

court noted that Mr. Spears was transferred five times for mental health reasons during the AEDPA limitation period and asserted, “the period in which Spears was ‘drugged to near-sedation’ may constitute an exceptional circumstance for purposes of equitable tolling because it would have been outside of his control and unavoidable even with due diligence” (*Spears*, p 904).

However, the appeals court noted that mental impairment alone does not justify an untimely petition. Instead, a causal connection between the mental impairment and the ability to file must be made. The appeals court reasoned that “Spears has not explained how his mental-health issues or medications, apart from the drug-induced prison transfers, affected his ability to file a timely petition” (*Spears*, p 905).

Finally, the appeals court noted that equitable tolling involves both extraordinary circumstances and due diligence. With regard to due diligence, the court indicated that from April 2002 to December 2007, Mr. Spears did not seek information about his appeal or postconviction rights because he believed that he did not have the right to appeal, but the court asserted, “procedural ignorance is not an excuse for prolonged inattention when a statute calls for prompt action” (*Spears*, p 905).

#### Discussion

The appeals court relied largely on precedent in forging its opinion. Precedent sets forth that attorney negligence and *pro se* litigant ignorance are not extraordinary circumstances as understood under equitable tolling. In addition, equitable tolling relies on a two-prong assessment of an extraordinary circumstance and reasonable due diligence to be satisfied.

The appeals court acknowledged that multiple mental health transfers in quick succession between prisons while heavily medicated could suffice as an extraordinary circumstance. The court viewed such a situation as outside of the defendant’s control and unavoidable, which sets forth a basis for future equitable tolling claims. However, the appeals court provided a reasonable caveat, in that a history of these events must be causally linked to the defendant’s ability to file a petition in a timely matter. Thus, experience of these events alone, does not qualify for an equitable tolling argument without a causal link to explain the failure to file in a timely fashion.

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## Defendant’s Claims of Inadequate Counsel in Death Penalty Case

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### Trial Counsel’s Decision to List an Unsupportive Psychiatrist as a Defense Witness Did Not Constitute Ineffective Assistance of Counsel

In *Miller v. State*, 161 So. 3d 354 (Fla. 2015), the Supreme Court of Florida affirmed the denial by the Circuit Court in and for Orange County of Mr. Miller’s petition for a writ of *habeas corpus* with claimed ineffective assistance of counsel in Mr. Miller’s trial and sentencing for first-degree murder. Among the questions raised were counsel’s decision to list a non-supportive psychiatrist as a defense witness and failure to obtain a pretrial positron emission tomography (PET) scan, to explore a possible diagnosis of behavioral variant frontotemporal dementia.

#### Facts of the Case

In April 2006, Lionel Miller attempted to burglarize Ms. Jerry Smith, a 72-year-old woman whom Mr. Miller had met two days prior in her neighborhood. On the day of the robbery Mr. Miller, high on crack cocaine, walked to Ms. Smith’s home carrying a filet knife. Ms. Smith invited him in but became alerted to his intentions, and Mr. Miller attacked her. A passerby attempted to intervene and was stabbed by Mr. Miller. Ms. Smith ran, followed by Mr. Miller who then stabbed her three times. Mr. Miller fled the scene, discarding the knife. The passerby survived his wounds but Ms. Smith died during emergency surgery. At trial, it was learned that Ms. Smith had Alzheimer’s dementia.

Pretrial evaluations of Mr. Miller by a psychiatrist, Jeffrey Danziger, and a psychologist, Eric Mings, suggested mild cognitive and intellectual impairment. Dr. Mings also concluded that Mr. Miller was competent to waive his *Miranda* rights. However, both experts recommended that neuroimaging be conducted and trial counsel consulted with a neuro-

ogist regarding the modality of neuroimaging. Magnetic resonance imaging (MRI) was performed in 2007. The MRI indicated hippocampal sclerosis and Virchow-Robin spaces but displayed atrophy that was within normal limits.

Mr. Miller was tried, and convicted of the first-degree murder of Ms. Smith. During the penalty phase of the trial, Mr. Miller presented testimony from Dr. Mings, who provided a diagnosis of antisocial personality disorder. The state in rebuttal called Dr. Danziger, who had originally been retained by defense counsel as a confidential expert witness to assess Mr. Miller's competency to stand trial. Dr. Danziger had diagnosed antisocial personality in Mr. Miller and had informed Mr. Miller's counsel that he did not believe antisocial personality disorder could be considered legally mitigating. Dr. Danziger was listed as a defense witness, thus allowing a pretrial deposition by the state. Mr. Miller's counsel then determined that Dr. Danziger's testimony was of great benefit to the state and chose to wait for the state to call Dr. Danziger as a witness, thereby allowing for a defense cross-examination. Dr. Danziger testified for the state that Mr. Miller had dysthymia, polysubstance dependence in remission, and antisocial personality disorder. Mr. Miller was sentenced to death.

Mr. Miller sought postconviction relief claiming ineffective assistance of counsel, including trial counsel's decision to list a nonsupportive psychiatrist as a witness and the failure of defense counsel to obtain a pretrial PET scan, which he asserted would have demonstrated his inability to waive his *Miranda* rights knowingly. He claimed too that a PET scan would have established a statutory mitigating factor for the sentencing phase of his trial by demonstrating a diagnosis of frontotemporal dementia, a progressive and debilitating disease.

During postconviction proceedings, a neuropsychologist, Frank Wood, opined that the combined results of the MRI and a PET scan obtained in 2011 demonstrated significant atrophy; thus, it was probably that Mr. Miller had behavioral variant frontotemporal dementia (BVFD) at the time of the offense. Glenn Caddy, a forensic neuropsychologist, testified that Mr. Miller had pathological impairment of cognitive functioning at the time of the postconviction proceedings. Dr. Wood's testimony was rebutted by the testimony of another neuropsychologist, Alan Waldman, who disputed the imaging

findings and noted an absence of gross personality changes ordinarily consistent with BVFD.

Mr. Miller's counsel testified during the evidentiary hearing for postconviction relief that Mr. Miller had chosen to pursue a trial and sentencing phase strategy that would result in a nonunanimous recommendation for death. He had instructed his counsel to limit their presentation of mitigation evidence purposefully during the sentencing hearing. Although he did not want to be executed he believed a death sentence would provide him good prison accommodations during the lengthy appeals process. He believed too that a lengthy appeals process would allow the progression of his diagnosis of BVFD and might result in his death before execution or render him incompetent for execution under *Ford v. Wainwright*, 477 U.S. 399 (1986).

The circuit court denied relief. An appeal to the Supreme Court of Florida followed, on the same claims. A petition for a writ of *habeas corpus* was also filed claiming numerous trial errors including inadequate representation by counsel.

#### *Ruling and Reasoning*

Courts apply the *Strickland v. Washington*, 466 U.S. 668 (1984), two-pronged test to assess claims of ineffective assistance of counsel. Under *Strickland*, a defendant must demonstrate both deficient performance of counsel and a resulting prejudice (i.e., that but for the deficient performance, the trial outcome would likely have been different). In *Strickland*, the Supreme Court of Florida held that the failure to obtain a pretrial PET scan did not constitute deficient performance. It also held that although counsel's listing of Dr. Danziger as a witness was ineffective, it did not meet the prejudice prong of the *Strickland* test; thus, Mr. Miller's representation was not inadequate.

As to counsel's deficiency, the court cited testimony from trial counsel noting that the "'strategy' to impeach Dr. Danziger's conclusions during cross-examination was merely an afterthought, hastily made only after he realized that the expert's testimony was significantly more unfavorable to the defense than he originally envisioned" (*Miller*, p 367). The court held, however, that Mr. Miller failed to establish prejudice, finding that his assertions that Dr. Danziger prejudicially influenced the penalty phase proceedings by "dwelling" on a diagnosis of antisocial personality were not supported by legal authority.

The court also rejected the claim that the failure to obtain a pretrial PET scan denied him the opportunity to challenge his *Miranda* waiver. The court found the *Miranda* claim to be procedurally barred, having been litigated on direct appeal.

Next the court proceeded to the question of Mr. Miller's competence based on the congruent assessments of multiple experts "none of whom concluded that the results of the MRI or their neurological evaluations indicated that his neurological impairments prohibited him from making a knowing, voluntary, and intelligent waiver of his *Miranda* rights" (*Miller*, p 373). The court held that trial counsel had reasonably relied on the expert opinions of Drs. Mings and Danziger regarding neuroimaging. In addition, the court held that Mr. Miller failed to establish prejudice on the question of statutory mitigation for extreme mental or emotional disturbance and inability to conform his conduct to the law, noting the conflicting expert opinions regarding the level of Mr. Miller's cognitive impairment at the time of the offense.

A novel appeal claim was that the clinical condition of BVFD warranted setting aside the death penalty because of Mr. Miller's predicted incompetency. The court deflected this assertion, stating, "This claim is not ripe for review because Miller is currently competent and a death warrant has not been issued for his execution" (*Miller*, p 384).

The supreme court then affirmed the postconviction court and rejected his petition for a writ of *habeas corpus*.

#### Discussion

An unusual aspect of this case is the instruction given by Mr. Miller to his trial attorney to conduct the sentencing phase so that he would be given the death penalty, but by nonunanimous recommendation of the jury, thus preserving as many claims as possible to prolong the appeal process. In postconviction proceedings, the defense attorney testified that he agreed to pursue Mr. Miller's instruction. Although an attorney may accommodate the competent desires of the defendant, in this case, the defendant's wishes were likely based on the diagnosis of BVFD that was proffered by a defense expert, Dr. Wood. Mr. Miller took a risk, opting to have the better living conditions afforded on death row, and his gamble anticipated that his mental condition would decline so rapidly as to preclude execution. Given that circumstance, it is difficult to conclude

that his attorney fell short of the *Strickland* test in his defense of his client. However, Mr. Miller's decision-making capacity might have been questioned given that there appears to have been agreement among the clinical experts that Mr. Miller had some degree of cognitive impairment at the time he dictated his trial and sentencing strategies. Given the ultimate stakes involved, it would have been reasonable to have an evaluation of his competency, not merely to stand trial, but also to dictate trial and sentencing strategy.

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## Involuntary Treatment for Restoration of Trial Capacity and the Role of Trial Courts

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### Trial Courts Possess the Power to Order Involuntary Treatment of the Defendant When Deemed Necessary to Restore Trial Capacity, if the Due Process Requirements Set Out in *Sell v. United States* Are Met

In *State v. Lopes*, 322 P.3d 512 (Or. 2014) the Supreme Court of Oregon issued a peremptory writ of *mandamus* to James Lopes, holding that although the trial court had the power to order the involuntary treatment that was deemed necessary for the restoration of Mr. Lopes' trial capacity, the due process requirements of the U.S. Constitution, as articulated in *Sell v. United States*, 539 U.S. 166 (2003), were not satisfied by the trial court's order for forced medication.

#### Facts of the Case

Mr. Lopes was arrested in August 2012 and charged with attempted sex abuse in the first-degree after sexually assaulting an 8-year-old girl. He was found unfit to stand trial due to his inability to assist counsel. In October 2012, Mr. Lopes was committed to the Oregon State Hospital to be treated for restoration of fitness.

Subsequently, the hospital informed the trial court that it was unlikely that Mr. Lopes could be