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Benjamin Miller

From 1967 through 1971, several young black prostitutes were found strangled in a wooded area of Stamford, Connecticut, adjacent to the Merritt Parkway.

In April 1969, James Miller, a preacher in Stamford, reported to police that he had received an anonymous phone call. He said the caller, who sounded like a black male, described the location of a body that had not yet been found and expressed his wish that the deceased woman receive "a Christian burial." By that time, three bodies had been found.

The investigators created a list of all Millers who were clergymen in the area, including Benjamin Miller. Benjamin Miller was a white postal worker who claimed to be an ordained minister and spent much of his time preaching to the black community, especially to black women. He had a history of mental illness dating back to 1953. Police invited Miller in for an interview, but when he said he was too busy with church work, the matter was dropped.

By January 1972, a total of six black prostitutes had been found strangled and a task force of state and local police detectives was created. These investigators followed up on the earlier mention of Benjamin Miller and learned of his psychiatric history and his contacts with black women.

Over the course of the next few weeks, the detectives interrogated Miller several times. Miller denied committing the murders but admitted that he once had sex with one of the victims, Gail Thompson, in his car in North Stamford. The autopsy report on Thompson did not reveal recent sexual intercourse. However, some of Miller's statements included previously unpublished information

related to the murders. For example, when the detectives showed Miller a picture of Thompson's body and asked what he thought was around her neck, Miller responded, correctly, that it was a handkerchief, although the public information was that Thompson had been strangled with a brassiere. A polygraph test of Miller's denial that he had committed the murders proved inconclusive, apparently because of his erratic behavior.

In February, 1972, the detectives suggested that Miller speak with a psychiatrist. Miller agreed to see Dr. Shirley Williams, a psychiatrist he had consulted previously. After Dr. Williams and another psychiatrist evaluated Miller, he was diagnosed with chronic schizophrenia and involuntarily committed to a hospital. He was placed on suicide watch at times and was regularly administered medication. Hospital records described him as delusional.

While hospitalized, Miller was interviewed several times by a third psychiatrist, who told investigators he believed Benjamin Miller had committed the murders and encouraged them to continue investigating Miller. On February 29, the psychiatrist told detectives that Miller wished to speak with them.

When the detectives arrived, Miller wrote on a pad that he had killed seven women. He later stated that he had killed Thompson and others he could not remember. He described the murder of Thompson in detail and made a more general statement about killing three others. On March 1, Miller signed typed versions of these statements and accompanied the detectives to the area where the bodies had been found. He reenacted the Thompson murder and led them to the spots where three other bodies had been found.

Miller was arrested on March 17, 1972, and charged with the murders of Thompson and four other women.

His defense attorney interviewed Miller's father, who said that Benjamin had telephoned him to say he had signed a confession but that he was sick and would have signed anything.

Benjamin Miller told his defense lawyer that during the first several interrogations, the investigators had repeatedly tried to get him to confess to the murders, but he continued to deny killing the women. He said one psychiatrist had shown him a statement that he could sign in order to plead not guilty by reason of temporary insanity, but he told the psychiatrist he had not committed the murders.

Miller told his lawyer he had confessed because he was frightened and afraid of being beaten, and because the detectives told him that unless he confessed he would lose his job and his family would suffer. He said he was also concerned that because he had admitted adulterous conduct with black women, police would charge him with adultery and his wife would divorce him. Miller said the detectives asked him leading questions and showed him photographs of the murder scenes many times. When they took him to the site of the murders and asked him if they were in the right place, he claimed he had said "I think so" just to please them.

Miller was evaluated by a court-appointed psychiatrist who reported having no "certain idea" whether Miller committed the murders, but said that Miller was "chronically psychotic and delusional and totally incapable of discerning right from wrong," and that "[t]he force of his insanity drove him into the midst of the daily life of the people he is accused of having murdered."

In 1973, following an agreement between the prosecution and Miller's lawyer, two counts of murder were withdrawn and Miller pleaded not guilty by reason of insanity to three other murders. The case was then heard by a three-judge panel in Fairfield County Superior Court. After the prosecution and the defense jointly urged that the insanity defense be accepted, Miller was found not guilty by reason of insanity and was committed to a mental institution for a term of 25 years.

In 1982, a federal petition for a writ of habeas corpus was filed on Miller's behalf alleging that the prosecution had failed to disclose to the defense extensive evidence that connected another man, Robert Lupinacci, with at least four of the five women that Miller was accused of killing.

Lupinacci had been arrested in July 1972—several weeks after Miller was arrested—while he was attempting to strangle a black prostitute in the same area where the other victims had been found.

Miller's father read about Lupinacci's arrest and sent clippings to his son's defense lawyer. But the lawyer did not pursue the evidence because he was convinced that Miller's confessions revealed details that only the killer could have known.

According to the habeas petition, the prosecution had failed to reveal that an investigation of Lupinacci showed he was considered a "sex nut," with a history of patronizing black prostitutes, and was known to make racist comments. Also, the bodies of three of the women allegedly killed by Miller had been found within 100 feet of the spot where Lupinacci was arrested and Lupinacci's car had been seen near the murder scenes several times.

In 1967, Lupinacci had been seen in bars in the vicinity of Port Chester, New York, (near Stamford), bars that one of victims also frequented. Employees at the Hotel Hazelton reported that in1968, when one of the victims was a resident of the hotel, they had seen Lupinacci there.

Other evidence that had not been revealed to the defense included the fact that in 1971, Lupinacci worked at a motel at which Thompson resided. Lupinacci was known to sell pornographic playing cards, and in the trunk of his car police found a pornographic deck with the queen of hearts missing; a similar card had been found near Thompson's body. Thompson was last seen alive in a vehicle resembling Lupinacci's car, and such a vehicle was seen near the scene of her murder. Police found body hairs in the trunk of Lupinacci's car that appeared to have come from a black person. And in August 1971, the fifth victim was last seen alive on Grey Rocks Place in Stamford. At the time, Lupinacci was a member of a club

State:	Connecticut
County:	Fairfield
Most Serious Crime:	Murder
Additional Convictions:	
Reported Crime Date:	1971
Convicted:	1973
Exonerated:	1989
Sentence:	25 years
Race:	Caucasian
Sex:	Male
Age:	42
Contributing Factors:	False Confession, Official Misconduct, Inadequate Legal Defense
Did DNA evidence contribute to the exoneration?:	No

located on Grey Rocks Place.

In October 1983, despite all of this evidence, Miller's habeas petition was denied.

But in 1988, the U.S. Court of Appeals for the 2nd Circuit reversed the denial and ordered a new trial. The court held that "when the undisclosed facts possessed by the prosecution are added to the fact that Lupinacci was arrested in the act of attempting to strangle a black prostitute in the very area where the other victims had been found strangled, we conclude that the withheld information is sufficient to undermine confidence in the outcome of both Miller's decision to forgo any challenge to the State's assertion that he was the murderer and the decision of a rational fact finder as to whether the identity of Miller as the murderer was established beyond a reasonable doubt."

On May 8, 1989, a judge dismissed the case, ruling that a second trial would constitute double jeopardy, and Miller was released. However, he was immediately voluntarily recommitted to a mental institution after his lawyer said that Miller's long confinement left him unprepared to live on his own.

– Maurice Possley

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Benjamin Franklin MILLER Jr.

"The bra murders"

Classification: **Serial killer**
Characteristics: **History of mental illness**
Number of victims: **5**
Date of murders: **1967 - 1971**
Date of arrest: **March 17, 1972**
Date of birth: **1930**
Victims profile: **Rose Ellen Pazda, 29 / Donna Roberts, 22 / Gloria Conn, 21 / Gail Thompson, 19 / Alma Henry, 34** (black prostitutes)
Method of murder: **Strangulation**
Location: **Stamford, Connecticut, USA**
Status: **Found not guilty of certain murders by reason of insanity in 1973. Committed to the custody of the Commissioner of Mental Health of the State of Connecticut**

Between 1967 and 1971, black residents of Stamford, Connecticut, were intimidated by a string of murders claiming female victims, four of whom were strangled with their own brassieres.

Police reported that some of the victims were junkies, and three were known prostitutes, but the killer's apparent selectivity did nothing to calm a community under siege.

By the summer of 1971, black citizens were ready to accuse police of negligence - or worse - in their long-running search for an elusive strangler. Rose Ellen Pazda, 29, had been the first to die, reported missing on August 4, 1967, her skeletal remains recovered during April 1969. Donna Roberts, age 22, was found on May 3, 1968, the day after her disappearance from Stamford.

The third victim, 21-year-old Gloria Conn, was strangled to death on September 7, 1968, with her body recovered next day, 200 feet from the spot where Roberts was found. The killer took three years off before strangling 19-year-old Gail Thompson, on July 10, 1971.

Six weeks later, on August 22, he returned to claim the life of 34-year-old Alma Henry, her body discarded like so much rubbish. Thus far, all the victims had died or been found within a quarter-mile radius of the Riverbank-Roxbury Road overpass.

Four of the five were from Stamford, with one reported missing from nearby Mount Vernon, New York, and police found evidence of a car backing into the places where bodies were found, indicating that the killer hauled his victims in the trunk.

Accumulated evidence put homicide investigators on the trail of Benjamin Miller, a Darien post office clerk and self-ordained street preacher who spent most of his time with black congregations after his own church expelled him.

Described by his former pastor as "almost a fanatic," Miller had moved to Connecticut from Illinois at

eighteen years of age, in 1948. Employed at the post office for ten years, he talked religion on the job but otherwise ignored his fellow workers, keeping to himself whenever possible. Committed to Norwalk's Fairfield Hills Hospital on February 17, 1972, Miller found detectives waiting when he checked out a month later.

Arrested on March 17, he was charged with all five of the Stamford "bra murders," his apprehension restoring a measure of peace to the troubled community.

Michael Newton - An Encyclopedia of Modern Serial Killers - Hunting Humans

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848 F.2d 1312

Benjamin F. MILLER, Jr., Petitioner-Appellant,
v.
Colin C.J. ANGLIKER, M.D., Director, Whiting Forensic Institute, Respondent-Appellee.

No. 630, Docket 87-2355.

United States Court of Appeals,
Second Circuit.

Argued Jan. 19, 1988.
Decided May 20, 1988.

Before LUMBARD, KEARSE, and PIERCE, Circuit Judges.

KEARSE, Circuit Judge:

Petitioner Benjamin F. Miller, Jr. ("Miller"), having been committed to the custody of the Commissioner of Mental Health of the State of Connecticut ("State") in 1973 after being found not guilty of certain murders by reason of insanity, appeals from a judgment of the United States District Court for the District of Connecticut, Ellen Bree Burns, Judge, denying his petition for a writ of habeas corpus. Miller contended principally that his confinement resulted from (1) violation of his Sixth Amendment right to the effective assistance of counsel, and (2) violation of his due process right to be provided with exculpatory information in the possession of the State, both of which affected his decision to plead insanity rather than simply not guilty.

The district court denied the petition on the grounds that the courses of action followed by Miller's attorney did not constitute ineffective assistance and would not necessarily have been different had the exculpatory information been disclosed to him. On appeal, Miller contends principally that the district court failed to apply the proper legal standard in assessing the materiality of the information withheld by the State. For the reasons below, we agree and, finding merit in the due process contention, we reverse with instructions that the writ be granted unless the State elects to bring Miller to trial.

I. BACKGROUND

During the period 1967 through 1971, a number of young black prostitutes were found strangled in a wooded area of Stamford, Connecticut, adjacent to the Merritt Parkway. Miller was indicted in 1972 for five such murders. In 1973, pursuant to an agreement between prosecution and defense, two counts were withdrawn, and Miller pleaded not guilty by reason of insanity. The State joined in urging the three-judge panel before which the case was tried to accept the insanity defense, and Miller was found not guilty by reason of insanity.

The constitutional claims pursued on this appeal stem from the fact that, prior to the plea agreement leading to Miller's decision to rest on the insanity defense, the State possessed and did not disclose to Miller evidence that connected another individual, Robert Lupinacci, at pertinent times and places, with at least four of the five women alleged to have been killed by Miller. Lupinacci had been arrested in July 1972 as he was attempting to strangle a black prostitute in the same area in which the other victims had been found.

The following description of the events is taken largely from an October 1983 state court opinion in this matter, which was relied on by the district court.

A. The Events and the Investigation of Miller

On August 4, 1967, the body of Rosell ("Sissy") Rush, a young black woman, was found strangled near River Bank Road in a wooded area off the Merritt Parkway in Stamford. On May 3, 1968, and September 8, 1968, respectively, the similarly strangled bodies of Donna Roberts and Gloria Kahn, also young black women, were discovered in the same area. The crimes were not quickly solved.

Miller, a white postal worker who claimed to be an ordained minister, spent a great deal of his time preaching to blacks on street corners in Stamford, and especially to black women. He had a history of mental illness and had been hospitalized at Fairfield Hills State Hospital ("Fairfield Hills") as early as 1953.

Miller first came to the attention of police investigating the Rush, Roberts, and Kahn murders after a Reverend James Miller (apparently not related to petitioner) of Stamford reported receiving an anonymous telephone call in April 1969 from someone having the voice of a black male, describing the location of an as yet unfound body and expressing a wish that the deceased woman receive "a Christian burial." The investigators then sought to list all Millers who were clergymen in the area, and they included Miller's name among them. After three more bodies were discovered, they invited Miller to be interviewed. They apparently did nothing to pursue him, however, when Miller responded that he was too busy with church work to be interviewed.

On July 10 and August 22, 1971, the strangled bodies of Gail Thompson and Alma Henry, respectively, were found in the same area where the bodies of Rush, Roberts, and Kahn had been found. There had been a substantial amount of publicity in the Stamford area with respect to the series of killings, and the black community and other groups had expressed anger at the lack of any progress in solving the murders. By January 1972, a special team of state and local police detectives had been assigned to the cases on a full-time basis. These investigators began to follow up the earlier mention of Miller and learned of his psychiatric history and his contacts with black women.

Over the course of the next few weeks, the detectives interrogated Miller several times and at length. Miller denied that he had committed the murders but admitted having "had sexual relations with Gail Thompson in [his] car in North Stamford." Though the autopsy report on Thompson did not reveal recent sexual intercourse, certain of Miller's other statements accurately recited theretofore unpublished information related to the murders. For example, when the detectives showed Miller a picture of the body of Thompson and asked what he thought was around her neck, Miller responded, correctly, that it was a handkerchief; the public information was that Thompson had been strangled with a brassiere. A polygraph test of Miller's denial that he had committed the murders proved inconclusive, apparently because of his erratic behavior.

During an interrogation session on February 16, 1972, the detectives suggested that Miller speak with Dr. Robert Miller (apparently not related to petitioner), a psychiatrist at Fairfield Hills whom the investigators had consulted with regard to Miller in January. Miller refused to see Dr. Miller but agreed to see Dr. Shirley Williams, a psychiatrist he had consulted previously, at Norwalk Hospital. After Miller was seen by Dr. Williams and another psychiatrist, he was involuntarily committed to Fairfield Hills. Upon his admission to that hospital, Miller was found to be suffering from chronic undifferentiated schizophrenia. He was placed on suicide watch at times and was regularly administered medication. The hospital records indicated that "he is delusional, religosity [sic] is in evidence, low self-esteem, flat affect, thought disorders, poor judgment and insight."

During his stay at Fairfield Hills, Miller was interviewed a number of times by Dr. Robert Miller. As a result of these sessions, Dr. Miller told the investigators he believed Miller had committed the murders and encouraged them to continue investigating Miller. On February 29, Dr. Miller called the detectives and reported that Miller wished to speak with them.

After the detectives arrived at Fairfield Hills on February 29 and advised Miller of his rights, Miller wrote on a pad that he had killed seven women. He later stated that he had killed Thompson, Henry, Rush, and others he could not remember. He described the murder of Thompson in detail and made a more general statement about killing three others. On March 1, Miller signed typed versions of the statements he had made on February 29, and he accompanied the detectives to the area where the bodies had been found. He reenacted the Thompson murder and led them to the spots where three other bodies had been found.

On March 2, Miller signed a detailed statement admitting the murder of Henry. On that day he accompanied the officers to the Merritt Parkway and pointed out the spot where Henry's body had been found. On March 10, Miller signed a detailed statement admitting the murder of Roberts. At various times he also signed statements describing his trips with the officers to the scene of the murders.

Miller was placed under arrest on March 17, 1972, and on May 15, he was indicted for the murders of Rush, Roberts, Kahn, Thompson, and Henry.

B. The Preparation of Miller's Defense

Upon Miller's arraignment, Herbert J. Bundock, a public defender in Fairfield County since 1962, was appointed by the court to represent him. Joseph T. Gormley, Jr., the State's attorney in charge of the prosecution, informed Bundock that Dr. Robert Miller believed Miller could be found not guilty by reason of insanity. Gormley stated that if Miller would agree to plead insanity, the State would present only a prima facie case.

Bundock interviewed Miller, Miller's father ("Miller Sr.") and Dr. Williams, and reviewed Miller's psychiatric records. Miller Sr. told Bundock that Miller had telephoned Miller Sr. in February and said he had signed a confession but that he was sick and would have signed anything.

Miller told Bundock that during the first several interrogations, the investigators had repeatedly tried to get him to confess to the murders, but that Miller had denied killing the women. He said Dr. Robert Miller too had tried to get him to confess and had shown him a statement that he could sign in order to plead not guilty by reason of temporary insanity, but that his response was to ask Dr. Miller whether the latter "want[ed Miller] to ... confess to something I didn't do." Miller stated that he had eventually confessed while under the influence of the medication given him and that Dr. Miller and another doctor had broken him down. Bundock did not interview Dr. Miller or anyone else on the staff of Fairfield Hills.

Miller told Bundock he had given the confessions on February 29, March 2, and March 10 because he was frightened and was afraid of receiving a beating, and because the detectives told him that unless he confessed he would lose his job and his family would suffer. He was also concerned that, because he had admitted adulterous conduct with black women, the police would arrest him for adultery and his

wife would divorce him. He told Bundock that the detectives had asked him leading questions and he merely gave them the right answers. They had shown him pictures of the murder scenes many times; when they drove him to the site of the murders and asked him if they were in the right place, he had said "I think so" to please them.

Bundock had Miller evaluated by a court-appointed psychiatrist and in mid-December 1973 received a report. The report stated that although it was certain that Miller "is and has been chronically psychotic and delusional and totally incapable of discerning right from wrong," and that "[t]he force of his insanity drove him into the midst of the daily life of the people he is accused of having murdered," the psychiatrist had "no certain idea" whether Miller had actually committed the murders.

C. Robert Lupinacci

Shortly after Bundock commenced the preparation of Miller's defense, the police arrested Robert Lupinacci on July 29, 1972, as he was attempting to strangle a black prostitute in the same area in which Miller's alleged victims had been found. Thereafter, Miller Sr. sent Bundock a packet of clippings and ideas for investigation, including articles that described the arrest of Lupinacci and indicated that the investigation of all the murders might be reopened. Bundock, convinced that Miller's confessions revealed details that he would have known only if he were the killer, did not investigate the possibility that Miller did not commit the murders and did not pursue any investigation regarding Lupinacci.

The State's file on Lupinacci, which is included in the present record, included the following information. Lupinacci was considered a "sex nut," was known to patronize black prostitutes, and referred to blacks disparagingly. The bodies of three of the women allegedly killed by Miller had been found within 100 feet of the spot where Lupinacci was arrested; Lupinacci's car had been seen near the murder scenes several times. In addition, in 1967, Lupinacci had been seen in bars in the vicinity of Port Chester, New York, which is near Stamford; Rush, just prior to her death in 1967, also had frequented bars in Port Chester. In 1968, employees at the Hotel Hazelton had seen Lupinacci there; Kahn, killed in 1968, was a resident of that hotel. Lupinacci had been seen cruising the Stamford area on the night Kahn was killed. In 1971, Lupinacci worked at a motel at which Thompson, killed in 1971, resided. Lupinacci was known to sell pornographic playing cards, and in the trunk of his car police found a pornographic deck with the queen of hearts missing; a similar card had been found near Thompson's body. Thompson was last seen alive in a vehicle resembling Lupinacci's car, and such a vehicle was seen near the scene of Thompson's murder. A vacuum sweeping of the trunk of Lupinacci's car revealed negroid limb hairs. In August 1971, Henry was last seen alive on Grey Rocks Place in Stamford. Lupinacci was a member of a club then located on Grey Rocks Place.

A local police officer reported that during the investigations of the deaths of Thompson and Henry, Lupinacci had inquired about the location and duration of police stakeouts related to those investigations. In addition, Lupinacci had commented that not all of the victims had been strangled with brassieres, a fact that was not known to the public.

Because of the similarity between the crimes of which Miller was accused and the act in which Lupinacci was caught, the detectives who investigated Lupinacci turned over complete reports of the information gathered to Gormley. In June 1972, Bundock had moved for the production of all exculpatory information in the possession of the prosecution. Gormley, agreeing that Bundock could have free access to the State's file on Miller, never formally responded to Bundock's request. The State did not offer access to its file on Lupinacci and never turned over to Bundock any of its information on Lupinacci.

D. The Trial

Sometime after the arrest of Lupinacci and before receiving the report of the court-appointed psychiatrist, Bundock negotiated a plea bargain with Gormley pursuant to which two of the murder counts would be dropped and Miller would enter an insanity defense on the remaining counts. Accordingly, in January 1973, the State withdrew the charges with regard to Rush and Kahn, and Miller pleaded not guilty by reason of insanity on the charges that he had killed Roberts, Thompson, and Henry.

A one-day trial on the three remaining charges against Miller was held before a three-judge panel of the Connecticut Superior Court for Fairfield County. Under Connecticut law, the trier of fact may not enter a verdict of not guilty by reason of insanity unless it finds beyond a reasonable doubt that the defendant has in fact committed the acts with which he is charged. See State v. Warren, 169 Conn. 207, 363 A.2d 91 (1975). Accordingly, at the trial, the State presented a prima facie case, which consisted primarily of Miller's confessions. Miller presented his insanity defense through the testimony of Dr. Robert Miller and Miller's court-appointed psychiatrist. Both Gormley and Bundock urged the court to accept the insanity defense. The court, after a brief recess, found Miller not guilty by reason of insanity.

In March 1973, pursuant to Conn.Gen.Stat.Ann. Sec. 53a-47 (West 1972) (repealed by 1985 Conn.Acts 506, Sec. 31), the panel held a hearing to determine whether Miller's current mental state warranted his confinement in a mental hospital. The court found it established by a preponderance of the evidence, see id. Sec. 53a-47(a)(4), that Miller was currently mentally ill to such an extent that he posed a danger to himself and to others. Accordingly, the court committed him to the custody of the commissioner of mental health for a term of confinement not to exceed 25 years. Miller has remained so confined since 1973.

E. The Habeas Proceedings

In 1982, Miller sought habeas relief in state court, contending principally (1) that Bundock's failure to pursue the Lupinacci line of inquiry and certain other procedural strategies, such as a motion to suppress the confessions, violated his right under the Sixth Amendment to the effective assistance of counsel, and (2) that the State's failure to turn over to Bundock its file on Lupinacci violated his due process right to be given any exculpatory information in the possession of the prosecution, see Brady v.

Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). After an eight-day evidentiary hearing at which Bundock, Gormley, and others testified, the court made exhaustive findings of fact and denied relief. (See Memorandum of Decision Re: Petition for Writ of Habeas Corpus ("State Habeas Court Decision") dated October 13, 1983.)

In assessing Miller's claims, the court expressed "substantial doubt" as to whether the Lupinacci information possessed by the State would have been admissible at trial, noting that " '[o]rdinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which directly connects that third party with the crime.' ... '[I]t is within the sound discretion of the trial court to refuse to admit such evidence when it simply affords a possible ground of possible suspicion against another person.' " (State Habeas Court Decision at 44 (quoting State v. Kinsey, 173 Conn. 344, 348, 377 A.2d 1095, 1097 (1977), and State v. Renteria, 21 Ariz.App. 403, 404, 520 P.2d 316, 317 (1974), quoted in State v. Giguere, 184 Conn. 400, 405, 439 A.2d 1040, 1043 (1981)).) The court rejected Miller's claim of ineffective assistance of counsel because it concluded that Bundock's performance had not been ineffective, in that Bundock had acquired sufficient information to make an informed recommendation to Miller. The court rejected Miller's claim under Brady v. Maryland on the ground that "the information in the hands of the State's Attorney was [not] sufficient to create a reasonable doubt that did not otherwise exist." (State Habeas Court Decision at 38.) It apparently believed that the withheld information showed "mere[ ] similarities in crimes committed by two different individuals" (id.), that the information was not proper Brady material, and that the public information available to Bundock had "provided the defendant with an opportunity to discover the information he now alleges the prosecutor suppressed" (id.).

The court also ruled that Miller was not entitled to attack alleged constitutional deprivations that occurred prior to his January 1973 trial, reasoning, in effect, that Miller was not aggrieved by the events leading to that trial because "[h]e was acquitted." (Id. at 30.) The court viewed the habeas petition as an improper attack on Miller's confinement because his commitment on the ground that he was a danger to himself and others resulted from a proceeding that (a) was separate from the trial at which he was found not guilty by reason of insanity, and (b) focused on his mental state in 1973 rather than on his mental capacity at the times of the killings. Noting that Miller had not appealed from the March 1973 order of confinement, the court ruled that he was barred from presenting his claims by way of his habeas corpus petition.

The Connecticut Court of Appeals rejected the habeas court's view that Miller was barred from pursuing his habeas claims, but, endorsing its findings of historical fact, affirmed the denial of the writ on the merits. 4 Conn.App. 406, 494 A.2d 1226 (1985). As to the Brady v. Maryland claim, the appellate court found that the Lupinacci evidence was "clearly" and "obvious[ly]" exculpatory of Miller, id. at 421 n. 4, 494 A.2d at 1235 n. 4; but it believed that the test as to the materiality of withheld exculpatory evidence established by United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976), was not technically applicable to Miller's case "because Miller was found not guilty by reason of insanity," 4 Conn.App. at 421, 494 A.2d at 1236 (emphasis in original). Applying more general principles, the court stated that the pertinent question was

whether it is reasonably certain that the contents of the Lupinacci file should have caused Bundock to change his mind about his decision to recommend that Miller adopt an insanity plea, and that, had he done so, upon a trial after a plea of not guilty, a reasonable doubt would have been created by the Lupinacci material.

Id. Concluding that Bundock would have handled the case in the same way even if he had received all of the Lupinacci data in the State's possession, the court found no error in the denial of the writ. Leave to appeal to the Connecticut Supreme Court was denied. 197 Conn. 809, 499 A.2d 59 (1985).

In 1986, Miller filed his present petition for habeas corpus in the district court pursuant to 28 U.S.C. Sec. 2254 (1982), pursuing his Brady v. Maryland claim and his claim of ineffective assistance of counsel. The district court, pursuant to Sec. 2254(d), deferred to the findings of fact made by the state courts. It agreed with the standard of materiality applied by the state appellate court (see Ruling on Petition for Writ of Habeas Corpus dated July 28, 1987, at 11 n. 2), and with that court's conclusion that Miller had "failed to prove that the outcome of the proceedings in the instant case would have been different if the prosecutor disclosed evidence relating to the Lupinacci case," id. at 9. Judgment was entered denying the writ, and this appeal followed.

For the reasons below, we conclude that the writ should have been granted on the basis of Miller's Brady v. Maryland claim. We therefore need not reach the claim of ineffective assistance of counsel.

II. DISCUSSION

In challenging the district court's rejection of his Brady v. Maryland claim, Miller argues that the court did not apply the correct test for evaluating the materiality of the withheld information. Both the district court and the state appellate court focused solely on whether Miller's attorney would have pursued a different strategy had he been given the Lupinacci information; and both found that Miller had not proved that the outcome of the proceedings "would" have been different if the Lupinacci information had been disclosed. Miller contends (1) that these courts applied an unduly burdensome test of materiality, and (2) that the courts should have focused not just on Bundock's likely recommendation following disclosure but also on whether Miller himself would likely have agreed to plead insanity. We agree with both contentions.

A. The Applicability of Brady v. Maryland and Its Progeny to A Plea of Not Guilty By Reason of Insanity

It is by now well established that a person accused of a crime has a due process right to require the prosecution to turn over to him any material exculpatory evidence in its possession. "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. at 1196. The applicability of this principle to proceedings in which the defendant has pleaded not guilty by reason of insanity, however, is far from well established. Indeed, we are unaware of any case prior to Miller's state court habeas proceeding in which this question has been explored. For the reasons below, we think the most analogous principles on which we may draw are those applicable to proceedings in which the accused has entered a plea of guilty.

When a defendant pleads guilty, he waives several federal constitutional rights, including the right to confront his accusers and the privilege against compulsory self-incrimination. See Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). A plea of not guilty by reason of insanity resembles the plea of guilty in several significant respects, as it waives important trial rights belonging to the defendant, including his right to argue that he did not perform the acts with which he is charged, his right to urge through cross-examination of the State's witnesses that his confessions were not voluntary, and his right to introduce any other evidence tending to create a doubt that he actually performed the acts charged. Thus, Bundock testified that "when you go on the insanity defense, you admit the crime, but deny that your client was capable of committing it because of mental infirmity" (State Habeas Hearing Transcript, December 16, 1982, at 150-51); "when you pursue that course, you're admitting that he did it" (id., December 21, 1982, at 38). Similarly, Gormley testified that his agreement with Bundock was to "allow the State to put its case on as briefly as possible," and that there generally would be "no cross-examination or any contest with the facts presented by the State." (Id., December 16, 1982, at 33.) Accordingly, the state habeas court observed that "[s]ince his client had elected the plea of not guilty by reason of insanity Mr. Bundock did not, of course, while on trial attempt to throw suspicion upon Mr. Lupinacci." (State Habeas Court Decision at 27.)

On the other hand, under Connecticut law, the plea of not guilty by reason of insanity differs from a plea of guilty in that the State still has an obligation to present a prima facie case sufficient to convince the triers of fact beyond a reasonable doubt that the defendant performed the acts alleged. See State v. Warren, 363 A.2d at 96. Nonetheless, it is plain that the insanity plea is more like a plea of guilty than it is like a plea of not guilty since, while not relieving the State of all burden to prove that the defendant performed the acts charged, the insanity plea lessens that burden considerably as a practical matter by barring the defendant from contesting or impeaching the State's proof and from presenting other evidence that could counter that proof. Accordingly, we turn to principles pertaining to pleas of guilty.

In the absence of special circumstances, the validity of a plea of guilty is determined by reference to whether it was intelligent and voluntary. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709. As a general matter, a plea is deemed "intelligent" if the accused had the advice of counsel and understood the consequences of his plea, even if only in a fairly rudimentary way; it is deemed "voluntary" if it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his options rationally. See Brady v. United States, 397 U.S. at 750, 90 S.Ct. at 1470. The Brady v. United States Court made clear, however, that this test suffices only in the "absen[ce of] misrepresentation or other impermissible conduct by state agents." Id. at 757, 90 S.Ct. at 1473. Since a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case, id. at 756, 90 S.Ct. at 1473, and of information that may be available to cast doubt on the fact or degree of his culpability, we conclude that even a guilty plea that was "knowing" and "intelligent" may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution.

Given the practical similarities between guilty pleas and pleas of not guilty by reason of insanity, and the influence that exculpatory material may have on the accused's decision whether to plead insanity rather than not guilty, we conclude that the Brady v. Maryland principles are also applicable where the defendant has pleaded not guilty by reason of insanity.

B. The Degree of Certainty Required To Establish Brady v. Maryland Materiality

A person who claims that exculpatory information has been withheld from him by the prosecution in violation of his due process rights as explicated in Brady v. Maryland is entitled to relief only if the withheld information was "material." Evidence is "material" in this context " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3384, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.)); see also United States v. Bagley, 473 U.S. at 685, 105 S.Ct. at 3385 (opinion of White, J.). This concept of materiality applies whether the accused has made a precise request for the material that was withheld, or only a general request for any exculpatory material, or no request at all. United States v. Bagley, 473 U.S. at 682-83, 105 S.Ct. at 3384-85 (opinion of Blackmun, J.); id. at 685, 105 S.Ct. at 3385 (opinion of White, J.).

In United States v. Agurs, the Supreme Court ruled that evidence that "creates a reasonable doubt that did not otherwise exist" as to the defendant's guilt must be considered material. 427 U.S. at 112, 96 S.Ct. at 2401. But "[t]his formulation does not mean that the defendant must be able to show that the evidence would 'probably lead to an acquittal,' which is the standard that must be met for the granting of a new trial on the basis of newly discovered evidence from a source other than the government...." United States v. Srulowitz, 785 F.2d 382, 388 (2d Cir.1986) (emphasis added). Rather, as the Court has made clear, a "reasonable" probability suffices, and " '[a] "reasonable probability" is a probability sufficient to undermine confidence in the outcome' " of the case. Pennsylvania v. Ritchie, 107 S.Ct. at 1001 (quoting United States v. Bagley, 473 U.S. at 682, 105 S.Ct. at 3384 (opinion of Blackmun, J., quoting Strickland v. Washington, 66 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984))).

Neither the state courts nor the district court applied this standard. The state appellate court instead required Miller to show to a "reasonable certain[ty]" that disclosure would have produced a different outcome. The district court stated its agreement with the standard adopted by the state appellate court and rejected Miller's claim because he had failed to prove that the outcome of the proceedings "would have been different."

The courts' rationale for their use of the "reasonable certain[ty]" test was that Miller had not been found guilty but had been found not guilty. Their reasoning suggested that Miller was not disadvantaged by the State's pretrial withholding of evidence and/or that his confinement was unrelated to the events that preceded his trial. We disagree. In fact, Miller has been in custody since 1973, committed pursuant to a court order finding by a simple preponderance of the evidence that he was a danger to himself and others. The preponderance standard was applicable because Miller had successfully invoked the insanity defense. See Conn.Gen.Stat.Ann. Sec. 53a-47 (repealed 1985). Had Miller pleaded not guilty and been acquitted, he would have had a due process right not to be committed involuntarily unless his dangerousness was established by clear and convincing evidence. See Addington v. Texas, 441 U.S. 418, 432-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979) ("[t]o meet due process demands ... the proof [supporting involuntary commitment] must be greater than the preponderance-of-the-evidence standard ..."); see generally Warren v. Harvey, 472 F.Supp. 1061, 1068-72 (D.Conn.1979), aff'd, 632 F.2d 925 (2d Cir.), cert. denied, 449 U.S. 902, 101 S.Ct. 273, 66 L.Ed.2d 133 (1980); cf. Conn.Gen.Stat.Ann. Sec. 17-178(c) (West Supp.1988) (adopting "clear and convincing" standard). Further, once Miller was found not guilty only by reason of insanity, the subsidiary finding that he had committed the acts attributed to him would be considered as "substantial" evidence of his likely dangerousness in the future. See Warren v. Harvey, 632 F.2d at 934. Since, in order for Miller to be found not guilty by reason of insanity, and hence subject to confinement under a mere preponderance standard, the State was required to prove beyond a reasonable doubt that he performed the acts attributed to him, Miller is entitled to challenge the State's withholding of evidence that would have cast doubt on that question and that could have affected his decision to plead insanity and waive his right to contest the State's proof.

We conclude that the standards of materiality established by Brady, Agurs, Bagley, and Ritchie are applicable to Miller's claim.

C. The Materiality of the Withheld Evidence

There is no question in this case that the State withheld the results of its Lupinacci investigation from Miller and Bundock. Both state courts so found. Nor can there be any question that the information gathered was favorable to Miller, in that it suggested that the murders might have been committed by Lupinacci rather than Miller. Indeed, the state appellate court found that the Lupinacci materials were "clearly" and "obvious[ly]" exculpatory of Miller. Thus, the only issue in the present case is whether there is a reasonable probability that disclosure of those materials would have affected the outcome of the proceedings, i.e., whether they are sufficient to shake one's confidence in the outcome of the Miller proceedings.

In seeking to state in somewhat more concrete terms this "reasonable probability" test of materiality as it would apply to the entry of an insanity plea after the prosecution has withheld exculpatory evidence, we note that the Supreme Court has considered the concept of materiality (or "prejudice" to the defendant) to be the same for claims of withheld evidence as for claims of ineffective assistance of counsel. See, e.g., Strickland v. Washington, 466 U.S. at 694, 104 S.Ct. at 2068 (test for "prejudice" stemming from error of counsel "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution"); United States v. Bagley, 473 U.S. at 682, 105 S.Ct. at 3384 (opinion of Blackmun, J., using the "Strickland formulation" in case involving withheld evidence); Pennsylvania v. Ritchie, 107 S.Ct. at 1001 (a withheld-evidence case adopting Justice Blackmun's Bagley formulation which included Strickland 's "sufficient to undermine confidence in the outcome" test). Accordingly, given the parallel standards and the similarities between a plea of guilty and a plea of not guilty by reason of insanity, we consider it useful in the present case to look to the Supreme Court's discussion of materiality in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), which involved a claim that the defendant's decision to enter a plea of guilty was caused by the ineffective assistance of his counsel.

In Hill v. Lockhart, the Court's bottom-line test to determine whether flaws in the performance of counsel were material was stated as follows: "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59, 106 S.Ct. at 370. As an illustration, the Court indicated that the defendant might meet this test if error-free representation would likely have led counsel to recommend a plea of not guilty:

For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id.

In assessing the materiality of the withheld information in the present case, the state appellate court and the district court focused solely on whether disclosure of the Lupinacci information would have affected Bundock's recommendation to Miller. The plea context, however, requires the broader focus manifested in Hill 's bottom-line formulation, for the right to decide whether to plead guilty, or not guilty, or not guilty by reason of insanity belongs to the defendant, not to counsel. Counsel indeed recommends, and if disclosure would likely have caused him to alter his recommendation, that likelihood will usually suffice to show materiality. But whatever counsel recommends, it is the accused who must decide. Thus, we conclude that even where counsel would likely adhere to his recommendation of a plea of guilty or not guilty by reason of insanity, if there is a reasonable probability that but for the withholding of the information the accused would not have entered the recommended plea but would have insisted on going to a full trial, the withheld information is material within the meaning of the Brady v. Maryland line of cases.

In assessing the likelihood that either the recommendation of counsel or the decision by the accused would have been different if the prosecution had not withheld the exculpatory evidence, the test is an

objective one, depending largely on the likely persuasiveness of the withheld information. We have detailed the evidence possessed by the State as to Lupinacci in some detail in Part I.C. above. The State's file included information that Lupinacci was a "sex nut" who patronized black prostitutes but despised blacks; that he had, at pertinent times spanning four years, frequented places where at least four of the five women Miller was charged with killing frequented or resided; that he had cruised the area from which Kahn disappeared on the night she was murdered; that Henry was last seen on the street of Lupinacci's club; that Thompson was last seen in a car resembling Lupinacci's and that a similar car had been seen near the murder site on that night; that Lupinacci's car had been seen near the murder sites several times; that negroid limb hairs were found in the trunk of Lupinacci's car; that a deck of pornographic playing cards found in Lupinacci's trunk was missing a card and that a similar card had been found near Thompson's body; and that Lupinacci knew nonpublic facts about the murders.

There is no doubt that the insanity plea, unlike a plea of not guilty, offered the possibility that Miller could escape having convictions on his record and perhaps even escape further confinement altogether if the state could not prove that he was currently a danger to himself or to others. But when the undisclosed facts possessed by the prosecution are added to the fact that Lupinacci was arrested in the act of attempting to strangle a black prostitute in the very area where the other victims had been found strangled, we conclude that the withheld information is sufficient to undermine confidence in the outcome of both Miller's decision to forgo any challenge to the State's assertion that he was the murderer and the decision of a rational factfinder as to whether the identity of Miller as the murderer was established beyond a reasonable doubt.

In sum, we conclude that the withheld information was material within the meaning of the Brady v. Maryland line of cases.

Three other facets of the prior rejections of Miller's Brady claim deserve mention. First, the state habeas court indicated that it could not conclude that the withheld information was sufficient to create a reasonable doubt because the State possessed additional evidence that it had forgone presenting in light of the insanity plea agreement. We believe the State is not entitled to seek to minimize the materiality of the withheld information by arguing that it could have produced additional evidence at a fuller trial. Having avoided the need to make a full presentation by means of a plea agreement that immunized its presentation from attack, and having achieved the plea agreement only after withholding information that would have put teeth in the attack, the State should not be allowed to becloud the court's already hypothetical analysis of the likely effect of the withheld information by adverting to other evidence it might have adduced had it not procured the plea agreement.

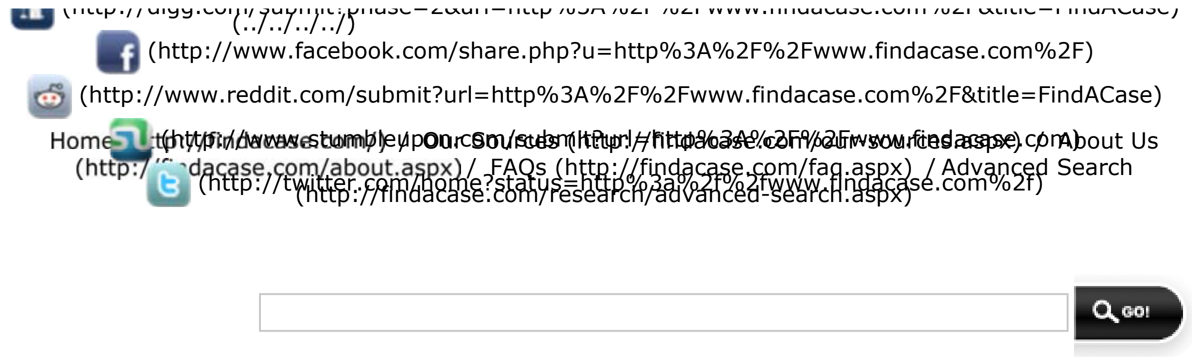
Second, both the state appellate court and the district court appear to have rested their rejection of Miller's Brady v. Maryland claim on a finding that Bundock's own recommendation would not have changed had he known the contents of the State's Lupinacci file. We are skeptical of the validity of such an individualized inquiry. The question whether there is a reasonable probability that counsel's recommendation would have been different had the information been disclosed is not a question of historical fact but rather a mixed question of fact and law resting on an objective evaluation as to the likely persuasiveness of the information. See Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2590, 91 L.Ed.2d 305 (1986); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052. Given the nature of the question and the clear directions in Hill and Strickland that the likely outcome of a trial should be assessed "objectively, without regard for the 'idiosyncracies of the particular decisionmaker,' " Hill v. Lockhart, 474 U.S. at 60-61, 106 S.Ct. at 371-72 (quoting Strickland v. Washington, 466 U.S. at 695, 104 S.Ct. at 2068), the habeas courts should have made an objective evaluation of the likely impact that the withheld information would have had on typically competent counsel, rather than make what appears to be a retrospective finding as to what the effect would actually have been on Bundock, who relied on his surely idiosyncratic view that the Lupinacci facts were "not relevant" because acts like the one in which Lupinacci was caught "happen[ ] every day on the Merritt Parkway" (State Habeas Hearing Transcript, December 16, 1982, at 140-41).

Finally, the state habeas court's doubt as to the admissibility of the Lupinacci information under state-law evidentiary principles was unwarranted. As the state appellate court ruled, the Lupinacci information was plainly relevant to the question of who committed the murders. Given a defendant's Sixth Amendment right to present evidence in his favor, see Taylor v. Illinois, --- U.S. ----, 108 S.Ct. 646, 652, 98 L.Ed.2d 798 (1988) (" 'at a minimum, ... criminal defendants have ... the right to put before a jury evidence that might influence the determination of guilt' " (quoting Pennsylvania v. Ritchie, 107 S.Ct. at 1001)), and his Fifth Amendment right not to be deprived of his liberty without due process, we have little doubt that the Lupinacci evidence would have been admissible. Connecticut law does not appear to be to the contrary, see State v. Bryant, 202 Conn. 676, 688, 523 A.2d 451, 458 (1987) (assuming relevance, "[i]t is always competent for a [defendant] to [present] evidence tending to show that another committed the crime [with] which he is charged") (brackets in original; quoting other Connecticut cases); and state law could not, in any event, diminish Miller's federal constitutional rights.

CONCLUSION

For the reasons above, we conclude that Miller's claim under Brady v. Maryland has merit. Accordingly, we reverse the judgment of the district court dismissing Miller's petition and remand for entry of a judgment conditionally granting the writ. The judgment should provide that the writ will be granted unless within a reasonable time the State brings Miller to trial.

contact



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MILLER v. ANGLIKER

Appellate Court of Connecticut

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July 2, 1985.

BENJAMIN F. MILLER, JR.
v.
COLIN C. J. ANGLIKER, M.D., DIRECTOR, WHITING FORENSIC INSTITUTE

This is an appeal from the denial of Benjamin Miller, Jr.'s petition for a writ of habeas corpus which, if granted, would have released him from

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confinement at the Whiting Forensic Institute. We conclude that the trial court's denial of that petition was proper.

The court's meticulous and comprehensive findings of fact need only be summarized here. On March 17, 1972, Benjamin Miller, Jr., was arrested after an investigation of nearly five years duration into the murders of five black prostitutes. All were found strangled in a wooded area off of the Merritt Parkway, near River Bank Road in Stamford. The first victim, Rosell Rush, was found on August 4, 1967. Thereafter, the bodies of Donna Roberts, Gloria Kahn, Gail Thompson and Alma Henry were found on May 3, 1968, September 8, 1968, July 10, 1971, and August 22, 1971, respectively.

There was a substantial amount of publicity about the murders in the Stamford area. The black community, as well as other groups, expressed anger over the lack of progress in the police investigation. For that reason, a special team of state police officers and a Stamford police detective was created to investigate the murders full time.

After a Reverend James Miller received an anonymous telephone call describing the location of one of the bodies and expressing the desire that the victim receive a Christian burial, the police made a check of other Reverend Millers in the Stamford area. As a result of that check, the name of the plaintiff, who claimed to be an ordained clergyman, was placed on a file card. After three more bodies were found, Miller was invited to an interview. He wrote a letter to the police saying that he could not come.

Nothing further was done to investigate Miller until January, 1972, when the card and Miller's failure to come in were discovered by the detective assigned to the investigation. At that point, a background investigation of the plaintiff was initiated. It was determined

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that Miller was a white employee at the Darien post office who walked past the home of Reverend James Miller every day during lunch. The plaintiff also spent a great deal of time preaching to the black community in Stamford, particularly to the women of the community. Miller also had a history of mental illness, having, at one time, been hospitalized at Fairfield Hills State Hospital. Police visited Fairfield Hills and were given access to Miller's files without his prior approval.

The police then expanded their investigation of Miller, interviewing his wife and acquaintances. They found that Miller had marital problems. He had beaten and threatened to kill his wife. Finally, they interviewed the plaintiff at his home, beginning with a reading of his Miranda*fn1 rights. This interview was not productive, however, because the plaintiff appeared to be somewhat incoherent.

Between January 26, 1972, and February 16, 1972, Miller was interviewed by the police four more times. These interviews were lengthy sessions, each of which began with a reading of Miller's Miranda rights. Miller was described as a compulsive talker who forced the police officers to work in shifts. During one of the interviews Miller offered to take a polygraph test, which was administered on the next occasion upon which he spoke to police. The test was inconclusive due to Miller's erratic emotional changes.

During these interviews, Miller made several incriminating statements to police officers. He stated that he had learned of Gail Thompson's murder some six weeks later. This was directly contradicted by the statement of the victim's mother, who said that Miller had visited the family home "a couple of days" after the body was found to express his condolences. Miller

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also admitted to having had sexual relations with Gail Thompson in his car in North Stamford, and when he was shown a photograph of her body, he correctly identified the item around her neck as a handkerchief although the publicized version of the killings suggested that all of the victims had been strangled with bras. Further, when Miller was shown a photograph of the body of Alma Henry, he correctly identified adhesive tape as the substance wrapped around her head, stating "I don't use tape that narrow." From the photograph it was almost impossible to identify what was wrapped around her head, and the fact that tape had been used was not publicly known.

On February 16, 1972, police suggested to Miller that he should consult Robert Miller, a psychiatrist at Fairfield Hills. He declined to see Robert Miller, preferring to see Shirley Williams, a psychiatrist at the Norwalk Hospital, instead. After speaking with Williams, Benjamin Miller was seen by Michael Moadel, another psychiatrist, who signed an order for Miller's temporary involuntary commitment to Fairfield Hills. Miller was immediately taken to Fairfield Hills and was admitted.

In early January, 1972, State Police Detective Robert Geoghan and Stamford Police Detective George Mayer had visited Fairfield Hills where they discussed Miller's background with Robert Miller, who was considered to be "somewhat of a forensic psychiatrist." He agreed that if the plaintiff could be admitted to Fairfield Hills, it would provide an excellent opportunity to conduct interviews of the plaintiff.

Throughout his confinement, there has been substantial agreement that Benjamin Miller suffers chronic schizophrenia. There was also evidence in his hospital records that he had been placed on suicide watch occasionally, that he was delusional and that "religosity [sic]

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is in evidence." Miller regularly received medication in the form of trilafon and, at some point, he was also given sinequan.

Miller was interviewed on several occasions by Robert Miller, by the investigating officers or by all of them. Robert Miller indicated to the officers that he believed that the plaintiff was, in fact, the killer of the women, although at no time did he obtain a confession. These interviews culminated, on February 29, 1972, in Benjamin Miller's handwriting a

confession to the murders of seven women. At another point, he wrote that he had killed Gail Thompson, Alma Henry, Sissy Rush and others he could not remember. The plaintiff led the conversation during which these confessions were made and his statements about the Gail Thompson murder corresponded to the physical findings at the scene.

On March 1, 1972, Miller signed both a handwritten statement and a typed duplicate admitting to and detailing the murder of Alma Henry. He also signed a statement indicating that he had returned, with police, to the murder scene where he pointed out the spot where the murder had occurred, and stating that he had tied her hands, taped her mouth and whipped her body with tree branches while he was killing her. These facts were not publicly known. In this statement, Miller also admitted that before Alma Henry died, but while she was unconscious, he had committed the act of cunnilingus upon her body.

On March 10, 1972, Miller signed another statement admitting to the murder of Donna Roberts, and giving considerable detail about her murder and the transportation of her body.

Each statement was witnessed by Geoghan and Mayer, who both stated that Miller had voluntarily led them to the murder scenes and to the places where the

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bodies were deposited thereafter. Each statement also contained Miller's written acknowledgment of his rights. As a result of this investigation and the confessions, Miller was arrested on March 17, 1972, and was indicted by a grand jury on May 15, 1972, for the five murders listed above.

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On the date of Miller's indictment, attorney Herbert Bundock was appointed to represent him. Bundock had been an assistant public defender for Fairfield County for ten years prior to his appointment to represent Miller. Although his position was part time, he spent practically full time on the job. Miller pleaded not guilty to all five counts and the case was continued to June 20, 1972, pending the filing of any pretrial motions.

On June 6, 1972, Bundock filed a motion for discovery which included a request for all exculpatory information in the possession of the prosecution. Bundock also obtained two psychiatric reports, dated April 14, 1972, and May 6, 1972, both of which confirmed that Miller was competent to stand trial. Bundock also reached an agreement with Joseph Gormley, the state's attorney involved in the case, which allowed him free access to the state's file on the Miller case. Gormley testified at the habeas corpus hearing that he was reasonably certain that Bundock had seen practically the entire file.

From the date of his appointment through the end of 1972, Bundock worked on Miller's case. He had a psychiatrist, Johnathan M. Himmelhock, appointed by the court and, from conversations with Himmelhock, Bundock concluded that the doctor would testify that Miller was insane.

Bundock also spoke with Miller and his father on several occasions during this time. Benjamin Miller, Sr., told Bundock, on April 1, 1972, that his son had stated that he was sick and had signed a confession, but that

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he would sign anything. Miller, Jr., corroborated this version of the events on September 12, 1972. He stated that he had been afraid of a beating when he signed the statements and that, after they showed him photographs of the bodies many times, they drove him to the murder scenes and asked him if this was the place. He said he would respond by saying "I think so" to please them. He also stated that the police had repeatedly asked him to confess to the murders, had harassed him, and had called him a liar. At no time did Bundock use any of this information to file a motion to suppress Miller's confessions. Rather, he came to an agreement with Gormley that Miller should plead not guilty by reason of insanity. Gormley agreed to present only a prima facie case under those circumstances. Both the plaintiff and his father willingly participated in that plea.

On July 29, 1972, Robert F. Lupinacci was apprehended in the act of attempting to strangle a black prostitute. The crime occurred in the same area as those of which Miller was accused. The report of this incident was eventually turned over to Gormley because of the similarities between the crimes.

Lupinacci was a known patron of Stamford's black prostitutes and he was allegedly in the downtown area on the night that Gloria Kahn disappeared. Lupinacci also admitted to having taken other prostitutes to the same place where the assault occurred. He frequently used pornographic literature and drove a car similar to one which had been seen in the same area where the body of Gail Thompson had been found.

A Stamford police officer informed the state trooper who was investigating the Lupinacci case that during the Alma Henry and Gail Thompson investigations, Lupinacci had inquired about the location and duration of police stakeouts relative to those investigations. Lupinacci had further commented that not all of the

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murders had been committed with bras, a fact not known to the public.

The Miller case was opened because of the Lupinacci investigation. That fact was reported in the newspaper and was brought to Bundock's attention in the form of a scrapbook put together for him by Miller, Sr. During the investigation, the state police sent twenty-three items of evidence, obtained at the scenes of the murders with which Miller was charged, to the FBI for comparison with the Lupinacci case. In the end, however, Lupinacci was charged only with assault and the investigation was closed on September 23, 1972, with a statement that there was no solid evidence connecting Lupinacci to the killings of which Miller was accused. Gormley never offered the Lupinacci file to Bundock, nor did the evidence show that Bundock had ever requested it.

On January 30, 1972, Miller was found not guilty by reason of insanity of the murders of Donna Roberts, Gail Thompson and Alma Henry for which he was tried. He was ordered confined to Fairfield Hills pursuant to General Statutes 53a-47 (c)*fn2 pending an examination

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to determine whether he was a danger to himself or to others. At a hearing on March 29, 1973, Miller was found to be a danger to himself and to others and was confined to the custody of the commissioner of mental health. Miller has never disputed the validity of the March 29, 1973 proceedings, and, since his confinement, the superintendent of Fairfield Hills has filed reports every six months as required by General Statutes 53a-47 (c)(3), concluding that Miller's release would still constitute a danger to himself or to others.

On January 21, 1982, nearly nine years after Miller was committed, he filed the present petition seeking a writ of habeas corpus claiming, essentially, two grounds therefor: (1) that he received ineffective assistance of counsel in violation of his constitutional rights; and (2) that the state's attorney withheld exculpatory information from him. The trial court concluded that Miller failed to prove either claim and, further, that Miller, by failing to appeal from the March 29, 1973 order committing him to the custody of the commissioner of mental health, was barred from presenting these claims for the first time in a habeas corpus petition.

In this appeal, Miller claims that the trial court erred: (1) in holding that he had failed to prove that he had not deliberately bypassed his right to appeal from the March 29, 1973 confinement order; (2) in holding that the prosecution did not withhold exculpatory information from him; and (3) in holding that his counsel was not ineffective, in violation of his rights under the sixth and fourteenth amendments to the constitution of the United States. We conclude that although the court erred in its application of the "deliberate bypass" rule,

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that error was harmless in light of the court's correct conclusions as to the merits of the petition.

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The trial court concluded that "the Petitioner cannot for the first time raise any issue as to the impropriety of [the commitment hearing of March 29, 1973] by habeas corpus. Vena v. Warden, 154 Conn. 363[225 A.2d 802 (1966)]; Blue v. Robinson, 173 Conn. 360[377 A.2d 1108 (1977)]." This conclusion misses the point of Miller's claims, for they do not relate to the commitment hearing, but to the original acquittal. Miller testified that he was never told of his right to appeal from his acquittal by reason of insanity. He never testified about whether he was told that he could appeal from the subsequent commitment order. Consequently the court concluded that he had failed to prove that he had not deliberately bypassed his right to appeal from the later order.

In Vena v. Warden, supra, the court stated that "a petitioner may collaterally raise federal constitutional claims in a habeas corpus proceeding even though he has failed to appeal his federal constitutional claims directly to us if he alleges and proves, by a fair preponderance of the evidence, facts which will establish that he did not deliberately

bypass the orderly procedure of a direct appeal." Id., 366-67. Since Miller's constitutional claims do not arise out of the commitment order, but out of his acquittal, it was that judgment, if any, from which he should have been required to appeal.

Not only did Miller testify that he was not told of his right to appeal from his acquittal,*fn3 but the claims which

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he raises in this petition are "more properly pursued on a petition for new trial or on a petition for a writ of habeas corpus rather than on direct appeal." State v. Gregory, 191 Conn. 142, 145, 463 A.2d 609 (1983), quoting State v. Mason, 186 Conn. 574, 578-79,442 A.2d 1335 (1982); see also State v. Chairamonte, 189 Conn. 61, 64-65, 454 A.2d 272 (1983).

Although each of the cases cited immediately above dealt only with claims of ineffective assistance of counsel, the same rationale used therein applies to the present claim regarding the prosecutor's failure to turn over to Bundock alleged exculpatory evidence which would not ordinarily be part of the record in a direct appeal. In State v. Chairamonte, supra, the court, referring to its role in a direct appeal, stated: "Our role in a case like this, however, is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court. Without a hearing in which the reasons for counsel's decision may be elicited, any decision of ours on this claim would be entirely speculative." Id., 64; see also State v. Mason, supra, 579. Similarly, without a hearing in which Gormley's reasons for failing to disclose the Lupinacci evidence are elicited, and in which that evidence itself is provided, we would have an insufficient basis for deciding the merits of Miller's claim. See State v. Grasso, 172 Conn. 298, 301,374 A.2d 239 (1977). Consequently, under the circumstances of this case it would have been inappropriate for Miller to raise either of these claims through a direct appeal.

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In State v. Mason, supra, however, the court stated: "We note that a defendant may well be forced to raise a claim of ineffective assistance on direct appeal, even when the record is inadequate for review, because of the possibility that if this is not done collateral review of the claim may be precluded by a finding that the appellate process has been deliberately bypassed. . Whether there has been a deliberate bypass . . . must be determined on a case by case basis. "(Citations omitted.) Id., 579 n. 3. This statement cannot be construed as a prohibition of habeas corpus petitions in the absence of a prior direct appeal. Rather, it is merely a caution to counsel reminding them of the risks of such a petition. Under the circumstances of this case, however, we can find no fault in Miller's failure to directly appeal.

We conclude that because Miller's claims in this petition, in all likelihood, could not have been successfully appealed directly, there was no violation of the deliberate bypass rule in this case.

With regard to the merits of the constitutional claims raised by Miller's petition, those claims arise, to a great degree, out of the circumstances of the Lupinacci investigation. In that context, Miller seeks to augment the trial court's findings of fact with his own discussion of that investigation. Miller's claimed facts presented with regard to the Lupinacci investigation include the following: Lupinacci was a regular patron of Stamford's prostitutes. He was seen cruising in his car on the night of Gloria Kahn's disappearance, and was positively identified by another prostitute as having tried to pick her up on that same night.

On the night of Lupinacci's arrest, his car was searched and in the trunk was a deck of pornographic playing cards. One card was missing from the deck and a similar card had been found at the scene of the Gail

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Thompson murder. Vacuum sweepings of the trunk also disclosed a "negroid limb hair." Lupinacci's car had also been seen at the area of the murders on prior occasions. Lupinacci was described as hating blacks and as a "sex nut" who had a history of sexually molesting women and who had been accused of rape in the past. He also, apparently, went to great lengths to devise a way to look up from a basement work site under the dresses of women walking by on the street. He was known to frequent bars which Rosell Rush was known to patronize, and he was a known patron of both Gail Thompson and Gloria Kahn.

In addition, Miller would further augment the court's findings of fact by adding a summary of the testimony of Michael Sheldon, a professor at the University of Connecticut School of Law, from the habeas corpus hearing. Professor Sheldon testified at length about the quality of Bundock's handling of Miller's case. It is sufficient for us to state that he made clear his opinion that Bundock's handling of the matter was not competent. The trial court did not, however, credit Sheldon's opinion which, of course, it was free to reject.

We note at the outset of our consideration of Miller's claims that they arise in a procedurally confused context. Ordinarily, claims of procedural misconduct or ineffective assistance of counsel arise after the accused has been found guilty. Here, however, Miller claims that he should have been acquitted unconditionally rather than by reason of insanity. Accordingly, the tests by which courts> have traditionally decided the validity of claims such as those presented here do not mesh well with the facts of this case.

Miller claims that Bundock's failures as counsel were "glaring" and "legion." Specifically, he points to Bundock's lack of research into the Lupinacci case and to his failure to challenge the validity of Miller's

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confessions although Miller had provided him with cause to dispute whether they had been made voluntarily. These failures, however, must be viewed in light of the agreement reached between the state and Bundock regarding Miller's insanity plea.

The standard used to review claims of ineffective assistance of counsel is whether defense counsel's performance was "reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." State v. Clark, 170 Conn. 273, 283, 365 A.2d 1167, cert. denied,425 U.S. 962, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976), quoting Gentry v. Warden, 167 Conn. 639, 646,356 A.2d 902 (1975); see also Levine v. Manson, 195 Conn. 636, 639, 490 A.2d 82 (1985); State v. Chairamonte, supra, 63. The burden here is on Miller to prove that counsel did not meet this standard; Levine v. Manson, supra, 640; State v. Chairamonte, supra; State v. Clark, supra; and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington,466 U.S. 668, 694, 104 S.Ct. 2052, 80 L: Ed.2d 674, reh. denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984).

"[A] court will not second guess the tactics and strategy chosen by trial counsel after reasonable investigation and research." Whitehead, Constitutional Criminal Procedure, 371-72; see also Strickland v. Washington, supra, 689; Aillon v. State, 597 F. Sup. 158, 164 (D. Conn. 1984); Levine v. Manson, supra, 648. Although we might, given the benefit of 20/20 hindsight, conclude that Bundock's approach was not the best possible one, "the claim of ineffective representation must be examined as of the time the questioned representation occurred." Levine v. Manson,

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supra, 649; Siemon v. Stoughton, 184 Conn. 547, 554,140 A.2d 210 (1981). Bundock knew of the Lupinacci investigation long before Miller's trial and, as the court below found, "on the strength of all the information available to him he had come to the conclusion that the best defense for his client was a plea of not guilty by reason of insanity." This decision required Bundock to consider the possibility of conviction for all five murders for which he was indicted and a resulting possible maximum sentence of 125 years; General Statutes 53a-35 (c)(1) (Rev. to 1971); as well as the possibility of acquittal of the charges if he chose to pursue a complete acquittal. His decision to opt for the security of an agreement with the prosecution was well within the bounds of prudent advice to his client. It certainly did not "so [undermine] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" as required by Strickland v. Washington, supra, 686. Nor has Miller established that, but for Bundock's decision, the result for him would have been different, i.e., that he would have been acquitted of the charges against him. Id., 2068. We conclude, therefore, that Miller has not sustained his burden of proving a violation of his constitutional right to the effective assistance of counsel.

Miller's second claim is that Gormley committed misconduct by failing to provide Bundock with the exculpatory evidence contained in the Lupinacci file. This claim is premised upon the holding in Brady v. Maryland,373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), where the Court stated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ." Id., 87.

In cases, such as the present one, where only an initial general request for "any exculpatory information

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or material" has been made, it has been held that "there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all." United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Consequently, the test applied for determining the materiality of evidence*fn4 where no request has been made is equally applicable to the present case. That test is whether "the omitted evidence creates a reasonable doubt [about the defendant's guilt] that did not otherwise exist . . . ." Id., 112.

Technically, the Agurs test is not applicable to this case because Miller was found not guilty by reason of insanity. Nevertheless, since we have concluded that practical justice requires us to consider the combined effect of the finding of not guilty by reason of insanity together with the plaintiff's continued involuntary confinement at the Whiting

Forensic Institute, we will apply the general principles of Brady concerning the prosecution's failure to disclose exculpatory evidence to this case. Accordingly, we must determine whether it is reasonably certain that the contents of the Lupinacci file should have caused Bundock to change his mind about his decision to recommend that Miller adopt an insanity plea, and that, had he done so, upon a trial after a plea of not guilty, a reasonable doubt would have been created by the Lupinacci material. Even if we assume, arguendo, that, had the Lupinacci

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evidence been admitted at such a trial, it would have created a reasonable doubt, nonetheless the first part of the test is still not met in this case.

There is a point at which the prosecution must yield exculpatory evidence which has not been requested by the defense, but, as the Court said in United States v. Agurs, supra, "we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel . . . ." Id., 111. We must, necessarily, leave the initial determination of what to surrender voluntarily, to the prosecution. Id., 107. We can only subsequently determine whether the failure to surrender evidence was "of sufficient significance to result in the denial of the defendant's right to a fair trial." Id., 108. We conclude that, in the unusual circumstances of this case, the state's attorney's failure to turn over the Lupinacci evidence to the plaintiff did not deny the plaintiff a fair trial.

From our vantage point, twelve years after the events, we must assay the factors leading to Bundock's handling of the case as he did. He was an experienced criminal defense lawyer. He knew both the strengths and weaknesses of the state's case against his client. He knew of Miller's confessions and other highly incriminating evidence and he knew of the unanimous opinions of the psychiatrists who had examined Miller that he was insane. He knew of the probable lengthy incarceration, tantamount to the duration of his client's life, that Miller would face if he were convicted on all three counts, or possibly on all five counts upon which Miller had been indicted had he not accepted the agreement with the prosecution to plead not guilty by reason of insanity. He came to the reasonable conclusion that his client was, in fact, guilty and needed confinement in an institution and close supervision and treatment. Under General Statutes 53a-47, the superintendent of the institution was required to file a report

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with the court every six months with respect to Miller's condition. Further, General Statutes 53a-47, at the time of Miller's commitment, placed the burden upon the state to establish, upon the preponderance of the evidence, that the defendant was mentally ill. To sum up the situation Bundock faced, he chose a path which meant that his client, against whom the evidence was sufficiently strong, not only for a grand jury to indict him on five counts of murder, but, in all likelihood, to convict him of one or more of those murders, would not go to prison but rather would either be confined in a hospital, which all medical testimony indicated was appropriate, or be released as a free man. Applying, as we do, the Brady exculpatory rules, we cannot conclude that, had Bundock received all of the Lupinacci data in the state's possession, his resulting analysis thereof would have been reasonably certain to cause him to handle the case differently.

There is no error.

In this opinion the other judges concurred.

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