

IN THE SUPREME COURT OF FLORIDA

WILLIE B. MILLER,
Defendant/Appellant,

CASE NO: 85,744

v.

STATE OF FLORIDA,
Plaintiff/Appellee.

FILED

AUG 30 1986

CLERK OF THE COURT
[Signature]

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

CASE NO: 93-8494-CF

REPLY BRIEF OF APPELLANT

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ARGUMENT - ISSUE ONE

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.

The state argues that MILLER's school records do not indicate mental retardation. (State's Answer Brief at 17). The state is completely ignoring the plain content of the records. The school records state that MILLER is retarded (R361) and that he has an I.Q. of 59 (R364). People with an I.Q. below 60 are clearly mentally retarded. For the state to argue that MILLER presented no evidence of retardation (State Answer's Brief at 17) is disingenuous.

Furthermore, the state argues that MILLER, according to doctors' reports, was not insane at the time of the offense. (State's Answer Brief at 15). This is irrelevant. Sanity is not the test; a retarded I.Q. level and poor reasoning skills qualify as mitigation in capital sentencing proceedings in Florida. Campbell v. State, 571 So. 2d 415, 419-420 (Fla. 1990).

Because the abundant mitigation in MILLER's case clearly outweighed the aggravating factors, MILLER's death sentence must be reversed.

ARGUMENT - ISSUE TWO

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

The state argues that the issue of the prosecutor's "no mercy" speech cannot be raised by MILLER on appeal because there was no contemporaneous objection (State's Answer Brief at 21) and that, in any event, it was harmless error. (State's Answer Brief at 22).

The state is wrong on both of these points because the prosecutor's patently inaccurate and improper plea to the jury to show no mercy on MILLER rendered MILLER'S sentencing proceeding fundamentally unfair in violation of his constitutional rights to due process of law at penalty phase.

Said the Court in Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985):

Following the finding of an aggravating circumstance, the jury is granted full discretion to impose life imprisonment or death. 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...

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. at 1460.

In Drake, there was also a lack of objection, and the Court addressed that as follows:

We find the remark so serious under the circumstances of this case that we consider it despite the lack of an objection. This kind of remark was so improper that the trial court should itself have interrupted and stopped the prosecutor. ABA Standards for Criminal Justice, 3-5.5(e) (1980) ("It is the responsibility of the court to insure that final argument to the jury is kept within proper accepted bounds.")

Id. at 1461, fn 16.

Finally, the Drake court determined that the prosecutor's "no mercy" argument rendered the sentencing proceeding fundamentally unfair because it undermines confidence in the outcome of the proceeding. Id. at 1461; see also Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

The record in the instant case shows that the facts are strikingly similar to those in Drake. Furthermore, prosecutorial comments that are "designed to evoke a wholly emotional response from the jury" can result in constitutional error. Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). In MILLER's case, as in Drake, the "no mercy" argument was fundamental error because it violated MILLER's Eighth Amendment right to have his death sentence based on a complete evaluation of his own individual circumstances, as well as his Fifth Amendment rights to due process in capital sentencing proceedings. Id.

Accordingly, the error here was fundamental and cannot be considered harmless beyond a reasonable doubt. Therefore, MILLER's death sentence must be reversed.

ARGUMENT - ISSUE THREE

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), FLORIDA STATUTES (1995).

The state argues that the victim impact statement describing victim Wallace was permissible under §921.141(7), Fla. Stat. (1995), because it demonstrated Wallace's "uniqueness as an individual human being and the resultant loss to the community's members." (State's Answer Brief at 27). The plain language of the victim impact statement contains nothing that would indicate "uniqueness" on Wallace's part. (R343). The Florida victim impact statute allows evidence regarding the victim's character only to show that the victim was unique in the community and the loss to the community as a result of that person being taken away. Windom v. State, 656 So. 2d 432, 438 (Fla. 1985). (emphasis supplied).

The American Heritage Dictionary defines "unique" as "being the only one of its kind; single." It is further defined as "without an equal or equivalent; unparalleled; unusual; extraordinary." The American Heritage Dictionary 1953 (3rd ed. 1992).

Clearly, the victim impact statement about victim Wallace's character falls far short of the definition of unique, nor is it unique as contemplated by §921.141(7), Fla. Stat. (1995). It was simply designed to evoke a super-charged, emotional response.

Therefore, MILLER's Eighth, Fifth and Fourteenth Amendment rights were violated, and his death sentence must be reversed.

ARGUMENT - ISSUE FOUR

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE UPON APPELLANT MILLER IN THAT SUCH IMPOSITION WAS DISPROPORTIONATE 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.

Please see Appellant's argument in Issue One of this Reply Brief, page 1.

ARGUMENT - ISSUE FIVE

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.

No reply to the state's Answer Brief on this issue is necessary or warranted; therefore, Appellant MILLER stands upon the argument in his Merit Brief.

ARGUMENT - ISSUE SIX

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.

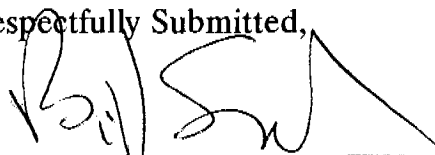
The state argues that ineffective assistance cannot be raised by Appellant MILLER as an issue in this direct appeal. (State's Answer Brief at 33). This is incorrect. Where the ineffective assistance of counsel claim can be sufficiently determined by the record on appeal, the issue can and should be raised on direct appeal. Kelly v. State, 486 So. 2d 578, 585 (Fla. 1986); Adams v. State, 456 So. 2d 888, 890-891 (Fla. 1984).

Here, the record on appeal is sufficient for this Court to decide the ineffectiveness of counsel issue. Appellant's Merit Brief directs this Court by page number to every portion of the record necessary to expressly evaluate the issue. Therefore, the issue is properly raised by MILLER on this appeal.

CONCLUSION

WHEREFORE, the Appellant Willie Miller respectfully requests this Court to remand this case to the trial court for a new trial on both the guilt and penalty phases.

Respectfully Submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: RICHARD MARTELL, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol - PL-01, Tallahassee, FL 32399-1050 by U.S. MAIL this 19th day of AUGUST, 1996.

By:



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