 2017. A pleading appearing to be identical except for the addition of a table of contents and the use of a different font was filed in the Donald Bradley case[6] by CHU-N three days earlier on November 1, 2017. Even though the pleadings were nearly identical to other cases, it appears Anderson billed approximately 93.5 hours for drafting pleadings for a total of approximately $9,350 in attorneys' fees. This number excludes countless more hours Anderson claims to have spent researching the cases cited in the pleadings. All told, Anderson billed the state court for $24,860 for work done on Miller's 2017 state habeas.

This does not appear to be an isolated incident. In addition to the state habeas, Anderson filed a petition for writ of certiorari[7] in the United State's Supreme Court on Miller's behalf on May 29, 2018. A substantially similar petition for writ of certiorari was filed by CHU-N on February 12, 2018, in the case of Eric Branch[8], more than three months earlier, and Miller believes witnesses would corroborate the

[5] Motion for Payment of Attorney's Fees, *State v. Miller*, 1997-cf-6680 (Fla. 4th Cir. Ct. Mar. 19, 2020).
[6] Petitioner's Reply in Support of Response to Order to Show Cause, *Bradley v. Jones*, SC17-1219 (Fla. Nov. 1, 2017).
[7] Petition for Writ of Certiorari, *Miller v. Jones*, 139 S.Ct. 152 (2018) (No. 17-9314).
[8] Petition for Writ of Certiorari, *Branch v. Florida*, 138 S.Ct. 1164 (2018) (No. 17-7758).

certiorari petition in both cases was researched and drafted by CHU-N. Yet Anderson submitted a bill[9] to the state trial court on March 13, 2020, billing $8,630 for work done on Miller's petition for writ of certiorari.

Up until CHU-N's intervention, Anderson appears to have done essentially nothing on Miller's behalf. Anderson never sought appointment in federal court to assert Miller's rights to federal habeas review. There are serious questions as to what role Anderson played in the eventual state litigation and whether Anderson had effectively abandoned Miller and then attempted to conceal this abandonment. Perhaps there are innocent explanations for these discrepancies, but Miller should have been given the opportunity to develop this evidence at the district court.

CHU-N was appointed as federal habeas counsel on August 15, 2017. Before that they had no formal relationship with Miller, and no agency relationship which could bind Miller to their errors or omissions. As stated above, the district court had given CHU-M until December 8, 2021, to brief the court on tolling during CHU-N's representation but dismissed the petition before the briefing was due. CHU-M was prepared to brief the district court on CHU-N's misconduct.

CHU-N chief Nolas was Miller's lead counsel from CHU-N's appointment on August 24, 2017, until he was forced to resign due to allegations of personal and

[9] Motion for Payment of Attorney's Fees, *State v. Miller*, 1997-cf-6680 (Fla. 4th Cir. Ct. Mar. 13, 2020).

professional misconduct in the fall of 2018. Nolas was an extremely experienced capital habeas attorney, with decades of experience as a trial, postconviction, and federal habeas lawyer. CHU-M's investigation of the issue of tolling during CHU-N's representation was ongoing when the district court dismissed his petition. CHU-M was prepared to present evidence that CHU-N chief Nolas had structured CHU-N, so he was lead counsel in every case and in charge of strategy. The other at CHU-N attorneys were given assignments by Nolas and did not have direct responsibility over decision making. Based upon his extensive experience, the evidence would show Nolas was well versed in how the AEDPA statute of limitations operated, and under what circumstances an individual would be entitled to statutory tolling. However, Nolas accepted a caseload he knew he could not effectively litigate, while his personal and professional life were simultaneously spiraling out of control. This dangerous combination led to Nolas effectively abandoning Miller.

Between late 2015 and his forced departure from CHU-N in late 2018, Nolas entered initial appearances in approximately 47 federal capital habeas actions. This included approximately 26 out of district appointments in the Middle District of Florida. In addition to appearing in approximately 47 capital federal habeas proceedings during that time period, Nolas moved the federal district courts to allow him to appear in state court on behalf of petitioners in approximately 24 cases, and was granted permission by the district courts in 19 cases between May 2016 and

April 2018. Nolas was a signatory to approximately 16 state habeas corpus petitions before the Florida Supreme and approximately 14 appeals to the Florida Supreme Court of the denial of state postconviction motions between March 2017 and April 2018, all while under a simultaneous obligation to fulfil significant administrative duties as chief of CHU-N. In total, Nolas represented a total of 24 different clients before the Florida Supreme Court between March 2017 and April 2018.

Miller believes the evidence would show Nolas took it upon himself to ensure every capital defendant in Florida had pending litigation regarding *Hurst v. Florida* and *Hurst v. State* with no regard for how accepting so many cases would lead to clients unknowingly forfeiting other types of claims. The evidence would also establish that the number of cases Nolas took on was wildly out of touch with professional norms regarding caseloads for capital defense attorneys. Had Nolas sought appointment from the state courts instead of the federal courts for his extensive work in state court on behalf of 24 clients, he would have been barred from representing more than 10 individuals under Section 27.711(9), Florida Statutes. The problem of Nolas dramatically overextending himself was particularly acute during the period when Nolas was appointed to represent Miller. In a two month stretch between August 2017 and September 2017, during which time Nolas was appointed to represent Miller, Nolas moved for appointment in 11 new federal capital habeas cases.

Miller believes the evidence would show Nolas did not advise Miller of the excessive number of appointments he had and was continuing to seek, nor that it would be practically impossible for Nolas to timely gather and review records in an effort to assert Miller's federal habeas rights given his caseload. It was not until Nolas was forced to resign that other lawyers began reviewing the excessive number of cases to determine what needed to be done. At an evidentiary hearing, CHU-N lawyers would be able describe a chaotic situation in which they frantically attempted to get up to speed on each case including Miller's after Nolas' departure.

c. This Court's Decisions in *Thomas I* and *Thomas II* Support the Need for Additional Factfinding by the District Court.

This Court's opinions in *Thomas I*[10] and *Thomas II*[11] are instructive. In *Thomas I*, after an untimely petition was filed, the district court first held a hearing at which it questioned Thomas' habeas counsel as to the untimely filing of the petition. *Thomas I*, 795 F.3d at 1288. After questioning counsel, the district court appointed conflict free counsel and ordered briefing on initial habeas counsel's conduct. *Id.* Following briefing, the district court dismissed the petition. *Id.* Thomas then wrote a pro se letter to the court detailing his lawyer's failings. *Id.* at 1289. The district court held a hearing on the motion for reconsideration at which time additional testimony was taken from his initial habeas counsel, and

[10] *Thomas v. Attorney Gen., Florida*, 795 F.3d 1286 (11th Cir. 2015).
[11] *Thomas v. Attorney Gen.*, 992 F.3d 1162 (11th Cir. 2021).

supplemental briefing was ordered. *Id.* Following the motion for rehearing and supplemental briefing, the district court granted rehearing and scheduled an evidentiary hearing. *Id.* At the evidentiary hearing, the court took testimony from Thomas, initial habeas counsel, and Thomas' state postconviction counsel. *Id.* The district court then ordered supplemental briefing, and then granted equitable tolling. *Id.*

This Court reversed and remanded in *Thomas I*. This Court found intervening law had changed the inquiry, and ordered the district court to "make specific and detailed factual finding to support any conclusions that equitable tolling may be appropriate in this case." *Id.* at 1294. This Court ordered the district court "provide a more thorough account of the facts of this case, including those which shed light on [habeas counsel's] decisionmaking, her understanding of the AEDPA filing deadlines, her mental health, and any actions Thomas may have taken to ensure the timeliness of his petition." *Id.* at 1296-97.

On remand, the district court allowed initial habeas counsel to be deposed and scheduled an additional evidentiary hearing. *Thomas II*, 992 F.3d at 1176. The evidentiary hearing was cancelled after the parties entered a joint stipulation regarding the facts related to equitable tolling. *Id.* The district court ordered supplemental briefing, and Thomas used the supplemental briefing to enter

additional sworn affidavits into the record. *Id.* On remand, the district court ultimately held equitable tolling was warranted, and this Court affirmed. *Id.* at 1193.

Thomas I and *Thomas II* make clear the essential role of judicial factfinding by the district court on the issue of equitable tolling. Even after Thomas' counsel was questioned under oath, briefing on tolling was submitted, additional testimony was taken from habeas counsel at a rehearing hearing, an evidentiary hearing was held, and supplemental briefing was conducted, this Court still ordered in *Thomas I* that additional judicial fact finding was warranted. *Thomas* stands in stark contrast to this case. Miller was granted a limited evidentiary hearing on tolling during Norgard's representation only and prevented from presenting evidence of his mental illness or evidence regarding conduct of other lawyers. The district court then used the lack of evidence of mental illness, which the district court caused, to deny Miller equitable tolling. Now this Court has denied a COA based on Miller's failure to prove tolling during representation subsequent to Norgard's withdrawal, when the district court specifically limited the evidence to Norgard and denied the petition before briefing on subsequent representation was due. This Court should follow the example it set in *Thomas* and require the issue of tolling in this case be decided after specific and detailed fact finding by the district court.

d. The Allegations Made by Miller That He Suffers from Mental Illness and That His Mental Illness Prevented Him from Timely Filing His Petition Apply Equally During the Representation by Counsel Subsequent to Norgard.

Miller raised in his application for COA that jurists of reason could disagree with the district court's denial of Miller's request for an evidentiary hearing on the issue of equitable tolling due to mental disability. This Court has held that a Petitioner's mental incapacity may under certain circumstances justify equitable tolling of the AEDPA statute of limitations. *Hunter v. Ferrell*, 587 F.3d 1304 (11th Cir. 2009); *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005), *aff'd*, 549 U.S. 327 (2007). Representation by counsel does not preclude equitable tolling based on mental illness. *See Milam v. Harrington*, 953 F.3d 1128, 1132-33 (9th Cir. 2020); *Riva v. Ficco*, 615 F.3d 35, 43-44 (1st Cir. 2010) (where the First Circuit faulted a district court's "failure to consider whether the counseled filings enjoyed the petitioner's effective participation" and remanded "for further development of the record with a view toward determining whether the petitioner's mental illness so severely impaired his ability effectively to pursue legal relief, either on his own behalf or through counsel."); *Stiltner v. Hart*, 657 F. App'x 513, 523-26 (6th Cir. 2016) (awarding equitable tolling to a petitioner unable "to monitor the legal assistance provided for him by a fellow prisoner or an attorney to make sure that they met the relevant deadline"); *see also Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (awarding equitable tolling to Title VII plaintiff whose "mental illness . .

. precluded her from exercising an agency relationship with the attorney who handled her EEOC case").

The allegations made by Miller to the district court that he suffers from mental illness, and that there was a causal connection between his mental illness and his failure to timely file his petition, were not specific to the period during which he was represented by Norgard.

In his petition (Doc. 15), Miller alleged:

> One indication that equitable tolling is warranted stems from the fact that Miller has significant mental health issues which impact his ability to **communicate with counsel**. Miller has been diagnosed with a number of disorders throughout his life, including a mixed personality disorder with features of schizoid personality, schizophrenia, and brain damage. A recent mental health examination confirms that Miller has paranoid schizophrenia, with a history of pervasive hallucinations and delusions dating back to at least the early 1980s…It is likely that Miller **would have acquiesced to what his attorneys wanted him to do**, simply to end the interaction and return to his solitude. This tendency would be particularly pronounced under stress. At Miller's best, he is low-functioning, and in many ways presents with symptoms appearing similar to a severe form of autism. He is paranoid and withdrawn. The rest of the time, he presents with active schizophrenia and psychosis in the form of delusions and hallucinations. These symptoms **would have made effective communication virtually impossible between Miller and his defense counsel.**

Doc. 15 at 10-11 (emphasis added).

Miller's Memorandum of Law (Doc. 24), alleged "Miller suffers from severe schizophrenia and other mental health conditions that rendered him incompetent and **unable to communicate with his attorneys** or make rational decisions regarding

his legal rights." Doc. 24 at 7 (emphasis added). Miller's Reply in Support of 28 U.S.C. § 2254 Petition (Doc. 33), alleged,

> Miller has specifically alleged that his longstanding mental illness—characterized by delusions, religious preoccupations, and hallucinations—rendered him **unable to effectively communicate with counsel** or assist in pursuing his legal rights. See, e.g., Regnier report ("Attachment 1") at 3-7, 14-21 (diagnosing Miller with multiple mental health disorders including schizoaffective disorder and schizotypal personality disorder, and finding he was likely incompetent for much of his legal process).

Doc. 33 at 6 (emphasis added). Miller's allegations were supported by the declaration of licensed psychologist Eddy Regnier, who found,

> Throughout his trial **and appeals process**, Mr. Miller has been by reason of mental infirmity, disease or defects unable to act reasonably with his defense. When Mr. Miller refused or failed to participate in his legal defense, he was likely responding to delusional ideas of religious beliefs, and was in a psychotic state that prevented him from making ration decisions with regard to his legal defense.

(Emphasis added). Doc. 33, Att. 1 at 21. None of these various allegations were specific to the period when Miller was represented by Norgard, and none were conclusively refuted by the state court record, which predated the time during which the petition was due to be filed.

The district court precluded Miller from presenting any evidence of his mental disability during the time his petition was due. Miller was strictly limited to presenting the testimony of Norgard. Miller was prepared to present evidence of his mental disability and the causal connection between his mental illness and his

inability to timely file his petition. At the summary judgment stage, the district court was required to take the allegations of Miller's mental disability as true. As this Court stated in *Hunter*, "in the summary judgment posture of this case, the only question is whether [the petition] has presented sufficient evidence to create a factual issue as to a causal connection between his mental incapacity and his ability to file a timely § 2254 petition." *Hunter*, 587 F.3d. at 1308. Jurists of reason could debate whether the district court erred at the summary judgment stage in dismissing Miller's petition as untimely.

III. Conclusion

This Court overlooked the fact that Miller's failure to address his entitlement for tolling during representation subsequent to Norgard was caused by the district court, his briefing on that subject was due after the petition was dismissed, and his allegations of mental illness that caused his inability to timely file his petition extend to the periods of time he was represented by subsequent counsel. For the reasons stated in this motion, this Court should grant this motion for reconsideration, find that jurists of reason could debate the district court's procedural ruling dismissing the petition, and grant Mr. Miller a certificate of appealability.

Respectfully submitted this 31st day of May 2022,

/s Gregory W. Brown
Gregory W. Brown, Esq.,
Assistant Federal Defender
Florida Bar # 086437

Office of the Federal Public Defender
Capital Habeas Unit
Middle District of Florida
400 N. Tampa Street, Suite 2600
Tampa, Florida 33602
Tel: 813-228-2715
Email: greg_brown@fd.org
Secondary Email: FLM_CHU@fd.org

/s Tennie B. Martin
Tennie B. Martin, Esq.,
Assistant Federal Defender
Arizona Bar # 016257
Office of the Federal Public Defender
Capital Habeas Unit
Middle District of Florida
400 N. Tampa Street, Suite 2600
Tampa, Florida 33602
Tel: 813-228-2715
Email: tennie_martin@fd.org
Secondary Email: FLM_CHU@fd.org

Counsel for the Petitioner/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel for the Respondents/Appellees.

/s/Gregory W. Brown
Gregory W. Brown, Esq.
Florida Bar No. 86437
Assistant Federal Defender
Capital Habeas Unit

CERTIFICATE OF COMPLIANCE

Petitioner/Appellant certifies that this pleading confirms with type-face limitations of Federal Rule of Appellate Procedure 32 and word limit of Federal Rule of Appellate Procedure 27(d)(2) and contains 5128 words, and was prepared in Microsoft Word in 14 pt. Times New Roman font.

/s/Gregory W. Brown
Gregory W. Brown, Esq.
Florida Bar No. 86437
Assistant Federal Defender
Capital Habeas Unit