IN THE SUPREME COURT OF FLORIDA

WILLIE B. MILLER,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO: 85,744

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, JACKSONVILLE, DUVAL COUNTY, FLORIDA

CASE NO: 93-8494-CF

MERIT BRIEF OF APPELLANT

BILL SALMON
Florida Bar No: 183833
Post Office Box 1095
Gainesville, Florida 32601
(352) 378-6076
Attorney for Appellant, MILLER

ISSUES PRESENTED

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Willie Miller is the Appellant in this capital case. The Record on Appeal consists of 24 volumes, and references to the pleadings and other matters of record will be referred to by the letter "R", while references to the transcripts will be denoted by the letter "T".

TABLE OF CITATIONS

CASES **PAGE(S)**

STATUTES

STATEMENT OF THE CASE

An Indictment in the Circuit Court in and for Duval County, Florida, filed February 2, 1994, charged Willie MILLER (hereinafter "MILLER") with the following: Count 1, Murder in the First Degree; Count 2, Attempted First Degree Murder; Count 3, Armed Robbery; Count 4, Armed Robbery; and Count 5, Armed Burglary. (R253-254).

MILLER proceeded to trial before the Honorable William Wilkes. At the close of the State's case, MILLER's Motion for Judgment of Acquittal was denied. (T1038).

After the defense rested, and the trial Court instructed the jury on the law. The jury found MILLER guilty of Counts 1, 2, 3, 4 and 5. (R320-328).

MILLER proceeded to the penalty phase of the trial, and the jury, after hearing additional testimony and argument, recommended the death sentence for MILLER. (R351). It found in aggravation:

1. Was previously convicted of a violent felony, to wit: armed robbery.

2. Committed the capital crime while engaged in, or was an accomplice in, the commission of a burglary.

3. Committed the capital felony for pecuniary gain.

(R385.)

In mitigation, the trial Court stated there was no statutory mitigation. (R386). With regard to non-statutory mitigation, the trial Court considered MILLER's family background and abuse as a child (R386), but merely mentioned evidence that MILLER was addicted to cocaine and had a difficult time performing as a student. The trial Court did not consider these latter two factors. (R388). The trial Court found that the aggravation

outweighed any mitigating circumstances. (R388), agreed with the advisory sentence, and imposed death.

As to the other convictions, the trial Court imposed the following sentences, departing from the guidelines: Count 2 - life, consecutive to the death sentence; Counts 3, 4, and 5 - life on each, concurrent to each other but consecutive to the sentence in Count 2. (R390-391).

The trial Court denied MILLER's Motion for New Trial. (R373).

This appeal follows.

STATEMENT OF THE FACTS

On July 15, 1993, Willie MILLER, then 34 years old, and his 16 year-old nephew, Samuel Fagin, entered the Jung Lee Grocery at Beaver and Acorn streets in Jacksonville. (T803-805). Previously, the two had met with Ezekiel Miller, MILLER's brother, who came up with the idea for them to rob the store. (T795). Ezekial Miller gave MILLER and Fagin a .22 caliber rifle (T794), and Ezekiel Miller and Fagin went into the store to observe the situation while MILLER remained outside. (T800-802).

Fagin testified that he and MILLER entered the store, with MILLER carrying the .22 rifle, in order to rob the store. (T803). Fagin entered first, followed by MILLER. (T805).

The store was owned by Kwong Jung and operated by his son, James Jung, the State's key witness at trial. (T501-502). Jung testified that he was in the store with his parents and the security guard employed by the store, James Wallace, at about 4:30 p.m. on July 15, 1993. (T504-505). Wallace had a holster and a .38 caliber handgun on his person. (T507).

Fagin testified that upon entering the store, MILLER put the rifle up to the face of Wallace, who was sitting on some crates. (T806). Fagin then took the .38 handgun off of Wallace's person. (T806-807). Fagin testified that he heard a gunshot and saw blood coming from Wallace's face. (T808). Fagin then shot James Jung, who was behind the counter; Fagin testified that he did so accidentally. (T824). Then, according to Fagin, MILLER took the money from the cash register. (T810). According to Jung, MILLER came behind the counter, reached into the register, pulled out the cash tray and set it on the counter. (T519). Jung said MILLER took the money out, hopped across the

counter, and then left with Fagin. (T521-522). Jung was hospitalized and recovered from his gunshot wound. (T524).

Fagin testified that he and MILLER split the money (T811-821) and sold the .38 caliber handgun to a Jamaican man, Eric "Bobby" Harrison. (T813-814). Harrison testified that he bought the gun from Fagin. (T840).

A fingerprint expert testified that a print on the cash tray belonged to MILLER. (T622). Also testifying were firearms experts and several jailhouse informants who had conversations with MILLER, relating that the Appellant shot Mr. Wallace.

The medical testimony established that Wallace developed numerous ailments during his hospitalization and eventually died on January 17, 1994. (T901). His last physician testified that he died of pneumonia and respiratory failure. (T901). The medical examiner who performed the autopsy, however, testified that Wallace's cause of death was a gunshot wound to his head. (T1030).

SUMMARY OF THE ARGUMENT

Raised in this appeal are six issues, each of which requires the vacating of Appellant MILLER's death sentence.

First, the trial Court erred in imposing the death penalty because the mitigating circumstances in MILLER's case outweighed the aggravating factors proven by the State. The evidence showed that MILLER came from an unstable family background, was abused as a child, is mentally retarded with an I.Q. of 59, and is a cocaine addict and alcohol abuser. This mitigation is strikingly heavy and clearly outweighs the three statutory aggravators, to wit: Ten-year plus old prior violent felony conviction, capital crime committed during the course of a burglary, and capital crime committed for pecuniary gain.

Second, the prosecutor made comments to the jury in closing argument of penalty phase to the effect that mercy would be inappropriate for MILLER. This comment, clothed in the mantle of prosecutorial authority, was clearly misconduct and was a misstatement of the law. The comment was so prejudicial that it rendered MILLER's sentencing proceedings fundamentally unfair.

Third, the ultimate sentencer, the trial Court was informed, at penalty phase, of victim impact evidence that was violative of the dictates of both Florida law and United States Supreme Court case law, and § 921.141(7), Fla. Stat., resulting in the death sentence being imposed on MILLER without due process of law.

Fourth, the trial Court's imposition of the death penalty upon MILLER was disproportional when the totality of the circumstances is viewed and compared with other

death cases. The disproportional imposition of death violated MILLER's right to be free from cruel and unusual punishment pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution.

Fifth, the trial Court erred and violated MILLER's due process rights by failing to expressly evaluate and weigh each and every mitigating circumstance that was submitted on MILLER's behalf. The court's sentencing order is woefully inadequate and indicates that the sentencing judge gave short shrift to a great deal of valid mitigation in MILLER's case.

Finally, MILLER suffered ineffective assistance of counsel at penalty phase in that his attorney failed to investigate and present crucial mitigation, which was readily available and easily obtainable. This resulted in MILLER being sentenced to death without due process of law; the ineffective assistance was so egregious as to cause fundamental constitutional error.

Each of these six issues, upon examination of the facts and relevant case law, requires that MILLER's death sentence be vacated. He was wrongly and unlawfully condemned to die.

ARGUMENT - ISSUE I

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY UPON APPELLANT WILLIE MILLER IN THAT THE TRIAL COURT IMPROPERLY EVALUATED AND WEIGHED THE MITIGATING EVIDENCE BECAUSE THE MITIGATION ESTABLISHED AT PENALTY PHASE OUTWEIGHED THE AGGRAVATING FACTORS.

At sentencing, the trial Court found three statutory aggravating factors as follows:

(1) The Defendant was previously convicted of a violent felony;

(2) The capital crime was committed while the Defendant was engaged, or was an accomplice, in the commission of a burglary; and

(3) The capital felony was committed for pecuniary gain.

(R385-386).

As for non-statutory mitigating factors, the trial Court gave consideration to only two: MILLER's family background and abuse of MILLER as a child. (R387). Without discussing the weight to be given to each mitigatory factor, the trial Court stated, "The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case.... The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present." (R388). Whereupon, the trial Court sentenced MILLER to death. (R389).

The trial Court erred and abused its discretion by not considering and evaluating all of the available and submitted mitigating evidence and by improperly weighing the aggravation against mitigation, resulting in an erroneous finding that the aggravation outweighed the mitigation.

In Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), the Florida Supreme Court specifically set forth a three-step analysis the sentencing judge in a death case must undergo as follows:

(1) First, the trial Court must consider whether the facts alleged in mitigation are supported by the evidence;

(2) Then, determine whether the established facts are the kind capable of mitigating punishment; and

(3) Then, determine whether these existing factors are of sufficient weight to counter-balance the aggravating factors.

Id.

A mitigating circumstance is "any aspect of a defendant's character or record" that reasonably may serve as a reason for imposing life over death. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Mitigating circumstances need not be proven beyond a reasonable doubt -- only by a preponderance of the evidence. Walls v. State, 641 So. 2d 381, 390 (Fla. 1994); Henry v. State, 613 So. 2d 429 (Fla. 1992).

Once a mitigating factor is found, it cannot be dismissed as having no weight. Dailey v. State, 594 So. 2d 254 (Fla. 1991). For the trial Court's final decision in the weighing process to be sustained on appeal, the conclusion must be supported by sufficient competent evidence in the record. Id. Here, the trial Court erred and abused its discretion both by improperly evaluating and weighing the two mitigating factors it discussed in its sentencing order and by ignoring other established mitigating factors,

to wit: Appellant MILLER's mental retardation, I.Q. 59 (R364), and that he was a cocaine addict. (R388).

First, the trial Court in its sentencing order appears to give consideration to only two mitigating factors: the Appellant's family background and his abuse as a child. (R387). The trial Court quite simply gave these factors short shrift, although how much weight assigned is impossible to determine because the trial Court was so vague and cursory in its sentencing order.

Through a pre-sentence investigation report, the evidence showed that MILLER never really knew his father and never stayed much with his mother. (T1291). He had a twin brother, and the children were physically abused by their mother, resulting in the death of his twin at the age of 11 or 12. (T1292). As a child, MILLER was passed around among various family members and provided with no stability; by the eighth grade, he had dropped out of school and turned to a group of street criminals for companionship. (T1292).

The evidence also established, and the trial Court noted, that MILLER was very close to his twin brother and was present when the abuse at the hands of their mother -- the one person in the world the boys should have been able to trust -- resulted in MILLER's beloved twin's death. (R387).

Again, because the trial Court in its sentencing order does not specify what weight it gave to these mitigating circumstances, it is impossible to tell, but obviously the trial Court did not give them much weight. This is clearly an abuse of discretion; the Appellant's childhood and formative years were quite obviously tragic. The Florida

Supreme Court has made it clear that such evidence is valid non-statutory mitigation. Evidence of a bad childhood is relevant and admissible as mitigation. Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992).

Furthermore, evidence that the defendant was an abused or battered child can be non-statutory mitigation. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). An abusive childhood is clearly mitigating evidence and should be weighed by the trial Court. Wickham v. State, 493 So. 2d 194 (Fla. 1991).

Because the evidence of MILLER's abominable family background and his abuse as a child was clearly proven by a preponderance of the evidence and was, in fact, compelling evidence of mitigation, it is clear that the trial Court improperly considered and weighed this evidence and therefore abused its discretion in imposing the death penalty upon Appellant MILLER.

Next, the trial Court abused its discretion by effectively ignoring evidence of other non-statutory mitigating factors which, if properly evaluated and weighed, would have joined MILLER's family background and abuse as a child to clearly outweigh the aggravating factors present.

The trial Court had before it the school records of Appellant MILLER, and they are part of the Record on Appeal. (R361-372). These records clearly prove by a preponderance of the evidence that MILLER was of dull intelligence and is, in fact, retarded (R361), with an I.Q. of only 59. (R364). In the seventh grade, MILLER had only a second-grade reading level. (R361). He made "extremely low scores" on arithmetic, immediate rote recall, conceptual thinking, and abstract organizing abilities. (R362). He

was "unsuited to classroom -- emotionally, socially and mentally," according to a teacher. (R372). It is imperative to note that since MILLER dropped out of school by the eighth grade, these observations were made during his last period of education (emphasis supplied).

The Florida Supreme Court has repeatedly recognized dull intelligence and mental retardation as non-statutory mitigation. Indeed, this Court has reversed and remanded for resentencing on the issue of mental condition, or facts strongly similar to those in this case. Campbell at 419, 420. Sanity is not the test; a retarded I.Q. level and poor reasoning skills qualify as mitigation. Campbell at 418. In Morris v. State, 557 So. 2d 27 (Fla. 1990), this Court found as mitigation that the defendant had an I.Q. of 75 and his mental limitations were obvious. Surely, Appellant MILLER's mental limitations are obvious from the record here.

MILLER's dim intelligence combines with his abusive childhood to clearly outweigh the aggravating factors. A similar case is Livingston v. State, 565 So. 2d 1288 (Fla 1988), also a convenience store robbery case. There, this Court reduced the defendant's sentence from death to life because his childhood was marked by severe beatings and parental neglect, and his intelligence could "at best be described as marginal." Id.

The trial Court barely mentioned MILLER's extremely low I.Q. and mental retardation in its sentencing order, did not list it as one of the mitigating factors evaluated, and apparently gave it no weight. This was an abuse of discretion. The fact that trial judge ignored MILLER's mental retardation in his sentencing order, instead

stating dismissively that MILLER "had a difficult time in performing as a student and that he was a disciplinary problem" (R388), shows that the trial Court, as in Hall v. State, 614 So. 2d 473 (Fla. 1993), gave mental retardation short shrift. This was eloquently pointed out by Justice Barkett in her dissent in Hall:

> It would appear that the trial judge did not understand the nature of mental retardation. Otherwise, he could not have reached the conclusion that the mitigating factors were entitled to little weight because he could not 'definitely establish that they affected Hall at the time of the crime.'

Id. at 481.

Finally, the trial Court appeared to have ignored evidence that MILLER was a severe substance abuser. Even as far back as seventh grade, MILLER was noted to have an alcohol problem. (R362-363). MILLER had used marijuana since the age of 10 and cocaine since the age of 20, and in the pre-sentence investigation admitted to being a cocaine addict. (R388). Although the trial Court gave this a brief mention in its sentencing order, it clearly did not consider or weigh the intoxication factor as non-statutory mitigation.[1]

Extensive drug or alcohol abuse can be a mitigating factor calling for life over death because the Defendant's control over his behavior was reduced. Stewart v. State, 558 So. 2d 416 (Fla 1990). Intoxication and/or addiction is a mitigating circumstance to

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[1]In fact, MILLER's dull intelligence, mental retardation and I.Q. of 59, and cocaine addiction point not only to non-statutory mitigation, but also to the statutory mitigator found in §921.141(6)(f), Fla. Stat.: the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

be considered, evaluated and weighed by the sentencing court in death cases. Campbell v. State, 571 So. 2d 415 (Fla. 1990); Carter v. State, 560 So. 2d 1166 (Fla. 1990).

Here, the trial Court made a very brief allusion to MILLER's substance abuse in its sentencing order, but clearly did not consider it as a potential mitigating factor or assign it any weight. (R388). This was an abuse of discretion; MILLER's substance abuse was proven and not rebutted, and it should have been found as mitigating evidence and afforded substantial weight. This error is particularly egregious when one considers that the combination of the intoxication factor with the other established mitigation -- dull intelligence, mental retardation and I.Q. of 59, family background and abuse as a child, form a heavy pile of mitigation on the aggravation versus mitigation scale.

The trial Court's failure to adequately consider and weigh each and every mitigating factor set forth above becomes extra crucial in light of the statutory aggravating factors found and weighed by the court -- that MILLER was previously convicted of a violent felony as set forth in § 921.141(5)(b), Fla. Stat. The evidence presented by the state on this aggravating factor was that MILLER was convicted of Armed Robbery with a Firearm on June 27, 1984. (T1226). The evidence -- testimony of the detective who worked the case -- showed that no one was injured or shot during that robbery. (T1246). Less than $200 was stolen. (T1249). Moreover, and significantly, the conviction was more than 10 years prior to MILLER's conviction in the instant case, which occurred on February 24, 1995. (R320).

The facts underlying the prior violent felony conviction may be considered by the sentencing court in determining what weight should be assigned to this aggravating circumstance. Slawson v. State, 619 So. 2d 255 (Fla. 1993). Here, the facts of the prior conviction certainly were not egregious, inasmuch as it was a standard, run-of-the-mill robbery with no one injured or killed and very little taken. This lightens the effect of this aggravating factor considerably.

Furthermore, the remoteness of the prior conviction decreases the weight to be attached to this aggravating circumstance. In the context of non-capital felonies, a conviction for an offense committed more than 10 years prior to the primary offense is generally not scored as prior record. Rule 3.702(8)(A), Fla.R.Crim.Pro. In a death case justice demands this principle be taken even more seriously. A 10-year-old conviction does not deserve much weight as an aggravating factor.

In sum, the trial Court erred and abused its discretion by improperly considering and evaluating mitigating circumstances which were established during penalty phase, and by improperly weighing the aggravating and mitigating circumstances. This resulted in the denial of Appellant MILLER's due process rights at sentencing and his right to be free from cruel and unusual punishment in that it resulted in the trial Court illegally and improperly sentencing him to die. Therefore, Appellant MILLER's death sentence must be vacated because the sentence was arbitrary, capricious, unreliable and in violation of MILLER's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Secs. 9, 16, 17 and 22, Florida Constitution.

ARGUMENT - ISSUE II

THE PROSECUTOR'S COMMENT IN CLOSING ARGUMENT OF PENALTY PHASE THAT MERCY IS INAPPROPRIATE WAS A MISSTATEMENT OF THE LAW THAT RENDERED APPELLANT MILLER'S SENTENCING HEARING FUNDAMENTALLY UNFAIR.

During his closing argument at penalty phase, the prosecutor made the following comments to the jury:

> I submit to you you should show no more mercy on this defendant than he showed on James Wallace on...July the 15th, 1993. He showed no mercy on James Wallace as he sat on that milk crate, as he was disarmed, as he took the bullet in the face from which he languished and died six months later. I ask you to do your duty.

(T1284-1285).

This constituted a comment by the prosecutor to the jury that mercy would be inappropriate for the jury to consider in deciding MILLER's fate. That, the prosecutor may not do.

This issue was explored at length in Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), where the prosecutor argued to the jury that they could not and should not consider mercy for the capital defendant in the case. The Court reversed the denial of the defendant's writ of habeas corpus because the prosecutor's comments were a misstatement of the law and so prejudicial as to deny the defendant a fair sentencing hearing. Id. at 1461.

Said the Court:

> Just as retribution is an appropriate justification for imposing a capital sentence..., a jury may opt for mercy and impose life imprisonment at will. The ultimate power of the jury to

> impose life, no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale.

Id. at 1460.

Then, the Court concluded:

> Thus, the suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life.

Id.

Here, the prosecutor's comment regarding the inappropriateness of mercy had the same effect on Appellant MILLER, and the improper argument, as in Drake, rendered his sentencing proceeding fundamentally unfair. Id. at 1461.

Clearly, the comment constituted prosecutorial misconduct, which is especially dangerous due to its likely influence on the jury. United States v. Young, 70 U.S. 1 (1985). "The prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. *en banc* 1985).

In addition, the prosecutor's "speech" on no mercy was obviously designed to do nothing more than evoke an emotional response from the jurors. Even if his comment had been on a permissible subject, which it was not here -- "if those comments are nonetheless designed to evoke a wholly emotional response from the jury, constitutional error can result." Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Such was the case here.

Because the prosecutor's argument was a misstatement of the law, unfairly prejudicial, and it rendered Appellant MOORE's sentencing proceeding fundamentally unfair, Appellant MOORE's death sentence must be vacated.

ARGUMENT - ISSUE III

IT WAS REVERSIBLE ERROR AND A DENIAL OF THE APPELLANT'S DUE PROCESS RIGHTS FOR THE SENTENCER, THE TRIAL COURT, TO BE INFORMED OF A VICTIM IMPACT STATEMENT THAT CONTAINED INFORMATION PROHIBITED BY BOOTH V. MARYLAND AND WHICH DID NOT COMPLY WITH § 921.141(7), FLA. STAT.

Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987), prohibited the "sentencer" from being informed of characteristics personal to the victim by way of a victim impact statement. Payne v. Tennessee, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), overruled portions of Booth but specifically did not overrule the prohibition of all information condemned in Booth. Florida subsequently modified its capital sentencing scheme by adding a section relating to victim impact statements in § 921.141(7), Fla. Stat. That statutory section states:

> VICTIM IMPACT EVIDENCE -- Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of the victim impact evidence.

On March 17, 1995, just prior to the penalty phase of MILLER's trial, the State filed a victim impact statement that violated Booth and § 921.141(7). Specifically the victim impact statement addressed the following:

1. The constitutional issue addressed in Booth regarding victim impact statements was that the sentencer would be informed of certain information about the victim that was irrelevant to a capital sentencing decision, and would create a "constitutionally unacceptable risk" that the death penalty might be imposed in an arbitrary and capricious manner.

2. Although the trial Court in the case at bar apparently did not allow the jury to read or otherwise consider the victim impact statement, it is clear that the trial Court, the ultimate sentencer, did read and thus impermissibly consider prohibited victim information prior to sentencing MILLER to death. Although the record is silent as to whether the court did or did not consider constitutionally prohibited information, it must be assumed that by reading it the court was influenced. Thus, notwithstanding whatever else the trial Court may have said on the record about the impermissible victim impact statement, it is clear that the court's mere review and consideration of it was reversible error.

ARGUMENT - ISSUE IV

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE UPON APPELLANT MILLER IN THAT SUCH IMPOSITION WAS DISPROPORTIONAL IN VIOLATION OF MILLER'S RIGHTS TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

Based on the facts and circumstances of Appellant MILLER's case, the death sentence is disproportional and in violation of his right to be free from cruel and, in particular, unusual punishment pursuant to the Eighth Amendment to the United States Constitution and Florida's own Constitution, Article I, sec. 17.

Proportionality review is a consideration of the totality of the circumstances and a comparison with other death cases to determine if death is far and not "unusual" punishment for a particular capital defendant. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). It must be noted that proportionality review is separate and different from Issue I of this brief, namely, the trial Court's improper weighing and consideration of aggravating and mitigating circumstances. Proportionality review is not a mere tallying of the number of aggravators and the number of mitigators. Id.

In reviewing a death sentence, the Florida Supreme Court "must consider the circumstances revealed in the record in relation to other decisions and then decide if death is the appropriate penalty." Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

In the case at bar, as discussed in Issue I of this brief, the mitigation is heavy -- MILLER had a tragic family background with no stability, was an abused child who witnessed his twin brother's killing at the hands of his mother, is mentally retarded with at best a second-grade reading level and corresponding immaturity, was a cocaine addict and alcohol abuser, and suffered with an I.Q. of 59.

Although the trial Court found three aggravating circumstances, one is fairly weak, as discussed in Issue I: prior violent felony conviction. As discussed in Issue I, that crime was a run-of-the-mill armed robbery that involved no injury to anyone, and the conviction was more than 10 years prior to the conviction at hand here.

Looking at the totality of the circumstances, death is a disproportional penalty for Appellant MILLER. Not only is the mitigation extremely heavy, but it must be noted that MILLER is mentally retarded, a factor which was discussed extensively by Justice Barkett in her dissenting opinion in Hall v. State, 614 So. 2d 473 (Fla. 1993). Under the law, execution must be reserved for "the most heinous of crimes and the most culpable of murderers...." Hall at 481 (Barkett, J., dissenting). Executing a mentally retarded person is disproportionate because mentally retarded people are "not as culpable as other criminal defendants...." Id.

Furthermore, the totality of circumstances in Appellant MILLER's case is similar to that in Livingston v. State, 565 So. 2d 1288 (Fla. 1988). There, this Court found that the defendant's abusive childhood, immaturity, dull intelligence and extensive drug abuse counterbalanced the two aggravating circumstances and therefore vacated his death sentence. Id. at 1292. All of these mitigating factors are similarly present in MILLER's case.

Based on the totality of circumstances in MILLER's case and a comparison to other death cases, execution is disproportional in violation of MILLER's constitutional rights. Accordingly, his sentence of death must be vacated.

ARGUMENT - ISSUE V

THE TRIAL COURT ERRED AND THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE OF THE SENTENCING ORDER TO EXPRESSLY EVALUATE AND WEIGH EACH MITIGATING CIRCUMSTANCE SUBMITTED ON BEHALF OF APPELLANT MILLER.

The Appellant's trial counsel failed to present substantial mitigating evidence, including the Appellant's retardation, low educational level, marijuana use and cocaine addiction among others, which easily could have been discovered and were in fact contained in the presentence investigation report, and could have been presented either to the jury or the trial Court during the sentencing phase of the Appellant's trial. Notwithstanding counsel's failure to obtain and present easily obtainable mitigating evidence, counsel did argue several substantial and persuasive mitigating aspects of the Appellant's life, which the trial Court did not expressly evaluate or weigh in its written sentencing order.

The Florida Supreme Court in Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), held:

> [T]he sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature.

Additionally, this process must be carried out by the judge, even if the presentation is "scant." Bryant v. State, 656 So. 2d 426 (Fla. 1995). Here, by way of the presentence investigation report prepared on the Appellant as well as argument, albeit minimal, from the Appellant's counsel, the trial Court was well aware of the multiple items of mitigating factors relating to the Appellant's childhood, mental retardation,

severe drug addiction, and low I.Q. The trial Court's written sentencing order mentions, almost in passing, some of the mitigating evidence contained in the Appellant's presentence investigation report, comments on virtually none of it and wholly fails to make the express evaluation of that evidence required by Campbell.

Furthermore, this Honorable Court in Campbell remanded for resentencing because the judge did not evaluate and weigh the mitigators properly in his sentencing order. Id. at 420. It is equally important to note that this Court in Campbell held that the trial Court **must** find as a mitigator, every **proposed** factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. Id. at 419 (emphasis supplied).

Although Appellant's counsel has not had an opportunity to review the presentence investigation report on the Appellant because it is sealed within the records of this Honorable Court,[2] the record is clear that the substantial mitigation regarding the Appellant suggested above is in the presentence investigation report, was at a minimum presented by trial counsel during the sentencing process, and was acknowledged, although not adequately analyzed, by the trial Court.

The failure of the trial Court to adequately and expressly evaluate all mitigating evidence proposed on behalf of the Appellant violates the specific sentencing procedures mandated by this Honorable Court, denies the Appellant his right to due process, and requires remanding to the trial Court for a new sentencing hearing.

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[2]Counsel has contemporaneously with the filing of this Merit Brief also filed a Motion for Extension of Time for filing an Amended Merit Brief to allow this Court to review his motion to unseal the presentence investigation report and allow counsel to review it.

ARGUMENT - ISSUE VI

FUNDAMENTAL CONSTITUTIONAL ERROR OCCURRED AT THE APPELLANT'S TRIAL IN THAT APPELLANT MILLER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE DUE TO TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT CRUCIAL MITIGATION, INCLUDING MENTAL RETARDATION, WHICH WAS READILY AVAILABLE TO COUNSEL, RESULTING IN MILLER BEING SENTENCED TO DEATH WITHOUT DUE PROCESS OF LAW.

At the conclusion of the State's presentation of evidence at penalty phase of MILLER's trial, the trial Court asked defense counsel to proceed with its evidence. Defense counsel replied, "Nothing, Your Honor," and the judge advised the jury that the evidence was closed and only arguments from counsel and instructions from the court remained. (T1250). Thus, the defense presented absolutely no evidence of mitigation to the jury at penalty phase.

Defense counsel then, in closing arguments to the jury, said, "Let me tell you a little bit about Mr. Miller," and proceeded to provide some information about MILLER's background and unstable, abusive childhood, apparently from a presentence investigation report. (T1291-1292). None of this information, however, had been presented to the jury as evidence, and there is no indication that the presentence investigation report was admitted into evidence, read to the jury, or sent back to the jury room for the jurors' review during deliberations.

This left the jury with a mountain of testimony from State witnesses and nothing from the defense in mitigation in spite of its easy availability. The jurors promptly returned a 12-0 recommendation of death for MILLER. (T300).

In fact, as discussed at length in Issues I and IV of this brief, very heavy mitigation existed, and it should have been presented to the jury that was to have the awesome responsibility of recommending whether MILLER was to be put to death.

MILLER's school records, which defense counsel did not bother to produce until a few minutes before the trial Court imposed sentence on April 24, 1995 (T1309-1310), over a month after penalty phase, clearly establish that MILLER is mentally retarded. According to the records, he had a verbal I.Q. of 66, a performance I.Q. of 60, and a Full Scale I.Q. of 59. (R364). That score classified him as mentally retarded in the seventh grade (R361). Significantly, he dropped out of school for good by the eighth grade. (T1292). The inescapable conclusion is that MILLER was retarded when he committed the capital crime in the case at bar. As discussed in Issues I and IV of this brief, mental retardation is heavy mitigation at penalty phase. Here, defense counsel never even mentioned it to the jury, only mentioned it to the trial Court moments before the death sentence was imposed, did not include it at all in his sentencing memorandum (R358), and certainly never investigated it and explored it to the point of presenting expert testimony on it. Having not mentioned the retardation to the jury, defense counsel, of course, failed to request a special penalty-phase jury instruction that retardation is mitigatory, to which MILLER clearly would have been entitled under Penry v. Lynaugh, 492 U.S. 302, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989).

Surely this was compelling mitigation that any reasonably competent defense attorney would have investigated and presented both to the jury and the trial Court in an aggressive, straightforward manner through the use of MILLER's school records and

expert testimony. Alas, it was never even considered due to defense counsel's ineffectiveness. This is the type of ineffective assistance of counsel that renders proceedings fundamentally unfair, and clearly resulted in MILLER being sentenced to death without due process of law.

Nor did defense counsel mention to the jury the fact that MILLER was a cocaine addict and alcohol abuser, as discussed in Issue I of this brief, and it was not even proposed formally to the trial Court as a non-statutory mitigator. Again, omitting such crucial mitigation evidence when MILLER was facing the electric chair is egregious, fundamental and constitutional error.

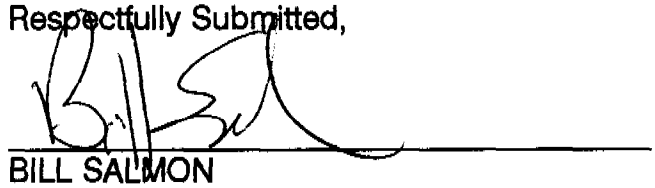
Ineffective assistance of counsel claims are not generally reviewable on direct appeal, but that does not mean they never are. McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991). Generally, claims that Appellant was denied effective assistance are more properly raised in a motion for post-conviction relief. Kelley v. State, 486 So. 2d 578, 585 (Fla. 1986). However, such issues are properly raised on appeal which the trial was so unfair as a result of the grievance complained of that fundamental error occurred. Sochor v. State, 580 So. 2d 595, 601 (Fla. 1991). Fundamental error occurs "where the interests of justice present a compelling demand for its application." Ray v. State, 403 So. 2d 956, 960 (Fla. 1981). If the error amounts to a denial of the defendant's right to due process of law, it is fundamental and may be raised on appeal. Sochor at 601. Further, this is the type of ineffective assistance issue that can be sufficiently determined by the record in this case, as it stands. Kelley at 585.

The failure of defense counsel to investigate, pursue and present MILLER's significant mitigation was such egregiously ineffective assistance of counsel that it rendered MILLER's entire sentencing proceeding fundamentally unfair and violative of MILLER's due process rights. Although this is not a post-conviction proceeding, it is clear that trial counsel's deficient and ineffective representation was not a strategical decision, was clearly prejudicial and in violation of Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Therefore, his death sentence must be vacated.

CONCLUSION

Each and every one of the six issues outlined in this brief evidences a clear violation of Appellant WILLIE MILLER's right to due process of law at sentencing. As a result of each error set forth in this brief, MILLER was improperly and unlawfully condemned to die. Because MILLER suffered a violation of his fundamental constitutional rights by virtue of all six errors outlined above, his death sentence should and must be vacated with directions to the trial Court below to conduct a new sentencing hearing.

Respectfully Submitted,



BILL SALMON
Florida Bar No: 183833
Post Office Box 1095
Gainesville, FL 32601
(352) 378-6076
Attorney for Appellant, MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief on the Merits has been furnished to: RICHARD MARTELL, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 by U.S. MAIL this 1st day of April, 1996.

By: _____
BILL SALMON