IN THE SUPREME COURT OF FLORIDA

WILLIE B. MILLER,

Appellant,

v. Case #: 85,744

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, WILLIE B. MILLER, the defendant in the lower court, will be referred to in this brief as Miller. References to the instant record on appeal will be noted by the symbol "R," and references to the transcripts, by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

## STATEMENT OF THE CASE AND FACTS

Sheila Rose testified that her grandmother's home is directly across the street from the Jung Lee Grocery (T 479). On the date in question, Rose sat on the front porch of her grandmother's house while her grandmother, Mary McGriff, was in Jung's store (T 483-84). Rose heard two sounds she thought were car backfires, and then saw her grandmother run across the street from the store; her grandmother said that Wallace had been shot (T 484-85). Because Rose could see into the store from her grandmother's porch, she saw a dark skinned guy jump across the counter in Jung's store and saw two guys exit the store (T 486). Rose described the two: "The dark skin[ned] guy was short and had plats in the head and the light skin[ned] guy was light skin[ned], taller than the dark skin[ned] guy and had a fade . . . ." (T 486). Rose thought they looked to be about 17 or 18, and both were black (T 486-87).

James Jung, the assistant manager at the Jung Lee grocery, testified that, on that day, he, Wallace, both of his parents, McGriff, and two children were in the store (T 505). As Jung sat behind the counter (T 508), he noticed two young men enter the store behind McGriff -- one tall and dark, the other, short and light; the taller one appeared to be late teens, and the shorter

one appeared to be about 5'6", 140 pounds (T 510). Jung identified Miller in court as the shorter one (T 511).

The taller person walked toward Wallace and then Jung heard a shot (T 516). Jung saw Wallace bleeding from the face (T 517). The taller one then paired with Miller, and both approached the counter (T 517). Jung heard another shot and felt a pain in his arm and chest (T 517).[1] The taller one held a pistol on Jung's father, while Miller, armed with a "short shotgun rifle," came behind the register and told Jung to open the register or get shot again (T 518-19). Jung opened the register, and Miller removed the cash register tray (T 520). Miller took the cash, put his foot on the counter, and jumped across the counter (T 521).

Latent print examiner Fertgus testified that the fingerprint lifted from the cash register drawer belonged to Miller (T 622). Melvin Green, a jailhouse inmate, testified that Miller told him that Miller and his nephew Fagin went to the Jung store, carrying a .22 sawed-off rifle in a tote bag; shot the security guard between the eyes; Miller took Wallace's .38 revolver; Fagin then shot Jung; and Miller removed the cash drawer (T 670-71, 675).

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[1] This shot broke Jung's left forearm, entered his chest above his heart, traveled across his body, and lodged in the right side (T 524).

Green also testified that Miller wrote a letter to Fagin, stating he was not going to say anything about Fagin's involvement and that all the police had was Miller's fingerprints (T 681). William Paul Elliott, another jailhouse inmate, testified that Miller told him that authorities had found Miller's fingerprints on the Jung cash register, and related the a newspaper recounting of the incident incorrectly attributed Wallace's wounds to Jung (T 763). Miller also told Elliott that the .22 rifle was used on Wallace, and the .38 on Jung (T 769).

Samuel Fagin, Miller's accomplice and nephew, testified that Miller and Miller's brother Ezekiel planned the robbery to get money for Ezekiel, who is paralyzed (T 793-94). Fagin stated that Miller shot Wallace in the face with a .22 rifle they got from Ezekiel, and that Fagin shot Jung with a .38 (T 793-94). Fagin stated that the three discussed the robbery, ran an errand, bought bullets at the pawn shop, and returned to Ezekiel's house to plan the robbery. Ezekiel brought out the .22 and Miller and Ezekiel fired it twice in the back of the house (T 800). They then went to the Jung store, and although they did not commit the robbery then, they learned about Wallace the security guard (T 801). On this "planning trip" to the Jung store, Ezekiel and Fagin went inside,

while Miller remained outside (T 802). Eric Harrison testified that Miller sold a .38 to him (T 840).

Neurosurgeon Nuygen testified that, as a result of the gunshot wound to the head, Wallace was paralyzed on the left side of his body; the paralysis was caused by a stroke, which was caused by the occlusion of the carotid artery which nourishes the right side of the brain (T 867). Nuygen did not remove the bullet from Wallace's head because the bullet "ha[d] caused the damage and removing [it] would not [have] change[d] in any way the outcome" (T 869). Due to the paralysis, Wallace had difficulty in breathing, which required artificial ventilation (T 870). Wallace later contracted pneumonia as a result of his being bedridden and having a ventilation tube (T 873). Dr. Patel testified that Wallace had both legs amputated above the knees during his hospital stay, due to his being bedridden and having diabetes, hypertension and poor circulation (T 884). Dr. Millstone testified that Wallace died of pneumonia and respiratory failure (T 901).

FDLE senior crime laboratory analyst Lardizabel testified that the bullet removed from Jung was fired from the .38 officers recovered from Harrison (T 907-08, 935-36). Forensic pathologist Floro testified that she recovered several fragments of a projectile from the right side of Wallace's neck (T 1008). Floro

stated that, as a result of the injury caused by the projectile, the carotid artery became blocked, causing a stroke, and Wallace became paralyzed (T 1012-14). Floro opined that this injury was sufficient to cause death (T 1015). As a result of his being paralyzed and bedridden, Wallace developed a number of complications during his hospital stay:

> He developed pneumonia because he was bedridden and immobilized in bed. . . . He developed complications of respiration. He also developed bed sores for which he was amputated . . . . His cerebral vascular disease also contributed to that. He developed all sorts of complication you could think of in a patient who is bedridden.

(T 1017). Finally, Dr. Floro stated that, although the immediate cause of death was pneumonia, the proximate cause of death was the gunshot wound to the head: "If not for that Mr. Wallace would probably still be a guard, so that gunshot wound initiated a chain of events leading to the death of Mr. Wallace" (T 1018). Wallace's previous problems with diabetes and hypertension had nothing to do with his death (T 1019).

After Floro's testimony, the state rested, and defense counsel moved for a judgment of acquittal (T 1032). Defense counsel advised the trial court that it would not be calling any witnesses, and the trial court conducted an inquiry of Miller regarding his

decision not to testify (T 1039-43). The jury began deliberations at 7:40 p.m. and returned its verdicts of guilt at 9:45 p.m. (T 1213-15).

In the penalty phase, the state called court operations supervisor Hanzelon, who testified that, in case number 84-1551-CF, Miller had been convicted of armed robbery and received a five-and-a-half year prison sentence (T 1224-26). The state also called Fertgus, who testified that the prints contained in case number 84-1551-CF matched the prints he took from Miller in January 1995 (T 1233). The state then called Detective Goodbred, who testified regarding the details of Miller's 1984 armed robbery conviction (T 1236-45). The state then rested, and defense counsel informed the trial court that he would be calling no witnesses (T 1250). The jury began deliberations at 1:55 p.m. and returned its 12-0 death recommendation at 2:32 p.m. (T 1299-1300).

Prior to sentencing, the prosecutor and defense counsel both submitted sentencing memoranda (R 357-60). At the sentencing hearing, defense counsel submitted copies of Miller's school records (R 361-72; T 1310-11). Defense counsel noted that Miller had been examined by Drs. Krop and Miller (T 1312). At sentence imposition, defense counsel introduced a letter from Miller's G.E.D. instructor (T 1319). The trial court sentenced Miller to

death on the first degree murder count, finding three aggravating factors: (1) prior violent felony conviction; (2) felony murder; and (3) pecuniary gain (R 385-86; T 1321-23). The trial court found no statutory mitigation, but considered nonstatutory mitigation presented in the PSI and defense counsel's memorandum, namely, family background and abuse of Miller as a child (R 386-88; T 1326-31).

The trial court sentenced Miller to life imprisonment for the attempted murder of Jung, the two counts of armed robbery, and the armed burglary (R 378-81).[2] The trial court also imposed a three year minimum mandatory sentence on the attempted murder charge based on the use of a firearm (R 382). The trial court entered a written order of departure from the sentencing guidelines, listing as its reasons for departure the unscored capital conviction and the excessive physical trauma to the victims and force used in committing the robbery (T 390).

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[2] The life sentence in count two was to run consecutively to the death sentence imposed in count one; the sentences in counts three through five were to run concurrently to one another, but consecutively to the sentence imposed in count two (R 391).

## SUMMARY OF THE ARGUMENT

Issue One: The trial court did not abuse its discretion in considering, but not finding, mitigating circumstances. Defense counsel argued for the applicability of only two nonstatutory mitigating factors, which the trial court fully considered. Furthermore, the trial court considered the reports of Drs. Krop and Miller, the PSI, the school records, and the letter from Miller's G.E.D. teacher.

Issue Two: Because defense counsel failed to object to the prosecutor's mercy comment during penalty phase closing argument, this issue is not preserved for appellate review, and Miller cannot prove fundamental error to escape this bar. In any event, any error on this point was harmless based on a full contextual record review.

Issue Three: Because Miller cannot show that the trial court even considered the victim impact statement written by Jung, the Court should refuse to consider the merits of this issue. Even if the trial court did consider the statement, it is clear that such a statement was within the boundaries noted by the statute and approved by this Court.

Issue Four: Miller's death sentence -- based on three aggravating factors and two nonstatutory mitigating factors -- is

proportionate to similar cases in which this Court has upheld death sentences.

Issue Five: The trial court did not abuse its discretion in considering all mitigation presented by Miller, but finding only two nonstatutory mitigating circumstances. The trial court fully complied with Campbell, and within its discretion, concluded that the aggravating circumstances outweighed the mitigating.

Issue Six: This Court should decline to reach this issue concerning the effectiveness of defense counsel in the penalty phase. This Court's caselaw has made clear that the appropriate vehicle for such claims are postconviction motions, and Miller can meet neither exception to this rule.

## ARGUMENT

### Issue One

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN CONSIDERING, BUT NOT FINDING, MITIGATING CIRCUMSTANCES.

It is within a trial court's discretion to determine whether a mitigating circumstance has been established, and the court's decision in this regard will not be reversed merely because an appellant reaches a different conclusion. Lucas v. State, 613 So. 2d 408 (Fla. 1992). Moreover, whether a mitigating factor has been established is a question of fact, and a trial court's findings are presumed correct and will be upheld if supported by the record. Campbell v. State, 571 So. 2d 415 (Fla. 1990). In this case, the trial court did not abuse its discretion in fully considering and weighing all evidence of mitigation, and finding some evidence and rejecting other. Miller's arguments on appeal constitute nothing more than his disagreement with these findings, and accordingly, should be rejected by this Court. Stano v. State, 460 So. 2d 890, 894 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985).

Although defense counsel did not call any witnesses in the penalty phase, he made the following argument in closing to the jury:

Let me tell you a little bit about Mr. Miller. Willie Miller was born March 27, 1960 in Jacksonville, Florida. Now he comes from a family of about 11 other sisters and brothers, big family. His mother -- he never really knew his father and he never stayed that much with his mother because his mother moved out of this town at a young -- while he was -- at a young age.

Now Mr. Miller also had a twin. In his youth, in his young years he was passed around from brother to sister, aunts and everybody. There was no stability. By the time he reached the eighth grade, you know, he had dropped out of school.

There was no father around, no stability in the family. I mean there was no father around to play football with him or take him to the park to catch the ball or take him to a ball game or not father to buy him a bicycle, show him to ride a bicycle on Christmas morning. He didn't have that.

He was just pushed around and usually when that happens what sociological fact that the -- that particular child may go out and what, find the peer pressure a little stiff out there in the streets and therefore will merge with those individuals in the street and have a bondage [sic] with them. They also at age 11 or 12 as I indicated had a twin and his twin died but was physically abused so he has had a lot of serious problems.

Now do you say because he doesn't have any stability, he didn't have a good home life, he didn't have a father to help him out and counsel him or direct him or family to direct him kill him, just wipe him off the books based on that?

> What do you do, Pontious [sic] Pilate and wash your hands on it and just let it happen or you say well an eye for an eye and when some great philosopher, spiritual person is saying turn the other cheek. Is that the way you do it? No. One death doesn't justify another death, and I know that and everybody knows that.

(T 1291-93).

In his written sentencing memorandum, defense counsel argued in mitigation that

> the defendant was 12 years of age when he witnesse[d] the physical abuse of his twin at the hands of his mother and the twin['s] subsequent death. The defendant never had the benefit of being raised by both parents. The defendant was duly transferred from one relative to the other. The defendant was denied the benefit of being raised as a child.

(R 359-60).

As the trial court's written sentencing order clearly evidences, the trial court fully considered the nonstatutory mitigation posited by Miller, i.e., family background and abuse of Miller (R 387). See Appendix. The trial court recounted the evidence offered in support of these two factors (R 387-88).[3] The trial court observed that no evidence had been presented in support

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[3] Miller's claims that the trial court gave this evidence "short shrift" and that the order was "vague and cursory" are flatly refuted by the record and the attached appendix. Initial Brief at 9.

of any statutory mitigating factors (R 386); that school records indicated only that Miller "had a difficult time in performing as a student, and that he was a disciplinary problem while attending school"; that Dr. Miller reported that Miller was not insane at the time of the offense or incompetent to stand trial; and that Dr. Krop had found Miller was malingering to avoid responsibility but was capable of assisting his attorney (R 388).

The presentence investigation report reflects that Miller completed the 5th grade; that Miller never knew his father; that he was raised primarily by an aunt; that he developed behavioral problems when he lived with his mother after age 11; that Miller constantly ran away from home and became involved with "less than desirable individuals"; that Miller's mother beat Miller's twin to death in Miller's presence; that Miller entered a juvenile delinquency facility at age 13; that Miller has many brothers and sisters; that Miller claims no physical or emotional problems; that Miller changed residences many times after age 11; that Miller reported that he drinks alcoholic beverages whenever they are available; that he tried marijuana first at the age of 10; that he first used powder cocaine at the age of 20 and is addicted; and that Miller has never tried crack cocaine or drug treatment.

Dr. Miller's 1993 report opined that Miller was competent to proceed with trial and was not insane at the time of the offenses. Dr. Miller concluded:

> Mr. Miller will provide a challenge for his attorney. The patient does not have a mental disorder per se, b[u]t a personality at this point in time will serve him in the use of passive aggressive mechanisms. His negativism and his refusal to cooperate are the only means which he has available to him at the present time to remind him that he has any control whatsoever over his destiny. Though this, indeed, is self-defeating behavior, it does not originate on the basis of a mental disease or disorder but of a characterologic problem which in many ways is even more of an obstacle to successful adaptation than the former. No treatment is indicated, but a great deal of time and patience will be required.

(R 25).

Dr. Krop's 1994 evaluation revealed conflicts between Miller and defense counsel and inappropriate courtroom behavior (R 44). Despite Miller's complaints of depression, auditory and visual hallucinations, and suicidal ideation, Dr. Krop found Miller resistant to completing psychological tests, deliberate in answering questions incorrectly, and generally coherent, logical, and goal directed in his thinking (R 45-46). Additionally, "[a] test utilized to rule out malingering was administered and the Defendant's responses to this assessment procedure strongly

suggested that he was attempting to exaggerate symptomatology and give an appearance of limited intellectual ability." (R 46). See also id. ("Mr. Miller is malingering in order to avoid responsibility."). Dr. Krop concluded that Miller was legally competent to proceed, but offered no opinion as to sanity based on Miller's refusal to discuss his involvement in the instant offenses (R 46).

Miller first claims that the trial court erred in considering only two nonstatutory mitigating factors and abused its discretion in not giving these factors enough weight. Initial Brief at 9. The record makes clear, however, that the trial court considered all mitigation. Furthermore, the written sentencing order reflects that, while the trial court considered these factors, it decided, within its discretion, to afford them little weight. Dougan v. State, 595 So. 2d 1, 5 (Fla. 1992) ("Deciding whether particular mitigating circumstances have been established and, if established, the weight afforded it lies with the trial court, and a trial court's decision will not be reversed because an appellant reaches the opposite conclusion.").

Miller also claims that his dull intelligence, substance abuse, low IQ, and mental retardation all point to statutory mitigation. Initial Brief at 11-12. This argument, however,

assumes Miller has no responsibility for presenting mitigation. Case law from this Court holds to the contrary. Lucas, 613 So. 2d at 410; Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978) ("It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not . . . ."). Had Miller considered these mitigating factors so noteworthy during the penalty phase, he had every opportunity to present additional evidence in support of them. In any event, to the extent that these factors existed, the trial court considered them via the school records, the PSI, and the medical reports.

Regarding retardation, intelligence, and low IQ, it is important to recognize that, while the school records refer to retardation, they

> didn't say that [Miller] was quote retarded or that he had any kind of organic disfunction or his brain didn't work, just rather that he was functioning in that retarded intellectual level and where they get that from is the plain fact he just . . . couldn't do the work because he never tried to do the work. He never applied himself.

(T 1315). Compare Martin v. State, 515 So. 2d 189 (Fla. 1987); Martin v. State, 455 So. 2d 370 (Fla. 1984). The school records also show that Miller did not accept responsibility for his

actions, was mean, could not get along with others, and was a bully (R 361-72).[4] See also (T 1315). These records, prepared in 1977 when Miller was 17 years old (T 1313), also conflict with the more recent reports provided by Drs. Miller and Krop, who found no evidence of retardation or any mental impairment.

Regarding substance abuse, the school records mentioned only that Miller, on the day of testing, "smelled rather strongly of alcohol and his eyes were somewhat bloodshot" (R 362). They do not refer to a longstanding problem. Miller, however, told the PSI preparer that he drinks alcoholic beverages when they are available, began using marijuana when he was 10 years old, began using powdered cocaine when he was 20, and was addicted to powdered cocaine (R 388). Critically, there is no report that he was drunk or high at the time of the instant offenses. See Cook v. State, 542 So. 2d 964, 971 (Fla. 1989). Under such circumstances, the trial court committed no error in considering, but not finding, this mitigating circumstance. See Duncan v. State, 619 So. 2d 279,

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[4] One record also referred to Miller's ability to bathe himself unaided, care for himself at the table, make minor purchases, go about his hometown freely, care for himself and others, play difficult games, and exercise complete care in dressing himself (R 366).

283-84 (Fla. 1993); Mason v. State, 438 So. 2d 374, 379 (Fla. 1983).

Miller also argues that the trial court improperly weighed the aggravating circumstances against the mitigating circumstances. Initial Brief at 14. First, Miller alleges that the prior violent felony aggravating factor was based upon a remote, insignificant felony. Initial Brief at 13. Detective Goodbred testified that, on June 27, 1984, Miller entered a convenience store, asked one of the clerks for change, pulled a gun, and demanded the money from the cash register (T 1237). Miller also demanded the money from the safe, but there was none (T 1237). Miller left with $160.00 (T 1237).

Although Miller would have this Court focus solely on the facts that the robbery occurred in 1984, no one was hurt during this robbery, and less than $200.00 was stolen (T 1245-47), the glaring fact remains -- this crime was a prior violent felony conviction within the meaning of **Fla. Stat.** § 921.141(5)(b) (1993). See Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992) (because statute is silent as to time, even remote conviction may be considered in aggravation); Thompson v. State, 558 So. 2d 416 (Fla. 1989), cert. denied, 109 L. Ed. 2d 521 (1990) (1950 rape conviction not too remote to be considered in aggravation, because statute is silent

as to time); Melendez v. State, 498 So. 2d 1258 (Fla. 1986) (prior armed robbery could be considered in aggravation, despite fact that it was 10 years old). Certainly, the trial court and jury heard the circumstances surrounding the armed robbery and could have found that "the circumstances surrounding that conviction mitigate[d] the significant weight that such a previous conviction would normally carry." Chaky v. State, 651 So. 2d 1169, 1173 (Fla. 1995). However, the violent nature of this prior felony -- pulling an armed weapon on unarmed convenience store clerks -- and its similarity to the instant offenses clearly and justifiably carried a great deal of weight. See Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977) ("the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.").

## Issue Two

WHETHER THE PROSECUTOR IMPROPERLY ARGUED AGAINST MERCY IN THE PENALTY PHASE.

Miller complains that the prosecutor's mercy argument in penalty phase closing arguments rendered his sentencing proceeding fundamentally unfair. Initial Brief at 16. Initially, this Court should be aware that the record shows that, after the state made its argument concerning mercy, defense counsel registered no objection (T 1284-85). Accordingly, Miller failed to preserve this issue for appellate review and this Court should deem it procedurally barred. Nixon v. State, 572 So. 2d 1336 (Fla. 1990); Rose v. State, 461 So. 2d 84 (Fla. 1984). Compare Hodges v. State, 595 So. 2d 929, 933-34 (Fla. 1992) (prosecutor's argument that defendant made choice of life or death for victim improper, but not objected to); contrast Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989) (defense counsel objected to, and moved for a mistrial after, each improper prosecutorial comment; this Court held the cumulative effect of all the prosecutor's improper comments, which included a plea for the jury to show Rhodes the same mercy as he had shown the victim, required reversal).

Admittedly, the merits of this type of claim may be considered by this Court without objection if Miller can prove fundamental

error, i.e., error which goes to the foundation of the case. Clark v. State, 363 So. 2d 331, 333 (Fla. 1978). However, this Court consistently has recognized that wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982). The control of comments made to the jury is within the trial court's discretion, and will not be disturbed on appeal absent a showing of abuse of discretion. Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990), cert. denied, 114 L. Ed. 2d 471 (1991).

A review of the record in this case shows that the prosecutor's comment in context did not constitute fundamental error. Specifically, the record reveals that the prosecutor's mercy comment was very limited in nature, constituting one paragraph (two sentences) of transcript (T 1284). Additionally, the record shows that this comment was in direct response to defense counsel's proposed mitigation instruction, which addressed mercy as a mitigating factor (R 344; T 1259-60). Because Miller cannot prove fundamental error, this Court should decline to reach the merits of this unpreserved issue. Davis v. State, 461 So. 2d 67, 71 (Fla. 1984), cert. denied, 473 U.S. 913 (1985).

In any event, a full review of the record supports a conclusion that any error was harmless beyond a reasonable doubt.

Evidence clearly established that Miller had entered the Jung store with his nephew Fagin; Miller shot Wallace, the security guard, between the eyes with a .22 rifle Miller brought with him; Fagin took Wallace's gun and Miller and Fagin both approached the counter; Fagin shot Jung the store operator; Miller came behind the counter and told Jung to open the register or he would shoot Jung again; Miller took the money from the drawer (T 512, 516-22, 622, 625, 670-72, 675, 714, 737, 769, 793-818). Thus, this record establishes "to a moral certainty" that Miller killed Wallace for financial gain, and there is no reasonable possibility the 12-0 jury recommendation for death (R 351) would have been different had this error not occurred.

Similarly, in Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), this Court held that the prosecutor's argument "asking the jury to show Richardson as much pity as he showed his victim" was error. However, this Court conducted a harmless error analysis under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), and concluded:

> [I]n light of the entire record, the error is harmless beyond a reasonable doubt. This record establishes to a moral certainty that Richardson killed Newton, and there is no reasonable possibility the verdict would have been different in absence of this error.

604 So. 2d at 1109. See also Drake v. Kemp, 762 F. 2d 1449 (11th Cir. 1985) (finding error in the mercy comments, the court proceeded to examine the record to determine whether there was a reasonable possibility that they caused the death verdict).

## Issue Three

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN CONSIDERING VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE.

The trial court has wide discretion in the admission of evidence in the penalty phase. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). Accordingly, a trial court's decisions in this regard will not be overturned absent a showing of abuse of discretion. Id. Miller can show no abuse by the trial court in this regard, as he cannot show that the trial court admitted, or even considered, the victim impact statement in imposing sentence.

The record makes clear that, although the state filed a victim impact statement concerning Wallace (written by Jung) (R 343), the state presented no evidence of victim impact to the jury, and the trial court did not admit the written statement (T 1260). Further, at sentencing, the trial court and the parties never mentioned the statement (T 1319-37).[5] Accordingly, Miller's claim that the trial court "must be assumed" to have considered it, Initial Brief at 18,

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[5] The only "statement" mentioned at sentencing was a note from Miller's adult studies instructor, who related that Miller was enrolled in the G.E.D. program; his attendance was "great" and his performance "increasing"; and that it had been a pleasure working with Miller (T 1319).

is nothing more than rank speculation. Under Florida law, it is Miller's responsibility to make error ***apparent*** from the record. Conley v. State, 338 So. 2d 541, 542 n.1 (Fla. 4th DCA 1976). Because Miller has failed to do so, this Court should refuse to address this issue.

In any event, even if it can be said that the trial court considered the victim impact statement in imposing the death sentence, Miller can show no error. Section 921.141(7), Florida Statutes (1993), permits the sentencer to hear evidence which will aid it in "ascertain[ing] whether the ultimate penalty is called for" in a particular case. Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977). Accordingly, "[a] state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Payne v. Tennessee, 115 L. Ed. 2d 720, 736 (1991). See also id. at 735 ("Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . ."). Most importantly, this Court has upheld the consideration of this type of evidence. See Windom v. State, 656 So. 2d 432 (Fla. 1995); Stein v. State, 632 So. 2d 1361 (Fla. 1994).

Jung's statement presented a brief history of Wallace's positive influence on his family, friends, neighbors, and community. Certainly, within the meaning of section 921.141(7), the statement contained brief humanizing remarks which demonstrated Wallace's "uniqueness as an individual human being and the resultant loss to the community's members" by his death.

## Issue Four

WHETHER MILLER'S DEATH SENTENCE IS PROPORTIONATE TO SIMILAR CASES IN WHICH THIS COURT AFFIRMED THE DEATH SENTENCE.

In reviewing a death sentence, this Court "looks to the circumstances revealed in the record in relation to those present in other death penalty cases to determine whether death is appropriate." Watts v. State, 593 So. 2d 198 (Fla. 1992). Miller's death sentence is proportionate to death sentences affirmed by this Court in other cases involved similar facts and a similar balance of aggravating and mitigating circumstances.

The trial court found three aggravating circumstances -- prior violent felony conviction (armed robbery with a firearm in 1984); felony murder (instant murder committed during the course of a burglary); and pecuniary gain (R 385). The trial court found no statutory mitigation, but considered and found two nonstatutory mitigating factors -- family background and abuse (R 387-88).

This Court has affirmed death sentences in similar cases. See Gunsby v. State, 574 So. 2d 1085 (Fla. 1991) (Gunsby shot grocery store clerk; three aggravating circumstances -- cold, calculated, and premeditated, prior violent felony conviction, and under sentence of imprisonment; statutory mitigating factor of mild retardation); LeCroy v. State, 533 So. 2d 750 (Fla. 1988) (LeCroy

shot campers during robbery; three aggravating factors -- prior violent felony conviction, committed during a robbery, and committed to avoid arrest; two statutory mitigating factors -- age and no significant criminal history; various nonstatutory mitigation); Remeta v. State, 522 So. 2d 825 (Fla. 1988) (Remeta shot store clerk during robbery; four aggravating factors -- prior violent felony conviction, committed during a robbery, committed to avoid arrest, and cold, calculated and premeditated; various mitigation); Preston v. State, 607 So. 2d 404 (Fla. 1991) (Preston killed store clerk; four aggravating factors -- committed during a kidnaping, committed to avoid arrest, pecuniary gain, and heinous, atrocious, or cruel; statutory mitigating factor of age; minimal nonstatutory mitigation); Deaton v. State, 480 So. 2d 1279 (Fla. 1985) (Deaton killed victim during robbery; three aggravating factors -- heinous, atrocious, or cruel, committed during a robbery, and cold, calculated, and premeditated; no mitigation); White v. State, 446 So. 2d 1031 (Fla. 1984) (White shot and killed one victim, and shot and paralyzed another victim, in grocery store robbery; three aggravating circumstances -- committed during robbery and pecuniary gain (merged); cold, calculated and premeditated; and prior violent felony conviction based on contemporaneous attempted murder; no mitigation); Maxwell v. State,

443 So. 2d 967 (Fla. 1983) (Maxwell and codefendant robbed golfers and shot and killed one victim; two aggravating circumstances -- prior violent felony conviction and committed during robbery;[6] no mitigation).

[6] This Court struck three aggravating factors -- pecuniary gain, heinous, atrocious or cruel, and cold, calculated and premeditated.

## Issue Five

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN CONSIDERING MITIGATION PRESENTED BY MILLER, BUT FINDING ONLY TWO NONSTATUTORY MITIGATING FACTORS.

It is within a trial court's discretion to determine whether mitigating circumstances have been established, and the court's decision in this regard will not be reversed simply because an appellant reaches a different conclusion. Lucas v. State, 613 So. 2d 408 (Fla. 1992). Moreover, whether a mitigating factor has been established is a question of fact, and a trial court's findings are presumed correct and will be upheld if supported by the record. Campbell v. State, 571 So. 2d 415 (Fla. 1990). In this case, the trial court did not abuse its discretion in fully considering and weighing all evidence of mitigation, and finding some evidence and rejecting other.

Miller stakes his claim on Campbell, asserting that it required the trial court here to find every proposed factor. Initial Brief at 22. Miller, however, misreads Campbell. Campbell requires a sentencing court to "expressly evaluate in its written order each mitigating circumstance ***proposed by the defendant*** to determine whether it is supported by the evidence and whether . . . it is truly of a mitigating nature." 571 So. 2d at 419 (emphasis

supplied). Campbell then requires the sentencing court to find as mitigation each factor that is "mitigating in nature ***and has been reasonably established by the greater weight of the evidence.***" Id. (emphasis supplied & footnotes omitted).

The trial court fully complied with Campbell in this case. Its written order makes clear that the court evaluated and considered each mitigating circumstance proposed by Miller -- abuse and family background. Compare Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995); Armstrong v. State, 642 So. 2d 730, 739 (Fla. 1994). The court observed that Miller had not presented any evidence in support of statutory mitigation. The court also considered mitigation contained in Miller's school records, presented by Miller at the sentencing hearing (T 1310), the PSI, and the evidence of mental state presented through the testimony of Drs. Krop and Miller. The court then weighed the aggravating circumstances against the mitigation, "[b]eing ever mindful that human life is at stake in this case," and concluded within its discretion that the aggravation outweighed the mitigation (R 388).

## Issue Six

WHETHER MILLER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE.

As this Court is very aware, claims of ineffective assistance of counsel are generally not reviewable on direct appeal, but are properly raised in a motion for postconviction relief. Kelley v. State, 486 So. 2d 578, 585 (Fla.), cert. denied, 479 U.S. 871 (1986); Perri v. State, 441 So. 2d 606 (Fla. 1983); State v. Barber, 301 So. 2d 7 (Fla. 1974). The reasons for this rule are because the trial court has not had the opportunity to consider the issue below, and the issue often involves collateral questions of fact that cannot be determined from the record on appeal.

Nevertheless, there are two exceptions to this rule. The first exists when defense counsel's failure to prepare was brought about by the speed in which the case went to trial, not by trial counsel's dilatory actions. See Valle v. State, 394 So. 2d 1004 (Fla. 1981). The second arises when the record on appeal is sufficient to allow determination of an effectiveness claim. Kelley, 486 So. 2d at 585. Although Miller has failed to identify the exception under which he seeks relief, it is apparent that the first exception does not apply.

Miller assumes counsel's incompetence in his assertion that "the defense presented absolutely no evidence of mitigation to the jury at penalty phase." Initial Brief at 23. To the contrary, defense counsel argued that the jury should consider Miller's family background in his closing argument. Furthermore, defense counsel presented Miller's school records at the sentencing hearing (T 1310) and a letter from Miller's G.E.D. instructor (T 1319). In its sentencing memorandum, the state addressed the mitigation argued by defense counsel (R 357). In his responding memorandum, defense counsel not only argued against the aggravating circumstances (R 359), but argued in support of mitigation (R 359-60).

The fact that counsel did not call any witnesses in the penalty phase does not equate with incompetence. Counsel was obviously aware of the mitigation, based on his written and oral arguments. Any numbers of scenarios could address the lack of penalty phase witnesses, i.e., a strategic choice based upon Miller's lengthy criminal history, as related in the PSI; Miller's "resistant" nature, as evidenced by the PSI, school records, and reports from Drs. Krop and Miller; his family's refusal to testify on Miller's behalf; or the inability to secure favorable expert witness testimony. However, this is conjecture at best, and fully

supports the reason why ineffectiveness claims must be developed in the trial court.

Miller's citation to Sochor v. State, 580 So. 2d 595 (Fla. 1991), Initial Brief at 25, is affirmatively misleading, as Sochor does not hold that ineffectiveness claims are properly raised on direct appeal when the trial was so unfair as to result in fundamental error. Initial Brief at 25. Sochor does not deal with ineffectiveness claims, and simply reviewed the fundamental error doctrine.

In any event, the state proved beyond a reasonable doubt that Miller killed Wallace during a robbery/burglary of the Jung store, that Miller killed Wallace so that his plan to rob could be effectuated, that Jung was shot in Miller's presence, and that Miller had a prior violent felony conviction. Although there was very little defense counsel could do in the face of such overwhelming, compelling evidence, defense counsel undertook effective cross examination of witnesses, argued for a judgment of acquittal, presented whatever mitigation could be found, and argued strenuously for a life recommendation. Defense counsel appeared prepared for both the guilt and penalty phases, having been Miller's lawyer since February 1994 (T 81). In the year preceding

the February 1995 trial,[7] defense counsel took depositions (T 83, 85), and filed and argued a number of guilt and penalty phase motions (R 68-232; T 152-97).

[7] Jury selection began on February 21, 1995 (T 189, 197).

## CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Miller's convictions and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
Assistant Attorney General
Florida Bar #0797299

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Bill Salmon, Esq., Post Office Box 1095, Gainesville, Florida 32601, this 14th day of June, 1996.

GYPSY BAILEY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

WILLIE B. MILLER,

Appellant,

v. Case #: 85,744

STATE OF FLORIDA,

Appellee.

_____/

**APPENDIX**

Judgments of Convictions & Sentences

_____ Probation Violator

_____ Community Control Violator

_____ Retrial

_____ Resentence

In the Circuit Court, Fourth Judicial Circuit,
in and for Duval County, Florida
Division CR-B
Case Number 93- 8494-CF-A

State of Florida
v
WILLIE B MILLER
Defendant

FILED
APR 28 1995
CLERK CIRCUIT COURT

# JUDGMENT

The defendant, WILLIE B MILLER, being personally before this court represented by Charlie Adams, the attorney of record, and the state represented by Steve Bledsoe, and having

✓ been tried and found guilty by jury/by court of the following crime(s)

____ entered a plea of guilty to the following crime(s)

____ entered a plea of nolo contendere to the following crime(s)

| Count | Crime | Offense Statute Number(s) | Degree of Crime | ~~Case~~ Number | OBTS Number |
|---|---|---|---|---|---|
| -1- | Murder in the First degree | 782.04(1)(A) | Capital-Felony | | |
| -2- | Attempted First Degree Murder | 782.04(1)(A) 775.087 | 1 pbl | | |
| -3- | Armed Robbery | 812.13-3 | 1 pbl | | |
| -4- | Armed Robbery | 812.13-3 | 1 pbl | | |
| -5- | Armed Burglary | 810.02(2) | 1 pbl | | |
| | | | | | |
| | | | | | |
| | | | | | |

✓ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED that the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

____ and pursuant to section 943.325, Florida Statutes, having been convicted of attempts or offenses relating to sexual battery (ch. 794) or lewd and lascivious conduct (ch. 800) the defendant shall be required to submit blood specimens.

____ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

State of Florida
v.

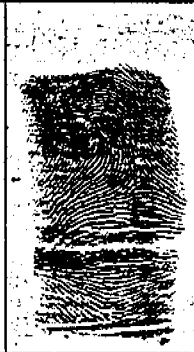
WILLIE B MILLER
Defendant

Case Number 93- 8494-CF-A

Imposition of Sentence ____
Stayed and Withheld
*(Check if Applicable)*

The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation/community control for a period of _____ under the supervision of the Department of Corrections (conditions of probation/community control set forth in separate order.)

## FINGERPRINTS OF DEFENDANT

| 1. Right Thumb | 2. Right Index | 3. Right Middle | 4. Right Ring | 5. Right Little |
|---|---|---|---|---|
|  |  |  |  |  |
| 6. Left Thumb | 7. Left Index | 8. Left Middle | 9. Left Ring | 10. Left Little |
|  |  |  |  |  |

Fingerprints taken by: R.G. Dorsey 5756 PTLW
Name Title

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, WILLIE B MILLER, and that they were placed thereon by the defendant in my presence in open court this date.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 26th day of APR, 19 95.

William Q. Willis
Judge

STATE OF FLORIDA
v
WILLIE B MILLER
Defendant

In the Circuit Court, Fourth Judicial Circuit,
in and for Duval County, Florida
Division CR-B
Case Number 93- 8494-CF-A

## CHARGES/COSTS/FEES

The defendant is hereby ordered to pay the following sums if checked:

✓ $50.00 pursuant to section 960.20, Florida Statutes (Crimes Compensation Trust Fund).

✓ $3.00 as a court cost pursuant to section 943.25(3), Florida Statutes (Criminal Justice Trust Fund).

___ $2.00 as a court cost pursuant to section 943.25(13), Florida Statutes (Criminal Justice Education by Municipalities and Counties).

___ A fine in the sum of $ _____ pursuant to section 775.0835, Florida Statutes. (This provision refers to the optional fine for the Crimes Compensation Trust Fund and is not applicable unless checked and completed. Fines imposed as a part of a sentence to section 775.083, Florida Statutes are to be recorded on the sentence page(s).)

___ $20.00 pursuant to section 939.015, Florida Statutes (Handicapped and Elderly Security Assistance Trust Fund).

___ A 10% surcharge in the sum of $ _____ pursuant to section 775.0836, Florida Statutes (Handicapped and Elderly Security Assistance Trust Fund).

✓ A sum of $ 200.00 pursuant to section 27.3455, Florida Statutes (Local Government Criminal Justice Trust Fund).

___ A sum of $ _____ pursuant to section 939.01, Florida Statutes (Prosecution/Investigative Costs).

___ A sum of $ _____ pursuant to section 27.56, Florida Statutes (Public Defender Fees).

___ Restitution in accordance with attached order.

___ Other _____

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 28th day of April, 19 95.

William Q. Wilkes
Judge

Defendant WILLIE B MILLER Case Number 93- 8494-CF-A BTS Number 0006336759

# SENTENCE

(As to Count 1 )

The defendant being personally before this court, accompanied by the defendant's attorney of record Adams, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

____ and the court having on _____ (date) deferred imposition of sentence until this date.

____ and the court having previously entered a judgment in this case on _____ (date) now resentences the defendant

____ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

**It Is The Sentence Of The Court That:**

____ The defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes plus $ _____ as the 5% surcharge required by 960.25, Florida Statutes.

✓ The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

**To be Imprisoned (Check one; unmarked sections are inapplicable):**

____ For a term of natural life.

✓ For a term of Death by Electrocution

____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

____ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisionment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

# OTHER PROVISIONS

**Retention of Jurisdiction** ____ The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

**Jail Credit** ✓ It is further ordered that the defendant shall be allowed a total of 1,326 days as credit for time incarcerated before imposition of this sentence.

**Prison Credit** ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

**Consecutive/ Concurrent As To Other Counts** ____ It is further ordered that the sentence imposed for this count shall run (check one) _____ consecutive to _____ concurrent with the sentence set forth in count _____ of this case.

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Defendant WILLIE B MILLER Case Number 93- 8494-CF-A BTS Number 0006336759

## SENTENCE

(As to Count 2 )

The defendant, being personally before this court, accompanied by the defendant's attorney of record C Adams, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

____ and the court having on _____ (date) deferred imposition of sentence until this date.

____ and the court having previously entered a judgment in this case on _____ (date) now resentences the defendant

____ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

**It Is The Sentence Of The Court That:**

____ The defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes plus $ _____ as the 5% surcharge required by 960.25, Florida Statutes.

✓ The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

**To be Imprisoned (Check one; unmarked sections are inapplicable):**

✓ For a term of natural life.

____ For a term of _____.

____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

____ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisionment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

## OTHER PROVISIONS

**Retention of Jurisdiction**

____ The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

**Jail Credit**

✓ It is further ordered that the defendant shall be allowed a total of 0 days as credit for time incarcerated before imposition of this sentence.

**rison Credit**

____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

**Consecutive/ Concurrent As To Other Counts**

✓ It is further ordered that the sentence imposed for this count shall run (check one) ✓ consecutive to _____ concurrent with the sentence set forth in count 1 of this case.

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Defendant WILLIE B MILLER Case Number 93- 8494-CF-A OBTS Number 0006336759

## SENTENCE

(As to Count 3 )

The defendant, being personally before this court, accompanied by the defendant's attorney of record C. Adams, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

____ and the court having on _____ (date) deferred imposition of sentence until this date.

____ and the court having previously entered a judgment in this case on _____ (date) now resentences the defendant

____ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

**It Is The Sentence Of The Court That:**

____ The defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes plus $ _____ as the 5% surcharge required by 960.25, Florida Statutes.

✓ The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

**To be Imprisoned (Check one; unmarked sections are inapplicable):**

✓ For a term of natural life.

____ For a term of _____

____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

____ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisionment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

## OTHER PROVISIONS

**Retention of Jurisdiction** ____ The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

**Jail Credit** ✓ It is further ordered that the defendant shall be allowed a total of 0 days as credit for time incarcerated before imposition of this sentence.

**Prison Credit** ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

**Consecutive/ Concurrent As To Other Counts** ✓ It is further ordered that the sentence imposed for this count shall run (~~check one~~) ✓ consecutive to ____ concurrent with the sentence set forth in count ~~C+2~~ of this case.

Defendant WILLIE B. MILLER Case Number 93-8494 CF BTS Number

# SENTENCE

(As to Count 4 )

The defendant, being personally before this court, accompanied by the defendant's attorney of record C Adams, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

____ and the court having on _____ (date) deferred imposition of sentence until this date.

____ and the court having previously entered a judgment in this case on _____ (date) now resentences the defendant

____ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

**It Is The Sentence Of The Court That:**

____ The defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes plus $ _____ as the 5% surcharge required by 960.25, Florida Statutes.

✓ The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

**To be Imprisoned (Check one; unmarked sections are inapplicable):**

✓ For a term of natural life.

____ For a term of _____

____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

____ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisionment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

# OTHER PROVISIONS

**Retention of Jurisdiction** ____ The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

**Jail Credit** ✓ It is further ordered that the defendant shall be allowed a total of 0 days as credit for time incarcerated before imposition of this sentence.

**rison Credit** ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

**Consecutive/ Concurrent As To Other Counts** ✓ It is further ordered that the sentence imposed for this count shall run (~~check one~~) ✓ consecutive to ~~concurrent~~ with the sentence set forth in count 3 of this case.

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Defendant WILLIE B. MILLER Case Number 93-8494 CF BTS Number

# SENTENCE

(As to Count 5 )

The defendant being personally before this court, accompanied by the defendant's attorney of record C. Adams, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

____ and the court having on _____ (date) deferred imposition of sentence until this date.

____ and the court having previously entered a judgment in this case on _____ (date) now resentences the defendant

____ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control.

**It Is The Sentence Of The Court That:**

____ The defendant pay a fine of $ _____, pursuant to section 775.083, Florida Statutes plus $ _____ as the 5% surcharge required by 960.25, Florida Statutes.

✓ The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

**To be Imprisoned (Check one; unmarked sections are inapplicable):**

✓ For a term of natural life.

____ For a term of _____

____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

____ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisionment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

# OTHER PROVISIONS

**Retention of Jurisdiction** ____ The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

**Jail Credit** ✓ It is further ordered that the defendant shall be allowed a total of 0 days as credit for time incarcerated before imposition of this sentence.

**Prison Credit** ____ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

**Consecutive/ Concurrent As To Other Counts** ✓ It is further ordered that the sentence imposed for this count shall run (~~check one~~) ✓ consecutive to ~~concurrent~~ with the sentence set forth in count 24 of this case.

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Defendant WILLIE B. MILLER Case Number 03-8494 CF

## SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

| | | |
|---|---|---|
| Firearm | ✓ | It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count. (COUNT TWO) |
| Drug Trafficking | ___ | It is further ordered that the _____ mandatory minimum imprisonment provisions of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count. |
| Controlled Substance Within 1,000 Feet of School | ___ | It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count. |
| Habitual Felony Offender | ___ | The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court. |
| Habitual Violent Felony Offender | ___ | The Defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court. |
| Law Enforcement Protection Act | ___ | It is further ordered that the defendant shall serve a minimum of ____ years before release in accordance with section 775.0823, Florida Statutes. |
| Capital Offense | ___ | It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes. |
| Short-Barreled Rifle, Shotgun, Machine Gun | ___ | It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count. |
| Continuing Criminal Enterprise | ___ | It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count. |

Defendant WILLIE B MILLER Case Number 93- 8494-CF-A

## OTHER PROVISIONS

**Consecutive/ Concurrent As To Other Convictions**

____ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) ____ consecutive to ____ concurrent with the following: (check one)

____ any active sentence being served.

____ specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Duval County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends _____

DONE AND ORDERED in open court at Jacksonville, Duval County, Florida, this 28th day of April, 1995.

William Q. Williams

Judge



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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 93-8494CFA
DIVISION: CR-B

STATE OF FLORIDA

vs

WILLIE B. MILLER

FILED
APR 28 1995
CLERK CIRCUIT COURT

SENTENCING ORDER

The defendant was tried before this court commencing on February 21, 1995, and ending on February 24, 1995, at which time the jury found the defendant guilty of all five (5) counts of the Indictment. In Count I the defendant was found guilty of Murder in the First Degree of James Wallace; in Count II the defendant was found guilty of Attempted Murder in the First Degree of James Jung with the Use of a Firearm; in Count III the defendant was found guilty of Armed Robbery with a Firearm of James Jung; in Count IV the defendant was found guilty of Burglary and during the commission of the Burglary the defendant committed an Assault while using a Firearm; and in Count V the defendant was found guilty of Robbery with a Firearm against James Wallace.

On March 17, 1995, the jury re-convened for the purposes of considering aggravating factors and mitigating factors, and rendered its advisory sentence by a vote of twelve to zero with a recommendation that the defendant be sentenced to death in the electric chair. On that same date the court requested sentencing memorandums from both counsel for the state and counsel for the defense. The state's memorandum in support of imposition of the

death sentence was furnished on April 3, 1995, and the defendant's memorandum in support of a life sentence was received on April 3, 1995. On April 24, 1995, the court had a sentencing hearing where both sides presented legal arguments. The court set final sentencing for this date, April 28, 1995.

This court having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and further argument both in favor and in opposition of the death penalty finds as follows:

AGGRAVATING FACTORS:

A. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON [Florida Statute 921.141(5)(b)]

During the penalty phase the state presented testimonial and documentary evidence that this defendant was previously convicted in 1984 of the crime of Armed Robbery with a Firearm (Case No. 84-1771-CF), and sentenced to five and a half (5 1/2) years at Florida State Prison and was released on October 22, 1987.

B. THE CAPITAL CRIME WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF A BURGLARY [Florida Statute 921.141(5)(d)]

The evidence clearly established that the defendant and his sixteen year-old nephew, SAMUEL D. FAGIN, entered the Jung Lee Grocery, the property of James Jung, with the intent to commit an offense therein. The victim, James Jung, testified that the defendant was not authorized to enter the building for the purposes of committing any criminal offense. The evidence adduced at the trial proved that the defendant entered or remained in the building with the intent of committing the assault as evidenced by the shooting and killing of James Wallace and the shooting of James Jung. The defendant forcible removed money from the cash register of the Jung Lee Grocery store. This aggravating circumstance was proved beyond a reasonable doubt as evidenced by the jury verdict in Count V of the Indictment.

C. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN. [Florida Statute 921.141(5)(f)]

This aggravating circumstance was proven beyond a reasonable doubt as the evidence clearly showed that the victim, James Wallace, was shot and killed by the defendant and that the

defendant removed approximately $40.00 from the cash register of the Jung Lee Grocery store. The proof of the removal of the cash from the cash register by the defendant was further evidenced by the testimony of Jacksonville Sheriff's Office Crime Laboratory Analyst, Ronald Fertgus, who testified that the defendant's left thumb print was found inside the cash register tray. None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this court.

MITIGATING FACTORS:

A. STATUTORY MITIGATING FACTORS

There were no statutory mitigating circumstances or factors proposed or presented either by the state of by the defendant at the penalty phase. Clearly, no statutory mitigating circumstances are applicable in this case.

B. THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY [Florida Statute 921.141(6)(a)]

This mitigating circumstance does not apply as evidenced by the prior felony conviction of an Armed Robbery with a Firearm by the defendant as used or applied in the aggravating circumstance.

C. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE [Florida Statute 941.141(6)(b)]

There was no evidence presented at the trial or penalty phase that the defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the murder.

D. THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT [Florida Statute 921.141(6)(c)]

There is no evidence to support this mitigating circumstance as the victim was merely seated on a bench tending to his duties as a security guard for the grocery store at the time that he was killed by the defendant.

E. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR [Florida Statute 921.141(6)(d)]

Although there was a second defendant in this case, i.e., the defendant's nephew, SAMUEL D. FAGIN, who was sixteen at the time of the commission of the crime. The evidence was overwhelming that the defendant was the actual person who shot and killed the victim, James Wallace.

F. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON [Florida Statute 921.141(6)(e)]

There was no evidence presented either at the trial of at the penalty phase that the defendant was under extreme duress and the evidence was clear that the domination of another person was the defendant over his nephew, an accomplice, SAMUEL D. FAGIN, who was sixteen at the time of the commission of the crimes.

G. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED [Florida Statute 921.141(6)(f)

There was no evidence presented on this mitigating circumstance.

H. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME [Florida Statute 921.141(6)(g)]

The evidence shows that this defendant was 34 years of age at the time of the commission of the crime. Therefore, this mitigating circumstance is not applicable.

NON-STATUTORY MITIGATING FACTORS:

The court after the conviction of the defendant of the First Degree Murder ordered a pre-sentence investigation report prepared by the Florida Department of Corrections concerning the background of the defendant. The defendant has never testified in this court at any stage of the proceeding and any non-statutory mitigating factors were presented through the pre-sentence investigation report and/or by the memorandum supplied by the defendant's counsel. The defendant has asked the court to consider the following non-statutory mitigating factors.

1. Family background.
2. Abuse of the defendant as a child.

The defendant was born on March 27, 1960 in Jacksonville, Florida to Estelle Miller. The defendant stated in the pre-sentence investigation that he never knew his father. He was raised primarily by his aunt, Mary Powell, until the age of 11. At that time, at age 11, the defendant went to live with his mother, Estelle Miller. The pre-sentence investigation report further indicates that the defendant's sister, Elizabeth Goodman, stated that while living with his mother, the defendant developed many behavioral problems. According to Mrs. Goodman the defendant was constantly running away and becoming involved with less than desirable individuals. Mrs. Goodman further related that the defendant was 12 years old when his mother physically abused his twin brother, whom the defendant was very close, and that the abuse caused his twin brother to die. The defendant was present when the abuse occurred.

The defendant has three brothers and seven sisters, but has had very limited contact with his siblings. The defendant was not

very cooperative with the preparer of the pre-sentence investigation report so the information contained therein is rather limited. However, the defendant did report to the Department of Corrections probation specialist, Andy W. Latimer, who prepared the pre-sentence investigation report that he drinks alcoholic beverages whenever they are available and he first began to use marijuana at the age of 10. He further reported that he used powered cocaine commencing at the age of 20, and admitted that he is in fact addicted to cocaine. He further reported that he has not received any prior drug treatment. The defendant reported that his employment history has consisted of sporadic jobs through the labor pool at Tenth and Main Streets in Jacksonville, Florida. However, the defendant did not report a verifiable and previous employer.

The state attorney presented certain school records from the Duval County Board of Public Instructions which were dated April 15, 1977, at which time the defendant was in the seventh grade. Those records were presented at the sentencing hearing and marked as defendant's Exhibit "1" on April 24, 1995. A review of those records indicates that the defendant had a difficult time in performing as a student, and that he was a disciplinary problem while attending the school.

The defendant's counsel was asked by the court at the sentencing hearing on Monday, April 24, 1995, whether or not he had been examined by any medical or mental professionals. He was sent for evaluation to Dr. Harry Krop, a psychologist in Orange Park, Florida, on February 6, 1994 and was sent to Dr. Ernest Miller, a psychiatrist in Jacksonville, Florida, on November 23, 1993.

Dr. Miller's report indicated that Mr. Miller would be a challenge for his attorney, but in his opinion the defendant merits adjudication of competency to proceed and does not meet the criteria for commitment. Dr. Miller reported that the defendant was not insane at the time of the commission of the alleged crimes.

Dr. Krop found that the defendant was malingering in order to avoid responsibility, but found in his opinion that he was capable of assisting his attorney in all legal procedures. Dr. Krop's report further indicated that due to the defendant's refusal to discuss his involvement with his office an opinion regarding his sanity could not be offered at the time of his report.

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, including the non-mitigating circumstances. Being ever mindful that human life is at stake in this case. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is

**ORDERED AND ADJUDGED** that the defendant, WILLIE B. MILLER, is

hereby sentenced to death for the murder of the victim, JAMES WALLACE. The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

**DONE AND ORDERED** in Jacksonville, Duval County, Florida, this 28th day of April, 1995.

WILLIAM A. WILKES
CIRCUIT JUDGE

Copies furnished to:

Stephen V. Bledsoe
Assistant State Attorney

Charlie Adams, Esquire
Counsel for the Defendant

Mr. Willie B. Miller
Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 93-8494CFA
DIVISION: CR-B

FILED
APR 28 1995
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs

WILLIE B. MILLER

ORDER FOR DEPARTURE FROM SENTENCING GUIDELINES

The defendant came before this court today for the purposes of being sentenced as a result of a jury verdict on February 24, 1995. In addition to being convicted of First Degree Murder in which the jury recommended death (12-0), the defendant was found guilty of Attempted Murder in the First Degree of James Jung, two counts of Armed Robbery with a Firearm, and one count of Burglary with Assault While Armed.

The justification for the court's departure from the sentencing guidelines is as follows:

1. The Defendant's Unscored Convictions for First Degree Murder.

It has been well established that Departure from the guidelines is permissible because of an unscored conviction for First Degree Murder. Bunney v. State, 603 So2d 1270 (S.C. 1992)

2. Excessive Physical Trauma to the Victims, James Wallace and James Jung, and Excessive Force Used in the Armed Robbery of both victims that Resulted in the Homicide.

This Defendant used more force than was necessary to commit the two Armed Robberies. That the victim, James Wallace, clearly

suffered excessive physical trauma. The evidence is clear that the victim, James Wallace, did not provoke the Defendant in any way, and did not resist the robbery at all. The Defendant shot the victim, James Wallace, in the head for no apparent reason. In addition, the second victim, James Jung, was shot during the robbery of the Jung Lee Grocery store and he also did not resist the robbery.

It is well established both in the Florida Statutes and case law that deviation is permissible where the victims suffer excessive physical trauma because of the Defendant's excessive use of force.

Therefore, due to the above listed clear and convincing aggravating factors, this Court, pursuant to Florida Rules of Criminal Procedure 3.701, as to Count II of the Indictment, hereby sentences the defendant to a term of life in the Florida State Prison with a 3 year minimum mandatory provision for use of a firearm, to run consecutive to the death sentence that the Court previously imposed. In addition, the Court hereby sentences the defendant to a term of life on each of the remaining counts of the Indictment, III, IV and V, which are to run concurrent to one another, but consecutive to the sentence imposed in Count II.

**DONE AND ORDERED** in Jacksonville, Duval County, Florida, this 28th day of April, 1995.

WILLIAM A. WILKES
CIRCUIT JUDGE

Copies furnished to:

Ken Boston, Esquire
Assistant State Attorney

Charlie Adams, Esquire
Counsel for Defendant

Willie B. Miller
Defendant

# Rule 3.988 (j)

## SENTENCING GUIDELINES SCORESHEET

| 1. Primary Docket Number | 2. Additional Docket Numbers | 3. OBTS Number | 4. Category: ☒1 ☐2 ☐3 ☐4 ☐5 ☐6 ☐7 ☐8 ☐9 |
|---|---|---|---|
| 93-8494CF | | | |

| 5. Name (Last Name First) | 6. Date of Birth | 7. Sex: ☒M ☐F | 8. Race: ☒B ☐W ☐Other | 9. Violation ☐Prob ☐CC | 10. County |
|---|---|---|---|---|---|
| Miller, Willie B. | | | | | Duval |

| 11. Judge at Sentencing | 12. Date of Offense | 13. Date of Sentence | 14. ☐Plea ☒Trial | 15. DOC Number |
|---|---|---|---|---|
| W.A.Wilkes | 7-15-93 | | | |

OFFICE USE ONLY

POINTS

I. PRIMARY OFFENSE AT CONVICTION

| Counts | Degree | Statute | Description | |
|---|---|---|---|---|
| 1 | 1PBL | 782.04 | AH murder 1° | I. 150 |

II. ADDITIONAL OFFENSES AT CONVICTION

| Counts | Fel/Misd | Degree | Statute | Description |
|---|---|---|---|---|
| 2 | F | 1PBL | 812.13 | Armed Robbery |
| 1 | F | 1PBL | 810.02 | Armed Burglary |

THIS INSTRUMENT IS COMPUTER NHD

(Continue on Reverse) II. 58

III. A. PRIOR RECORD

| Counts | Fel/Misd | Degree | Statute | Description |
|---|---|---|---|---|
| 1 | F | 1PBL | | Armed Robbery |

(Continue on Reverse) III. A. 40

III. B. SAME CATEGORY PRIORS (categories 3, 5 and 6 only) III. B. ____

III. C. PRIOR DUI CONVICTIONS (category 1 only) II. C. ____

IV. LEGAL STATUS AT TIME OF OFFENSE

____ (1) no restrictions ____ (2) legal constraint IV. ____

V. VICTIM INJURY

Number of Scoreable Victim Injuries

Degree of Injury X

- none or no contact
- slight or contact but no penetration
- moderate or penetration
- severe or death ✓

FILED
APR 28 1995
Henry C. W. Cook
CLERK CIRCUIT COURT

V. 42

TOTAL POINTS 290

RECOMMENDED SENTENCE 22-27 PERMITTED SENTENCE 17-40

TOTAL SENTENCE IMPOSED Life imprisonment; each ct, consecutively

REASONS FOR DEPARTURE Prior unscreable capital murder; excessive force in commission of armed robbery

JUDGE W.A.Wilkes. PREPARER S.V. Bleden

**OFFICE USE ONLY**

T.S. ____ CC ____ Prob. ____

S.P. ____ C.J. ____ E.F. ____

5
29

STATE ATTORNEY NO.: 93-26720

IN THE Circuit COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR Duval COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

Willie Miller

Defendant.

CASE NO.: 93-8494 CF

DIVISION: CRB

FILED
APR 28 1995
Henry W. Cook
CLERK CIRCUIT COURT

RACE: Black DOB: 3/27/60
SEX: Male SSN:

## JUDGMENT AND RESTITUTION ORDER

[F.S. 775.089]

THIS CAUSE having come on to be heard upon the State's Motion for an Order requiring that the defendant, pursuant to Section 775.089, Florida Statutes, pay restitution costs for the benefit of the victim, herein namely:

A. Name: James Young
Address: 3331 Prather Drive
City, State, Zip: Jax, FL 32209

*B. Victim Compensation Trust Fund
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

*If Victim Compensation has compensated the victim in part or in whole, then payments shall be made and distributed first to the victim, and when fully compensated, to Victim Compensation for reimbursement.

On the evidence presented it is adjudged,

1. That the State's Motion is hereby granted and the Defendant shall pay restitution for the benefit of the above-named victim in the total sum of $33,000.00; that shall bear interest at the rate of 12% a year, for which let execution issue. Said amount is to be offset by any monies paid to the victim by responsible co-defendants.

2. Payment shall be made to the victim through the Clerk of Court (Felony or Misdemeanor as applicable). If the defendant is released from prison to supervision under the Department of Corrections, payments and disbursements shall be made through the Department for the length of such supervision. Upon completion of supervision, payments and disbursements on any outstanding balance shall be made directly through the Clerk of the Court. The Clerk of Court is authorized to collect a $2.00 fee per payment, pursuant to Section 28.24(31), Florida Statutes.

3. Payment Schedule: [Check applicable instruction(s)]

[X] Total sum shall be paid immediately.

[ ] Total sum shall be paid in installment payments of $_____, payable on a [ ] weekly [ ] monthly basis. Payments shall be applied first to interest and the balance, if any, to principal.

[ ] Other, specified schedule: _____

_____

4. (a) The Court may require that the defendant make restitution under this section within a specified period or in specified installments.

(b) The end of such period or the last such installment shall not be later than:

1. The end of the period of probation if probation is ordered;

2. Five years after the end of the term of imprisonment imposed if the Court does not order probation; or

3. Five years after the date of sentencing in any other case; or

(c) If not otherwise provided by the Court under this subsection, restitution must be made immediately.

5. If a defendant is placed on probation or paroled, complete satisfaction of any restitution ordered under this section shall be a condition of such probation or parole. The Court may revoke probation, and the Parole Commission may revoke parole, if the defendant fails to comply with such order.

6. That the Clerk of the Court shall provide to the victim named herein a copy hereof, in order for the victim to record this judgment as a lien, pursuant to Section 55.10, Florida Statutes.

DONE AND ORDERED in Jacksonville, Florida, on April 28, 1995.

_____

Judge of the Circuit Court

Copies furnished by Clerk to:

Victim

Assistant State Attorney

Defendant and/or Defense Counsel

NOTE: The victim shall notify the Clerk of the Court, in writing, of any address changes.

# STATE OF FLORIDA
# UNIFORM COMMITMENT TO CUSTODY
# DEPARTMENT OF CORRECTIONS
# FOURTH JUDICIAL CIRCUIT COURT
# DUVAL COUNTY

FALL Term, 19 94

Conviction for MURDER IN THE FIRST DEGREE (COUNT I), ATTEMPTED FIRST DEGREE MURDER (COUNT II) ARMED ROBBERY (COUNTS III, IV (Offense) AND V)

Date of conviction APRIL 28, 1995

Date of sentence imposed APRIL 28, 1995

Term of sentence DEATH BY ELECTROCUTION, WITH CREDIT FOR 1 YEAR AND 260 DAYS JAIL TIME AS TO COUNT I. LIFE, TO RUN CONSECUTIVE TO COUNT I, 3 YEAR MINIMUM MANDATORY IMPOSED, AS TO COUNT II. LIFE, AS TO COUNTS III, IV AND V, TO RUN CONCURRENT AND CONSECUTIVE TO COUNT II. CJTF 943 $3.00, CCT FUND $50.00 AND FELONY COST $200.00 IMPOSED.

STATE OF FLORIDA, Plaintiff,

vs.

CASE NO. 93-8494 CF DIV CR-B

OFFENDER NO. 93-26383-5

WILLIE B. MILLER, Defendant.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

INDICTMENT

(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Department of Corrections of the State of Florida; and this is to command you, the said Department of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Department of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable WILLIAM A. WILKES

Judge of said Court, as also HENRY W. COOK

Clerk, and the Seal thereof, this the 28TH day of APRIL, 19 95

BY: M. Dea

Deputy Clerk

(to be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)