

IN THE  
SUPREME COURT OF THE UNITED STATES

---

DAVID MILLER, JR.,  
*Petitioner,*

v.

RICKY DIXON, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.  
*Respondents.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

---

A. Fitzgerald Hall, Esq.  
Federal Defender

Gregory W. Brown, Esq.  
Assistant Federal Defender  
Capital Habeas Unit  
Florida Bar No. 86437  
Federal Defender's Office  
400 North Tampa Street, Suite 2625  
Tampa, Florida 33602  
Telephone: (407) 648-6338  
E-mail: greg\_brown@fd.org

---

## QUESTIONS PRESENTED

### CAPITAL CASE

Petitioner, David Miller, Jr. (“Miller”) filed his initial 28 U.S.C. § 2254 petition for writ of habeas corpus with the district court nearly thirteen years after it was due under 28 U.S.C. § 2224(d) of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). Miller was represented by four different attorneys from the time the petition was due to the time it was filed and suffered and continues to suffer from severe mental illness. Miller asserted at the district court that he was entitled to the equitable tolling of his statute of limitations due to his severe mental illness that affected his ability to file, and also due to the abandonment and misconduct by each of his attorneys. The district court ordered the parties to address equitable tolling on a piecemeal basis beginning with the conduct of his first attorney, but denied attempts by both parties to expand the scope of the inquiry to include the conduct of additional attorneys and evidence of Miller’s mental status affecting his ability to file. Following a limited evidentiary hearing on the first attorney’s conduct, the petition was dismissed as untimely based upon the district court finding that Miller was not entitled to tolling during his first attorney’s representation and not entitled to tolling due to mental illness.

Miller sought a certificate of appealability from the Eleventh Circuit Court of Appeals on the ground that jurists of reason could debate whether the district court improperly denied Miller an opportunity to develop the factual record supporting his claim of equitable tolling due to his severe mental illness, and also on the ground that

jurists of reason could debate the district court's ruling that Miller was not entitled to equitable tolling during his first attorneys' representation. The Eleventh Circuit denied a certificate of appealability. The Eleventh Circuit assumed that Miller had established that jurists of reason could debate his entitlement to equitable tolling during his first attorney's representation, but denied the certificate on the alternative ground that Miller had not established his entitlement to tolling during subsequent periods of representation by the other three attorneys. Further, the Eleventh Circuit failed to address Miller's argument that jurists of reason could debate whether the district court's denied Miller an opportunity to develop a factual record regarding his entitlement to tolling based on his severe mental illness that affected his ability to timely file a petition.

In light of the foregoing proceedings, the questions presented are:

1. Did the Eleventh Circuit depart from the accepted and usual course of judicial proceedings and deny Miller his due process rights under the Fifth and Fourteenth Amendments when it denied a certificate of appealability on alternative procedural grounds not considered by the district court when the district court prevented Miller from developing a factual record regarding the alternative grounds?
2. Did the Eleventh Circuit depart from the accepted and usual course of judicial proceedings and deny Miller his due process rights under the Fifth and Fourteenth Amendments when it did not address Miller's claim in his request for a certificate of appealability that the district court erred when it refused to conduct an evidentiary hearing on Miller's allegations that he suffered from severe mental illness during the period his 28 U.S.C. § 2254 petition was due to be filed and that that mental illness prevented him from effectively communicating with counsel and from timely filing his petition?

## **ADDITIONAL RELATED PROCEEDINGS**

### **CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA**

#### **TRIAL AND POST-CONVICTION**

*STATE V. MILLER*, 1997-CF-006680 (FLA. 4<sup>TH</sup> CIR.)

Judgment Entered: July 24, 1998

#### **FLORIDA SUPREME COURT**

##### **DIRECT APPEAL**

*Miller v. State*, 770 So. 2d 1144 (Fla. 2000); SC60-93792

Judgment Entered: August 31, 2000

##### **POST-CONVICTION APPEAL**

*Miller v. State*, 926 So. 2d 1243 (Fla. 2006); SC05-472

Judgment Entered: March 23, 2006

##### **STATE HABEAS CORPUS**

*Miller v. Jones*, 237 So. 3d 921 (Fla. 2018); SC17-1211

Judgment Entered: January 31, 2018

### **UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA**

*David Miller, Jr. v. Secretary, Florida Department of Corrections*

Case No. 3:17-CV-00932

Judgment Entered: November 18, 2021

### **UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT**

*David Miller, Jr. v. Secretary, Florida Department of Corrections*

Case No. 22-10657

Judgment Entered: May 10, 2022, reconsideration denied August 9, 2022

## **LIST OF PARTIES**

Miller, David Miller, Jr., was the Petitioner in the district court and the appellant in the court of appeals. Respondents, Ricky Dixon, Secretary, Florida Department of Corrections, and Ashley Moody, Attorney General of the State of Florida were the respondents in the district court and the appellee in the court of appeals.

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....	i
ADDITIONAL RELATED PROCEEDINGS.....	iii
LIST OF PARTIES .....	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES .....	vi
REASONS FOR GRANTING THE WRIT .....	1
Did the Eleventh Circuit depart from the accepted and usual course of judicial proceedings and deny Miller his due process rights under the Fifth and Fourteenth Amendments when it denied a certificate of appealability on alternative procedural grounds not considered by the district court when the district court prevented the Miller from developing a factual record regarding the alternative grounds? .....	1
Did the Eleventh Circuit depart from the accepted and usual course of judicial proceedings and deny Miller his due process rights under the Fifth and Fourteenth Amendments when it did not address Miller’s claim in his request for a certificate of appealability that the district court erred when it refused to conduct an evidentiary hearing on Miller’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 counsel and from timely filing his petition? .....	12
CONCLUSION.....	15

## TABLE OF AUTHORITIES

### UNITED STATES SUPREME COURT CASES

<i>Drope v. Missouri</i> , 420 U.S. 162 (1975) .....	12-15
--	-------

## REASONS FOR GRANTING THE WRIT

### **I. DID THE ELEVENTH CIRCUIT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND DENY MILLER HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT DENIED A CERTIFICATE OF APPEALABILITY ON ALTERNATIVE PROCEDURAL GROUNDS NOT CONSIDERED BY THE DISTRICT COURT WHEN THE DISTRICT COURT PREVENTED MILLER FROM DEVELOPING A FACTUAL RECORD REGARDING THE ALTERNATIVE GROUNDS?**

#### **a. Respondent attempts to reframe Issue I in a manner that brings it outside of the holding of the Eleventh Circuit below**

Respondent attempts to reframe Issue I in their Brief In Opposition (“BIO”) as a question of whether the district court had the authority to limit the scope of the equitable tolling evidentiary hearing to the conduct of Miller’s first postconviction attorney, Robert Norgard. BIO at ii, 7. But the question presented in Issue I is not whether the district court had such discretion, or even whether it abused its discretion. Rather, the question presented is whether once the district court limited the scope of the equitable tolling evidentiary hearing to only the conduct of one of the four attorneys that represented Miller, the Eleventh Circuit can deny a certificate of appealability because Miller failed to prove entitlement to tolling during the representation of the other three attorneys. It is fundamentally unfair, and a departure from the usual course of judicial proceedings for the Eleventh Circuit to deny a COA based upon Miller’s failure to address the conduct of Miller’s subsequent attorneys, when Miller asked for the opportunity to present evidence regarding such conduct but was specifically denied by the district court.

Miller made allegations in his Petition and Memorandum of Law that he was entitled to equitable tolling based upon his severe mental illness and the egregious



misconduct of each of his four attorneys. None of these allegations were specific to Norgard. Pet. App. A-8, A-10, A264, A411. Yet the district court chose to limit the scope of the evidentiary hearing to the conduct of Norgard only, and set a separate deadline for addressing the conduct of subsequent attorneys. Pet. App. A-15, A-18, A19, A648-649, A662-663, A665. Both parties attempted to broaden the scope of the evidentiary hearing, but the district court insisted that the parties only address Norgard's conduct. Pet. App. A-17, A-20, A653-657, A668. The district court dismissed the Petition after the evidentiary hearing, and before the additional briefing was due. Pet. App. A-3, A-16, A079, A651. It was improper for the Eleventh Circuit to hold the lack of evidence regarding tolling during the subsequent periods of representation against Miller when it was the district court that prevented Miller from creating a record.

As Miller pointed out in his motion for rehearing from the denial of the COA, extensive evidence exists that would entitle Miller to equitable tolling during the period he was represented by the subsequent attorneys. Pet. App. A-25, A955-963. The reason that the record of attorney abandonment and misconduct was not before the Eleventh Circuit was because the district court refused to allow Miller to present it. Whether or not the district court had discretion to limit the scope of the hearing is beside the point. Once the district court chose to limit the scope of the evidence, Miller cannot be punished, by way of dismissal of his COA, for the deficient record created by the district court's limitations. Contrary to the Eleventh Circuit's holding that the record supported denying the COA on the alternative ground that Miller had

not established entitlement to tolling during the subsequent representation, the record on that issue simply did not exist because the district court would not allow Miller to create it.

**b. The district court's credibility findings regarding Norgard's testimony are irrelevant because the Eleventh Circuit assumed without deciding that Miller had sufficiently alleged that jurists of reason would debate Miller's entitlement to tolling during Norgard's representation**

Respondent's Brief in Opposition focuses extensively on the district court's credibility findings regarding Norgard's testimony. BIO at 10-13. But the Eleventh Circuit assumed without deciding that Miller had established that jurists of reason would debate Miller's entitlement to tolling during Norgard's representation and instead denied the COA based on Miller's alleged failure to address tolling during the subsequent attorneys' representation. Pet. App. A-1, A006. Therefore, for purposes of this Petition, Norgard's actions and the district court's credibility determinations regarding Norgard are not at issue. Miller spent little time in his Petition addressing Norgard's actions because they are not at issue. However, the Eleventh Circuit had very good reasons to assume Miller had established that jurists of reason would debate whether Miller had sufficiently proven entitlement to tolling during Norgard's representation. While Norgard's actions are not relevant for purposes of this Petition, given Respondent's almost exclusive focus on them, it is worth analyzing why Norgard's actions and the district court's credibility determination could not have provided the Eleventh Circuit grounds for denying the COA.

Respondent's repeated assertions that Norgard's testimony that Miller

instructed him not to file a federal habeas petition was un rebutted is not supported by the record. In fact, every single piece of evidence presented at the evidentiary hearing, with the exception of Norgard's testimony itself, refuted Norgard's assertions. Norgard testified that in early 2004, he became involved in his first two capital postconviction cases, this case and the case of Marvin Jones. Pet. App. A-22, A792. He also testified that at that time he had never handled a federal habeas corpus case. Pet. App. A-22, A801. Thus at the time he became involved in Miller's case, he had no experience in capital state postconviction and no experience in federal habeas. Most strikingly, Norgard testified that he never filed a petition in Miller's case, never filed a petition in the Jones case, and filed a petition that was time barred in his third federal habeas case, Oscar Ray Bolin. In the first three cases Norgard was responsible for filing a federal habeas petition, he failed to timely file a petition. Pet. App. A-22, A801. This was not an experienced federal habeas attorney. This was an attorney with a proven track record of blowing the AEDPA statute of limitations.

Norgard testified that Miller instructed him not to file *any* further appeals at the state evidentiary hearing. Pet. App. A-22, A773 ("From the time of the evidentiary hearing through that last call, he would not hear anything about **any** further appeals[.]") It is worth noting that despite being appointed nearly a month before the state evidentiary hearing, Norgard did not attempt to meet or speak with Miller until the day of the hearing. Pet. App. A-22, A749. Florida Department of Corrections ("FDOC") call and visitation logs entered at the evidentiary hearing

established that Norgard did not call or visit Miller at any time between the state evidentiary hearing and the time his petition was due. Pet. App. A-5, A110-186. These records established that Norgard only called or spoke to Miller twice over the course of nearly a decade, both times after the statute of limitations had already lapsed. Pet. App. A-5, A181-186. The same records documented dozens of calls and visits by Miller's prior counsel and accurately documented each visit Norgard's own investigator billed the state court for. Pet. App. A-5, A110-180. State court billing records also established that Norgard did not bill the court for any calls or visits between the state evidentiary hearing and the time the petition was due. Pet. App. A-5, A187-239. In fact, despite being Miller's counsel of record until August of 2013, Norgard did not bill for a single minute of work after December 1, 2005, and did not file any additional pleadings. Pet. App. A-5, A237. The mandate in this case, which restarted the running of the statute of limitations, was issued on April 13, 2006. Pet. App. A-3, A23 n.3.

Nonetheless, Norgard testified that he had two 30-minute phone calls with Miller between the state evidentiary hearing and the time his petition was due on March 6, 2006 and April 26, 2006, and several other calls and visits after the statute of limitations had passed which were also not captured by the FDOC logs. Pet. App. A-22, A760-763. Norgard could not recall the specifics of either of these conversations. When asked whether knew that the first call on March 6, 2006 actually occurred Norgard testified, "On that one I'm fairly sure I talked to him." Pet. App. A-22, A761. With regards to the April 26, 2006 alleged call, when asked whether

Miller actually answered the call, Norgard testified that “[t]here’s no indication that call was refused.” Pet. App. A-22, A762. In sum, Norgard claimed to have spoken to Miller on three occasions. First, at the state postconviction evidentiary hearing where Norgard met Miller for the first time, and where Norgard alleges Miller instructed him not to file any further appeals. Next, on March 6, 2006, where Norgard was “fairly sure” the call actually occurred. And finally, on April 26, 2006, where Norgard’s specificity regarding the call was that there was no indication the call was not answered. Yet, between the state evidentiary hearing in November 2003 where Norgard claims Miller told him not to pursue *any* further appeals, and his next alleged contact with Miller on March 6, 2006, Norgard filed a notice of appeal to the Florida Supreme Court, an initial brief, a state habeas petition, a reply brief, and conducted an oral arguments before the Florida Supreme Court. Norgard’s own testimony and actions are riddled with contradictions.

To believe, as the district court and Respondent allege, that Norgard’s testimony was un rebutted, requires one to repeatedly accept Norgard’s explanations for why every piece of documentary evidence contradicts his illogical version of the events. First, Norgard’s explanation regarding the call and visitation logs asks one to believe that DOC successfully documented dozens of meetings between Miller and his prior counsel and accurately reflect each visit by Norgard’s own investigator, but failed to document nearly any of his calls and visits. The only logical explanation for why the call and visitations logs do not reflect visits between Miller and Norgard is because the calls and visits did not occur.

Second, Norgard's own billing records indicated that these conversations never occurred. Norgard's explanation for this discrepancy was that he did not bill for these calls because they were related to his federal case and he had not been appointed in federal court. Pet. App. A-22, A7901-791. But this testimony defies logic when taken in context of the procedural history of the case. The two phone calls in question allegedly occurred on March 6, 2006, and April 26, 2006. Pet. App. A Norgard was actively litigating Miller's appeal and state habeas petition before the Florida Supreme Court during this time and Miller's appeal and state habeas petition were denied by the Florida Supreme Court on March 23, 2006. Pet. App. A-22, A771. Norgard's explanation asks one to believe that the first time he spoke to his client after his state appeals were denied, the two did not discuss the recent state court denial or the possibility of seeking certiorari or rehearing, but instead exclusively focused on federal matters. The logical explanation for why Norgard did not bill for the calls, that DOC logs coincidentally also did not record, is because they did not occur.

Third, Norgard's explanation for not filing the petition was that at the state evidentiary hearing, Miller instructed him not to file anything, and that Miller did not want to pursue any further appeals. But Norgard's own actions indicate that his was not true. Norgard did file appeals, multiple appeals. After the state postconviction motion was denied, Norgard filed a notice of appeal, filed appellate briefs on Miller's behalf at the Florida Supreme Court, filed a state habeas petition at the Florida Supreme Court, and presented oral argument at the Florida Supreme Court. Pet. App. A-22, A771. The logical explanation for why Norgard conducted the

state evidentiary and filed multiple state appeals rather than initiating waiver of postconviction proceedings is because Miller never instructed Norgard not to pursue his appeals.

Fourth, records indicated that Norgard sent Miller's file to an offsite storage facility in February 2006 shortly after the denial of the state postconviction motion was affirmed by the Florida Supreme Court, but before the federal habeas petition was due. Pet. App. A-5, A226-230. Norgard's explanation for this was that the bill that *he* submitted in which *he* specifically stated that rent at the storage facility began in February 2006, was inaccurate. Pet. App. A-22, A785-788. Norgard attempted to give several explanations for why he submitted an inaccurate billing motion, each of which was rebutted by the bill itself, and ultimately settled on the explanation that he essentially chose February 2006 at random and the file had actually been in storage since 2004. Pet. App. A-22, A785-788. The logical explanation why Norgard sent his file to storage shortly after the state appeal concluded, and did not bill for another minute of work, is because he was done working on the case.

Norgard's explanation and the logical explanation dictated by the evidence are at odds at every turn. Every piece of documentary evidence conflicts with Norgard's version of events and all point to the same inescapable conclusion. The *only* explanation why Norgard, a lawyer 1) with no federal habeas experience, 2) that missed his first three federal habeas deadlines, 3) that logged no calls or visits with his client before his federal habeas petition was due, 4) that did not bill for any work

after the completion of the state appeal, and 5) that sent his file to storage after the state appeal, missed Miller's federal habeas deadline, is because Norgard abandoned Miller at the conclusion of his state postconviction appeal. Ultimately, the Eleventh Circuit assumed that Miller had established that jurists of reason would debate whether he was entitled to tolling during Norgard's representation, and with good reason. Not a single iota of evidence was offered that corroborated Norgard's testimony, and multiple, credible sources, including Norgard's own records and actions, clearly established that Norgard abandoned Miller at the conclusion of the state appeal.

**c. The decision not to testify by a severely mentally ill man, whom multiple experts opined was actively psychotic during the relevant period, is neither surprising nor relevant to these proceedings**

Both Respondent and the district court placed great emphasis on the fact that Miller did not testify in order to rebut Norgard's testimony. BIO at 5,11, 12; Pet. App. A-3, A047. Once again, this is completely irrelevant to these proceedings because the Eleventh Circuit assumed that Miller had established that jurists of reason would debate his entitlement to tolling during Norgard's representation. Nonetheless, given the negative inference attributed to Miller by the district court, and the emphasis Respondent places on this decision, it is worth noting why nothing probative can be gleaned by the decision of a severely mentally ill man not to testify at a limited hearing where he would be given no opportunity to provide the necessary mental health context to his testimony.



The statute of limitations in this case began running when the case became final on January 22, 2001, and expired on August 3, 2006. Pet. App. A-3, A048 n.10. The only psychological evaluation of Miller that occurred during this time was conducted by psychologist Charles Golden, Ph.D., on January 23, 2002, before Norgard was appointed. Pet. App. A-5, A102. Dr. Golden noted that previous evaluations during involuntary hospitalizations of Miller is his youth documented a history of depression, suicidal thoughts, memory problems, and a profile consistent with schizoid or schizophrenia. Dr. Golden found that Miller “has a detachment from the real world...” Pet. App. A-5, A102-109. “A significant impairment with Mr. Miller is his ability to perceive and think.” Pet. App. A-5, A105-106. “The mediation portion of the data reflects the degree to which Mr. Miller is able to make conventional and acceptable response. Results here show a significant distortion in his way of responding to situation. Mr. Miller has poor ties with reality and difficulty developing accurate abstractions...” Pet. App. A-5, A106. Dr. Golden concluded that Miller “Mr. Miller is someone who does not live in a reality based world but in one that is more fantasy oriented.” Pet. App. A-5, A108.

Despite Dr. Golden’s striking findings, Norgard never had Miller evaluated by a mental health professional in the nearly ten years he represented Miller. Pet. App. A-22, A726. This was the case even though Norgard testified at the federal evidentiary hearing that “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....” Pet. App. A-22, A738. Because Norgard failed to ever have Miller

evaluated, and in fact, stopped doing any work on Miller's case in 2005, Miller was not evaluated again by a mental health professional until 2018 by psychologist Eddy Regnier, MSW, MA, Ph.D. Dr. Regnier's report noted among other things that Miller was actively psychotic during the period that his petition was due, and that he was experiencing hallucinations that he was being instructed by God not to participate in his defense. Pet. App. A-13, A626-632.

Miller requested that the district court allow him to present mental health expert testimony. In a September 22, 2021 Motion to Continue the limited evidentiary hearing, Miller specifically advised the district court that

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 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.

Pet. App. A-20, A673-680. Miller's requests to present mental health expert testimony were denied, and the district court repeatedly stated that the limited evidentiary hearing would focus only on Norgard's conduct.

The district court's order dismissing the petition specifically mentions Miller's choice not to testify, and applied a negative inference based on his failure to take the stand. Pet. App. A-3, A047. Respondent discussed the decision not to testify at length

in its Brief in Opposition. BIO at 9, 10, 11, 12. But this case involves a man who “was not living in a reality based world” and who was in the midst of a psychotic episode and experiencing hallucinations during the relevant period of time. In the absence of mental health expert testimony to provide context, what purpose could Miller’s testimony have possibly served? A man should not have to suffer the indignity of presenting incoherent testimony in order for a court to take his claims of severe mental illness seriously. Nor should a court, as the district court did here, mistake Miller’s ability to sit quietly through an evidentiary hearing as evidence of a lack of severe mental illness. Pet. App. A-3, A059. These matters are the province of mental health experts, and Miller should have been afforded the opportunity to present expert testimony. Miller’s decision not to testify is not grounds for denying this petition, but rather another consequence of the district court’s decision to severely limit the presentation of evidence regarding equitable tolling.

**II. DID THE ELEVENTH CIRCUIT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND DENY MILLER HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT DID NOT ADDRESS MILLER’S CLAIM IN HIS REQUEST FOR A CERTIFICATE OF APPEALABILITY THAT THE DISTRICT COURT ERRED WHEN IT REFUSED TO CONDUCT AN EVIDENTIARY HEARING ON MILLER’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 COUNSEL AND FROM TIMELY FILING HIS PETITION?**

- a. Respondent attempts to reframe Issue II in a manner that brings it outside Miller’s claim of error by the Eleventh Circuit where the Eleventh Circuit failed to address the claim Miller brought before that court**

Respondent attempts to reframe Issue II in the BIO as a question of whether

the district court erred when it limited the evidentiary hearing on equitable tolling to only one prong and to the testimony of only the “crucial witnesses.” BIO at i-iii, 19. Rather, the question presented by Miller in Issue II is that of an error by the Eleventh Circuit. The Eleventh Circuit did not address Miller’s claim that jurists of reason could debate the district court’s denial of Miller’s request for an evidentiary hearing on tolling due to Miller’s severe mental illness, schizoaffective disorder, where Miller had sufficiently alleged both that he suffered from a such a severe mental illness and that there was a nexus between his severe mental illness and his failure to timely file his petition. Pet. App. A-24, A906. Additionally, Respondent is disingenuous when it asserts in its framing of Issue II that the district court took testimony of “crucial witnesses.” The district court took testimony of only one witness, Norgard, and refused to allow Miller to call any other witnesses.

Respondent points to *Drope v. Missouri*, 420 U.S. 162 (1975) to support its argument. Respondent’s reliance on this case is misplaced. *Drope* is a competency to proceed to and with trial. *Id.* In *Drope*, this Court considered the defendant’s claims that he was “deprived of due process of law by the failure of the trial court to order a psychiatric examination with respect to his competence to stand trial and by the conduct in his absence of a portion of his trial.” *Drope*, 420 U.S. at 164.

When discussing a trial court’s failure to address a defendant’s competency, this Court noted only “that judges must depend to some extent on counsel to bring issues into focus.” *Drope*, 420 U.S. at 176–77. After noting that lower courts depend on counsel to bring the court’s attention to issues that counsel sees concerning a

defendant's competency, this Court went on to analyze all the other facts available, such as Drope's history of suicide attempts and his history of irrational behavior, that should have informed the trial court that Drope was not competent to proceed to trial and not competent to waive his presence at trial. *Drope*, 420 U.S. at 176–77. In *Drope*, this Court concluded “that when considered together with the information available prior to trial and the testimony of petitioner's wife at trial, the information concerning petitioner's suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry on the question.” *Drope*, 420 U.S. at 180. This Court went on to note that “evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required” and that, while “one of these factors standing alone may, in some circumstances, be sufficient,” there are “no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.” *Id.*

In Miller's case, the signs that that he was not competent to “waive” his federal habeas proceedings and the signs that his mental illness severely impacted his ability to pursue legal relief as to justify equitable tolling were not subtle. The signs that his mental illness severely impacted his ability to understand and to assist counsel were not subtle. There were prior hospitalizations, suicide attempts, and psychological reports diagnosing major mental illnesses. Dr. Golden's report that was available to Norgard when he first came on to the case said: “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.... Mr. Miller is someone who does not live in a reality based (sic) world but in one that is fantasy oriented.” Pet. App. A-5, A106-108.

Respondent misapprehends the issue raised here. The issue is that the Eleventh Circuit departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the lower court. By failing to address Miller’s claim in his COA that he was entitled to an evidentiary hearing at the district court to develop evidence that his mental illnesses entitled him to equitable tolling, the Eleventh Circuit departed from the usual course of judicial proceeding. Additionally, by failing to address the issue, the Eleventh Circuit essentially sanctioned the district court’s departure from the usual course of judicial proceeding where that court denied Miller’s request for an evidentiary hearing and used that denial to assert that Miller did not present any evidence as to his mental status and so ruled against him on the issue. As in *Drope*, the information before the courts and known to Norgard “require[s] further inquiry on the question.”

## **CONCLUSION**

For the foregoing reasons, the petition for writ of certiorari should be granted.

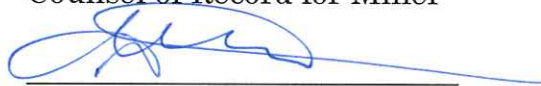
Respectfully submitted,

A. Fitzgerald Hall, Esq.  
Federal Defender

Marie F. Donnelly, Esq.  
Chief, Capital Habeas Unit



Gregory W. Brown, Esq.  
Assistant Federal Defender  
Florida Bar No. 86437  
Federal Defender's Office  
400 North Tampa Street, Suite 2625  
Tampa, FL 33602  
Telephone: (813) 228-2715  
E-mail: greg\_brown@fd.org  
Secondary Email: FLM\_CHU@fd.org  
Counsel of Record for Miller



Tennie B. Martin, Esq.,  
Assistant Federal Defender  
Arizona Bar # 016257  
Federal Defender's Office  
400 North Tampa Street, Suite 2625  
Tampa, FL 33602  
Telephone: (813) 228-2715  
E-mail: tennie\_martin@fd.org  
Secondary Email: FLM\_CHU@fd.org