IN THE SUPREME COURT OF FLORIDA

DAVID MILLER,

Appellant,

v. **CASE NO. 93,792**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 201170

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

References to the clerk's record will be designated with the prefix "R" followed by the volume and page number. The transcript will be similarly designated with the prefix "T." An appendix is attached to this brief containing the trial court's sentencing order.

This brief has been prepared using Courier New, 12 point, a font which is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

A Duval County grand jury indicted David Miller, Jr., on June 26, 1997, for the first degree murder of Albert Floyd and for the aggravated battery of Linda Fullwood. (R1:18-19) Miller proceeded to a jury trial on June 22, 1998. (T5:3) On June 26, 1998, the jury found Miller guilty as charged of both counts of the indictment.(R2:316-317) At the conclusion of the penalty phase portion of the trial held on July 7, 1998,(T11:811), the jury recommended a death sentence for the murder by a vote of seven to five. (R2:350) On July 17, 1998, the court ordered a presentence investigation, considered the State's request for habitual violent felony sentencing on the aggravated battery and allowed the defense the opportunity to present further evidence or argument pertaining to sentencing. (R3:590-597) Miller clarified one part of his penalty phase testimony. (R3:596-597) The State and the Defense presented written memorandums instead of argument. (R3:594-595)

On July 24, 1998, Circuit Judge L. Haldane Taylor adjudged Miller guilty on both counts. (R2:356, 360) The court sentenced Miller to death for the murder and to 25 years as an habitual offender for the aggravated battery. (R2:358-359, 361-362, 364-375; R3:599-626)

In support of the death sentence, the court found the following aggravating circumstances: (1) Miller had been previously convicted of another violent felony based on a 1986 conviction for second degree murder and the contemporaneous conviction for aggravated battery in this case; (2) the homicide was committed during an attempt to commit a robbery; and (3) the homicide was committed for pecuniary gain. (R2:365-366)(App A) The court merged the latter two factors into one aggravating circumstance. (R2:366)(App A) In mitigation, the court found the following regarding nonstatutory circumstances: (1) the court rejected the contention that Miller did not intend to kill the victim; (2) the court found that the victim was rendered unconscious immediately and did not suffer; (3) the court found that Miller turned himself in to the police; (4) the court found that the alternate sentence for murder is life without possible release; (5) the court found that Miller exhibited remorse and apologized to the victim's family; (6) the court found that Miller cooperated with the police investigation; (7) the court rejected as mitigating that the defendant suffered an abusive childhood and his father was an alcoholic; (8) the court found and considered as part of Miller's cooperation with police, that he did not resist arrest; (9) the court rejected as a mitigating factor that Miller had an alcohol and drug use problem during his adult life; (10) the court rejected

as mitigating that Miller supported himself through work at labor pools; (11) the court found that Miller suffered emotional distress over the death of his sister and close cousin; (12) the court found that Miller has a frontal lobe deficit which affects inhibition and impulse control; (13) the court found that Miller would likely adapt well to long-term incarceration; (14) the court found that Miller was loved by his family and had performed good deeds; and (15) the court found that Miller had adjusted well while incarcerated. (R2:366-374)(App A)

Miller filed his notice of appeal to this Court on August 21, 1998. (R2:385)

Guilt Phase -- The Prosecution's Case

On March 5, 1997, Albert Floyd lived on the street with his girlfriend, Linda Fullwood. (T7:268-271) They slept on the concrete floor under a covered doorway behind the Episcopal Church bookstore building. (T7:270, 273) As was his routine, Floyd awoke at 6:00 a.m. to catch a bus to his job in telemarketing sales. (T7:270) He returned from work around 7:00 p.m. (T7:270) Upon his return, Floyd and Fullwood talked and had something to eat. (T7:271) They shared three 16-ounce cans of beer. (T 7:291-292) Fullwood said they pooled their funds and purchased a $10 rock of crack cocaine which they smoked. (T7:271-272, 291-293) According to Fullwood, she and

Floyd did not use crack everyday; they usually reserved its use for the weekend. (T7:289-294) Fullwood and Floyd went behind the church building to sleep around 11:00 to 11:30 p.m. (T7:272) They had blankets and quilts to use. (T7:273) Floyd always positioned himself toward the outside, and Fullwood slept closer to the building. (T7:273)

During the night, Fullwood awoke to find a man beating Floyd with a pipe or stick. (T7:274) Floyd was still asleep, and he never moved from that position. (T7:297) Fullwood screamed and verbally confronted the man, asking him why he was hitting Floyd. (T7:274) The man turned and began hitting her in the head, arm, and side. (T7:274-275) Fullwood could not identify the man, but described him as a black man wearing light colored clothes. (T7:275-276)

Jimmy Hall was walking along Duval Street about 3:00 a.m. when he heard someone yelling, “Stop! Stop! Why are you doing this?” (T7:305-306) Hall ran behind the church building where he saw a man beating two people with a pipe. (T7:305-306, 308-309) The two people had been sleeping and were still under covers. (T7:306-307) Hall walked to within 10 or 15 feet and saw the man swing the pipe three times, striking the woman twice and the man once. (T7:308-309, 326-327) Hall could see blood sling off of the pipe onto the ceiling and walls of the covered doorway area. (T7:318-319) The pipe was four or five feet long with a bent end. (T7:315) The man

used both hands to swing the pipe, and he was hitting with the bent end. (T7:315) Hall yelled at the man to stop. (T7:308) The man turned and started walking toward Hall, but he then ran away around the building. (T7:309) Although the man took the pipe with him, he discarded it, and Hall heard the pipe hit a hard surface. (T7:319-320)

Hall went to aid Fullwood, who was standing up. (T7:309) The man was still laying down, covered in blood, and he did not move. (7:310) Fullwood asked Hall to go to the Y.M.C.A. across the street and ask someone to call the police. (T7: 309) Fullwood walked to the street to wait for the police. (T7:276) Officer John Merritt arrived within a few minutes. (T7:276, 310, 332)

Fullwood suffered a concussion, a broken arm, two broken fingers and several fractured ribs. (T7:278-279) Floyd died from his injuries which consisted of three blows to the head. (T7:339-350)

Dr. Bonifacio Floro performed the autopsy on Floyd. (T7:339-343) Floro found three lacerations to the head which produced a wound fracturing the skull and penetrating into the brain. (T7:348-351) The wounds were consistent with blows from a pipe. (T7:351) Any one of the blows would have produced unconsciousness. (T7:35-356) These injuries caused Floyd’s death. (T:7:352) In Floro’s

opinion, the death was a homicide. (T7:354) The toxicology tests Floro performed on Floyd found evidence of cocaine.(T7:353)

Detective Reddish found the pipe on the roof of the church building during his investigation. (T7:365-370) He had a crime scene technician, Raymond Godbee, retrieve the pipe and carry it to the crime lab. (T7:375-378) Frank Depreso, a forensic serologist found the presence of human blood on the bent end of the pipe. (T7:385-386) There was no way to determine the age of the blood stain. (T7:386) Carol Herring, a latent fingerprint analyst, was unable to develop any usable prints on the pipe. (T7:393-399)

Two and one half months after the homicide, David Miller approached a police officer in Baton Rouge, Louisiana, and told him he had killed someone in Jacksonville and wanted to confess.(T8:417) Detective Willie Vick spoke to Miller at the police Department. (T8:417-418) After Vick advised Miller of his rights, Miller told the detective that he had beaten a black man to death and had also beaten a woman while trying to rob the man.(T8:418-420) The man and woman were sleeping. (T8:420-421) Miller said he intended to knock the man unconscious with a five to six foot long pipe which was curved at the end. (T8:420-421) The woman who was also under the blanket woke up and started screaming. (T8:420-421) Miller said he struck her with the pipe. (T8:420-421) Another man came up and interrupted Miller, he stopped striking the

woman and fled. (T8:420-421) Detective Vick telephoned Detective Reddish in Jacksonville who spoke to Miller. (T8:425)

Reddish's questioned Miller during the telephone call, and Miller again related the circumstances of the homicide. (T8:511-522) Miller said he was high on drugs and alcohol that night, and he wanted money to buy more drugs or alcohol to maintain his high. (T8:513) He picked up a metal pipe and began looking for someone to rob of money, drugs or alcohol. (T8:513-514) Behind a building, Miller saw a man sleeping, and he raised the pipe and struck the man. (T8:515-516) To Miller's surprise, a woman arose from under the blanket -- he thought the man was alone. (T8:516) When the woman screamed, Miller started hitting her. (T8:516) A man came up and confronted Miller. (T8:516-517) Miller stopped hitting the woman, looked at the man who had just walked up and held the pipe in a threatening manner to keep the man from attacking him. (T8:517) Miller then backed away and fled on foot. (T8:517) He threw the pipe down. (T8:517)

Detective Reddish asked Detective Vick to obtain a statement from Miller. (T8:523) Vick conducted a full videotaped interview of Miller about the homicide. (T8:425-491) (State's Exhibit 12) During the videotaped statement, Miller related the following about the events surrounding the homicide of Albert Floyd:

Miller told the detectives that he contacted the police because he believed that people were looking for him and that his conscience was bothering him. (T8:438-439) He realized that what he had done was wrong and he wanted to apologize to the victim's family. (T8:482-483) Additionally, he felt as if the victim had family looking for him and he felt death was near. (T8:481-483) About two and a half months earlier, Miller accidentally killed a homeless man, he was trying to rob, with a pipe. (T8:439) He also struck a woman who was with the man. (T8:440, 445-446)

On the night of the homicide, Miller had been drinking and smoking crack cocaine. (T8:450-451) He told the detectives he drank three or four quarts and smoked a dime rock of cocaine. (T8:450-451) Miller said he was inebriated. (T8:445, 450) He began looking for more money or alcohol. (T8:441,445) In a park, Miller picked up a pipe which was about six feet long and had a dent in it. (T8:441) He walked behind a building which was near the Sulzbacher homeless center where he saw a man sleeping under a blanket on a covered concrete porch area. (T8:442-445) In order to avoid resistance to the robbery, Miller decided to strike the man to see if he was going to struggle and then go through the man's pockets.(T8:446) Miller wanted to disable the man before taking money or alcohol from him -- he did not intend to kill the man. (T8:439, 440-441)

When Miller struck the man on the head, a woman, who was also sleeping under the blanket, awoke screaming. (T8:446-447) Miller thought the man was alone. (T8:445) Miller struck the woman, trying to knock her out. (T8:447) He thinks he may have struck the man again as well. (T8:448) As Miller struck the woman, another man approached and verbally confronted him. (T8:440, 451-453) Miller walked away with the pipe which he dropped in a nearby open area.(T8:453)

Miller retrieved his bag and immediately changed clothes, since he thought the witness might remember what his clothes looked like. (T8: 454-457) He then went to an overpass where the homeless often slept. (T8:454) For the first day he stayed there, without leaving except at night. (T8:457) The second day, Miller worked for the labor pool. (T8:457-458) Later, he was drinking beer with some other homeless men, and they talked about the man who had been killed. (T8:458) Until that time, Miller had hoped that he had merely knocked the man unconscious. (T8:458) Miller left Jacksonville on the third day after the homicide. (T8:480-481)

Miller was transported back to Jacksonville, where Detective Reddish conducted another interview and had Miller show him the scene of the crime. (T8:523-545) Miller again related the circumstances of the homicide and walked the detectives through the events at the scene. (T8:523-545) Miller explained that he

decided to strike the man to avoid any resistance to the robbery. (T8:544) He knew that some homeless people sleep with knives or guns, and he chose to strike first to prevent giving the man the opportunity to hurt him during the robbery.(T8:544)

Guilt Phase -- The Defense Case

During the defense case, David Miller testified. (T8:573-T9:655) Miller said on March 5, 1997, he worked at the labor pool and then used his money to buy beer, liquor and crack cocaine. (T8:575) After drinking all the alcohol, 40 ounces of malt liquor, and smoking the cocaine, Miller started walking. (T8:576-577, T9:648-651) He picked up the pipe to carry for protection. (T8:576-577) The alcohol and cocaine had affected his judgment and he would do things he would not normally do when under the influence of drugs and alcohol. (T8:579-582) Miller said he never intended to kill anyone. (T8:582) He said the thought about taking money from the man did not come into his head until he was standing over him with the pipe. (T8:582) On cross-examination, Miller said he probably hit the man to rob him. (T9:655) However, Miller said he was operating in mechanical fashion at the time due to his impaired mental capacities. (T9:652) He started beating Linda Fullwood out of instinct when she startled and confronted him. (T9:655-658) When Jimmy Hall walked up, this caused Miller to realize what he was

doing, and he walked away. (T9:655-658) Miller explained that he turned himself in to the police because he thought someone related to the victim was following him. (T8:583) He also knew what he had done was wrong and his conscience bothered him. (T8:583-584) During Miller's testimony, the defense played an audiotaped statement Miller gave to Detective Reddish about the offense which again detailed the circumstances of the homicide. (T8:585-T9:648)

Penalty Phase And Sentencing

The State introduced judgments of conviction for two prior violent felonies in aggravation. (T11:824-826) One was for the aggravated battery committed contemporaneously with the homicide in this case. (T11:824-826) The second was a North Carolina judgment convicting Miller of second degree murder in 1986. (T11:824-826) Albert Floyd's wife, Gwendolyn Floyd, testified as the sole State witness to victim impact information. (T11:826-829) She met Floyd and he assumed responsibility for raising her two small children and the son they later had together. (T11:827) She described Floyd as a kind, generous man who loved his children and worked hard to support them. (T11:827-828)

Miller presented the testimony of his mother, sister and brother in mitigation. (T11:830, 862, 923) They testified to Miller's family background and his difficulties with drugs and

alcohol addiction. (T11: 830, 862, 923) Additionally, Dr. Harry Krop testified about his psychological assessment of Miller. (T11:893)

Yvonne Jordan, David Miller's mother, testified about David's childhood and his later difficulties with alcohol. (T11:831-862) David was the second of four children. (T11:831, 845) His older sister, Valnese, who suffered from schizophrenia, committed suicide when she was 14 years-old and David was 13. (T11:831-832, 845) David had a close relationship with Valnese and her death affected him. (T11:834) Sharon and Leonard were two and four years younger than David. (T11:850-851) David was also very close to a cousin and neighbor, Boyd Howe, whose death also greatly affected David. (T11:835-836, 925-926) The children's father, David Miller, Sr., was an alcoholic and was physically abusive to his wife and children. (T11:839-841) He would work all week, but on the weekend, he would drink heavily and fight. (T11:839-841) Ms. Jordan described one instance when he hit her with a soda bottle causing an injury requiring stitches. (T11:840) Mr. Miller would severely discipline the children by beating them with a belt. (T11:841) Ms. Jordan divorced the children's father when David was about 13 years-old, and she moved the four children to her parents home on a farm. (T11:841-842) She described the move as a positive one for her and the children. (T11:853-856)

After David graduated from high school, he joined the Navy. (T11:846-847) When he returned from the Navy, he was a different person. (T11:847) David was drinking heavily. (T11:847-849) He behaved differently when drinking. (T11:847-848) His mother did not allow alcohol in her home, and she asked him to leave the house because of his drinking and behavior. (T11:848-849, 861-862) Rather than stop drinking, David began living in boarding houses or on the street. (T11:848-849)

Sharon Barringer, David's sister, testified. (T11:863) She said that she and David had a normal, loving brother-sister relationship growing up. (T11:863) David was particularly good in math and helped her with her homework. (T11:863) She said the relationship with their mother was the basic role model source, and she did the best she could as a single mother of four. (T11:863-864, 871-872) Their father was abusive to their mother and the children. (T11:864-867) The children did not have a relationship with Mr. Miller because he was an alcoholic and emotionally uninvolved with them. (T11:864-865)

During one incident of their father's abuse, he grabbed their mother and choked her. (T11:865) She managed to get away from him, but he chased after her. (T11:865) Their mother had obtained a firearm, she shot it to keep him away from her, and she left in the car. (T11:865) Sharon said her father was really angry. (T11:865-

866) The children called their mother and told her not to come home. (T11:866) Their father then became angry at the children and beat them all with an electrical cord. (T11:866) Sharon also described the incident when their father hit their mother with a soda bottle causing an injury requiring stitches and leaving a large scar. (T11:865)

According to Sharon, drug and alcohol use changed David's personality and made him a different person. (T11:872-873) He did not have a drinking problem in high school. (T11:869) After David graduated, he joined the Navy. (T11:871-872) Sharon noticed when David returned home that he had changed. (T11:871-872) David developed a more aggressive personality and attitude. (T11:873) He had started drinking alcohol, and Sharon also suspected drug use as well. (T11:873) Sharon said at different times she talked to David about his alcohol and drug use. (T11:878-879) She lamented that she had not made the extra effort to counsel him more on this problem. (T11:878-879)

Leonard Miller, David's brother, also testified about their family background. (T11:923) Leonard said he was very close to his brother growing up. (T11:925-926) He said David was family oriented and on one occasion risked his life trying to put out a house fire. (T11: 928-929) Their father was and alcoholic and abusive to all the children. (T11:926-927) Leonard related one incident when their

father strapped their oldest sister, Valnese, to a door and beat her with an electrical cord. (T11:927) Sometime later when Leonard was in college, he was in the house when Valnese committed suicide. (T11:927)

After David joined the Navy, he began drinking and his life changed. (T11:930) He became more aggressive. (T11:930) His mother did not tolerate any drinking in her house, and David eventually left the house because of this conflict. (T11:930-931)

Dr. Harry Krop, a clinical psychologist, testified about his examination and testing of Miller. (T11:893-898) Krop reviewed many psychiatric records from the time Miller first obtained psychiatric treatment due to hospitalization in 1983 after a suicide attempt. (T11:895-898) Krop also reviewed the depositions and other information, including Miller's confession, about the homicide. (T11:896) Finally, Krop performed various psychological tests which included a neuro-psychological test. (T11:896-897)

Based on Miller's prior psychiatric history, involving three or four inpatient hospitalizations, and his own examination, Krop found Miller's primary diagnosis to be alcohol abuse and depression. (T11:898-899) A second diaognosis was mixed personality disorder which had features of schizoid personality, which is like schizophrenia but not to the extent that the person looses contact with reality, and paranoia. (T11:900-901) These people tend to be

aloof, distant and tend not to fit in with others in society. (T11:900-901) Krop did not find Miller to suffer from anti-social personality disorder, since persons with this diagnosis do not have empathy or concern about others. (T11:902-903) Third, neuro-psychological testing showed that Miller has impaired frontal lobe functioning. (T11:905-906) The frontal lobe of the brain is the last part to develop, and it usually is formed when a person is five or six years-old. (T11:906) This part of the brain controls inhibition and allows a person to stop and start certain behaviors. (T11:906-907) Although the frontal lobe does not control a person's decision-making regarding certain behaviors, it does affect the person's ability to stop behaviors. (T11:907) The person's impulse control is impaired. (T11:907) Miller's diagnosis of alcohol and drug abuse, frontal lobe defects and schizoid personality traits combined to create a seriously mentally disturbed individual. (T11:908-909)

David Miller testified in his own behalf. (T11:935) He stated that his family was a loving and respectable family. (T11:936) However, he said one thing that greatly affected him was that his mother and father never told him they loved him. (T11:936) Later, he realized that his mother loves him. (T11:936) She worked hard to raise four children. (T11:936) Miller said he did not want to use his childhood as an excuse. (T11:936)

Miller expressed his religious beliefs and said he was ready to take responsibility for his actions. (T11:936-937) He apologized to Linda Fullwood and the family of Albert Floyd, and he asked for forgiveness. (T11:937-938)

SUMMARY OF ARGUMENT

1. The State's evidence failed to prove the premeditation theory for first degree murder, and the trial court should have granted Miller's motion for judgement of acquittal on the premeditation theory. Miller's confession established that he struck the victim to knock him unconscious as a preemptive measure to prevent resistance to a robbery attempt. His statement was that he had no intent to kill anyone. In an effort to refute this direct testimony about Miller's state of mind at the time he struck the victim, the State could only point to the circumstantial evidence that Miller struck three blows. This circumstantial evidence is insufficient to prove premeditation, and it does not refute the evidence establishing an unintentional homicide.

2. The trial court rejected three mitigating circumstances which the evidence established and which this Court has held are mitigating as a matter of law. First, Miller proved that he did not intend to kill the victim. Second, through testimony of family members, Miller proved he suffered an abusive home environment during his early childhood. Third, evidence established that Miller suffered from a long-term problem abusing alcohol and drugs. The exclusion of these mitigating factors from the sentencing weighing process renders the death sentence imposed unconstitutional.

3. In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. Such a review in this case demonstrates that this case does not involve one of the most aggravated and least mitigated of murders. Miller committed an unintentional killing during an attempted robbery. Even though Miller had a prior conviction for second degree murder, the record is silent on the circumstances of that offense, and Miller's early release from prison militates in favor of giving this factor less weight than such an aggravating circumstance might otherwise carry. The trial court found several nonstatutory mitigating circumstances, and at least three others should have been found. Miller's death sentence is not proportional and must be reversed.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING MILLER'S MOTION FOR JUDGEMENT OF ACQUITTAL TO THE PREMEDITATION THEORY FOR THE FIRST DEGREE MURDER COUNT SINCE THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION.

The State's evidence failed to prove the premeditation theory for first degree murder, and the trial court should have granted Miller's motion for judgement of acquittal on the premeditation theory. (T8:558-560; T9:658) Miller's confession established that he struck the victim to knock him unconscious as a preemptive measure to prevent resistance to a robbery attempt. (T8:421) His consistent statement was that he had no intent to kill anyone. (T8:421, 439, 440-441, 446) In an effort to refute this direct testimony about Miller's state of mind at the time he struck the victim, the State could only point to the circumstantial evidence that Miller struck three blows. (T10:708) This circumstantial evidence is insufficient to prove premeditation, and it does not refute the evidence establishing an unintentional homicide.

Premeditation requires a conscious intent to kill before the killing. Sec. 782.04(1)(a)(1), Fla. Stat. As defined in the Standard Jury Instructions for Criminal Cases, premeditated murder is a

> killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass

> between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

Standard Jury Instr. (Crim. Cases). When the State relies on circumstantial evidence to prove premeditated murder, as it did in this case,

> a motion to acquit as to such murder must be granted unless the State can "present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Kirkland v. State, 684 So. 2d 732, 735 (Fla. 1996) (quoting State v. Law, 559 So. 2d 187, 188 (Fla. 1989)). Indeed, if "the State's proof fails to exclude a reasonable hypotheses [sic] that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993).

Kormondy v. State, 703 So.2d 454, 459 (Fla. 1997); see also, e.g., Fisher v. State, 715 So.2d 950, 952 (Fla. 1998); Norton v. State, 709 So.2d 87, 92-93 (Fla. 1997); Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997).

The State's own unrebutted evidence in this case failed to exclude the reasonable hypotheses that this was a killing caused by an accidental extreme use of force due to an impulsive act. Miller's confessions to the crime consistently indicated that he had no intent to kill anyone. (T8:420-421, 439, 440-441, 446) Relying solely on the three blows to the head of the victim, the State, nevertheless, urged premeditation had been established.

(T10:708) Evidence of multiple blows, standing alone, does not prove premeditation, especially, when there is other evidence, as in this case, which refutes premeditation. See, Kirkland v. State, 684 So.2d 732 (Fla. 1996); Coolen v. State, 696 So.2d 738 (Fla. 1997).

In this Court's decision in Kirkland, the defendant used a knife to slash the victim's throat "many" times, causing a deep, complex wound that cut off her breathing and produced a great deal of bleeding, causing her death by sanguination or suffocation. Kirkland apparently also beat the victim with a walking cane, causing blunt trauma wounds. There was evidence of sexual friction between Kirkland and the victim before the attack. However, this Court looked at the total record and rejected premeditation as a matter of law because of "strong evidence militating against a finding of premeditation." 684 So. 2d at 732. The Court found "there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide." Ibid. at 735.

Just as in Kirkland, the evidence of premeditation in the present case is insufficient. The defendant in Kirkland caused many wounds with two different weapons. Miller used one weapon and produced three wounds. (T7:348-351) Furthermore, at least one of those wounds happened after Miller was reacting to being

confronted. (T7: 308-309, 326-327) Just as in Kirkland, there was no evidence that Miller had an intent to kill prior to the homicide. Moreover, Miller expressly stated, in his complete confession, that he did not intend to kill. (T8:420-421, 439, 440-441, 446, 544) Like Kirkland, the evidence in this case fails to prove premeditation, and the court should have granted a judgment of acquittal on the premeditation theory.

In Coolen, this Court also found the evidence of premeditation lacking even though the defendant inflicted multiple knife wounds in what appeared to be an unprovoked attack. The defendant suddenly attacked the victim with a knife without warning or provocation; stabbing him multiple times -- inflicting deep stab wounds to the chest and back as well as defensive wounds on the forearm and hand. Coolen had threatened the victim with the knife earlier in the evening; Coolen and the victim fought over a beer; and the victim tried to fend off the attack. This Court rejected premeditation as a matter of law because evidence also showed Coolen "came of nowhere" to make a sudden and unprovoked attack, and the multiple stab wounds were consistent with an unpremeditated murder resulting from an escalating fight over a beer or a preemptive attack due to Coolen's paranoid belief the victim would attack him first. Coolen, 696 So.2d at 740-742. Like Coolen, the evidence in this case fails to prove premeditation, and the court

should have granted a judgment of acquittal on the premeditation theory.

The evidence failed to prove a premeditated murder in this case. Miller's motion for judgment of acquittal on this theory of prosecution should have be granted, and the charge should not have been submitted to the jury on this theory.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO FIND MITIGATING CIRCUMSTANCES ESTABLISHED BY THE EVIDENCE.

The trial court rejected three mitigating circumstances which the evidence established and which this Court has held are mitigating as a matter of law. First, Miller proved that he did not intend to kill, a factor which carries significant weight as a mitigating circumstance. See, Reilly v. State, 601 So.2d 222, 223 (Fla. 1992); Norris v. State, 429 So.2d 688 (Fla. 1983). Second, through testimony of family members, Miller proved he suffered an abusive home environment during his early childhood which is mitigating. See, Stevens v. State, 613 So.2d 402 (Fla. 1992); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990); Buford v. State, 570 So.2d 923 (Fla. 1990). Third, evidence established that Miller suffered from a long term problem abusing alcohol and drugs. This Court has held that such problems are mitigating circumstances once proven. See, Mahn v. State, 714 So.2d 391, 400-401 (Fla. 1998); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). The exclusion of these mitigating factors from the sentencing weighing process renders the death sentence imposed unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV U.S. Const. Miller urges this Court to reverse his death sentence.

Legal Standards

In a capital case, the trial court and this court are constitutionally required to consider any mitigating evidence found anywhere in the record. Amends. V, VIII, XIV, U.S. Const.; Parker v. Dugger, 498 U.S. 308 (1991); Art. I Secs. 9, 17 Fla. Const.; e.g., Santos v. State, 591 So.2d 160 (Fla.1991); Campbell v. State, 571 So.2d 415 (Fla.1990); Rogers v. State, 511 So.2d 526 (Fla.1987), cert. denied, 484 U.S. 1020. This Court addressed the duties of the sentencing court to find and consider mitigation in Rogers v. State, 511 So.2d 526. Acknowledging the command of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court defined the trial judge's duties as follows:

> ...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534. In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court reiterated the duties outlined in Rogers and

added the requirement that the trial court fully explain with clarity its evaluation of each mitigating factor in its sentencing order.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court stated that a trial court does have the discretion to reject a mitigating circumstance asserted by a capital defendant. However, the trial court can reasonably exercise that discretion only where the record contains competent substantial evidence refuting the mitigating circumstance:

> A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So.2d 964, 971 (Fla.1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance);see also Pardo v. State, 563 So.2d 77, 80 (Fla.1990) (this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

Nibert, 574 So.2d at 1062.

A. Miller Did Not Intend To Kill.

Lack of an intent to kill the victim is a substantial mitigating circumstance. See, e.g., Reilly v. State, 601 So.2d 222, 223; Norris v. State, 429 So.2d 688. The trial court

rejected as a mitigating circumstance that Miller did not intend to kill the victim. In the sentencing order, the court wrote:

> (1) Defendant did not intend to kill the victim.
>
> The defendant has stated that he did not intend to kill the victim. However, the court is not convinced that this has been proven. The defendant's conduct could lead one to believe otherwise. The defendant acknowledged that he initially struck the victim in order to make sure the victim could not offer any resistance. With the amount of force that was used, one could reasonably believe defendant intended to kill the victim or at least should have known that death was likely to occur. Defendant brutally struck the victim three times with such a force that any of the blows could have caused death. Defendant's self-serving statements are not credible in light of the expert and demonstrative evidence produced at trial which was uncontroverted. This mitigating factor has not been proven and will not be considered by the court.

(R2:367-368)(App A)

The trial court rejects Miller's statement in the confession that he did not intend to kill relying on the fact that the victim was struck three times. Evidence of the three blows does not refute Miller's statement about his state of mind. Miller's argument in Issue I, *supra*., as to why the evidence of premeditation was legally insufficient is equally applicable here. The trial court erred in denying a motion for judgment of acquittal to the premeditation theory and that same error has been continued into the sentencing process. Again, the court has relied solely on the fact that Miller struck three blows.

Miller did not intend to kill. Nothing about he manner of the killing is inconsistent with Miller's confession that he did not intend to kill. Three blows, standing alone, does not establish an intentional killing. See, Issue I, *supra*. Furthermore, in this case, Miller's abilities to control his behavior were diminished and provide a reason for the three blows other that an intent to kill. First, he was using drugs and alcohol on the night of the homicide which would have impaired his abilities. (T8:445, 450-451) Second, Miller's brain dysfunction, a frontal lobe deficit, reduced his ability to control his impulses or to stop a behavior once started. (T11:905-907) Moreover, the effect of the frontal lobe deficit would be exacerbated by the alcohol and drug use. (T11:908-909) Third, according to the testimony of Jimmy Hall, at least one of the three blows occurred after Miller was confronted and surprised by Linda Fullwood, and the additional blows may have been the result of Miller's panic. (T7:308-309, 326-327; T8:516)

B. Miller Had An Abusive Childhood.

Rejecting the proposed mitigating circumstance that Miller had an abusive childhood and an alcoholic father, the court wrote:

> (7) The defendant has an abusive childhood and the defendant's father was an alcoholic.

> While these two mitigating factors were listed separately by defendant they shall be considered as one by the court since they are so related.
>
> Defendant's mother, brother and sister all testified regarding defendant's early childhood when the father was still in the home. The father apparently did abuse alcohol and on a few occasions he was abusive primarily to defendant's mother and sometimes to the children including defendant. The father was out of the home by the time defendant reached his thirteenth birthday. The defendant was raised in the home of his maternal grandparents. Their home was apparently filled with much love and support. However, defendant's brother and sister have been law abiding citizens and have earned professional careers even though they were raised in the same environment as the defendant. Defendant's sister is a law enforcement officer with the city of Durham, North Carolina. Defendant's mother indicated the defendant was bright and creative and that he was regularly taken to church and Sunday School. In fact, the witnesses described a very close, loving and supportive family. Although there is some aspects of the defendant's family background that may provide slight mitigation, the totality of the defendant's family background is not mitigating, thus the court has not considered it as such and given it no weight in determining the sentence to be imposed.

(R2:369-370)(App A)

An abusive childhood experience is a mitigating circumstance. This Court has held that an abusive childhood, once factually established may not be rejected as not mitigating. See, Stevens v. State, 613 So.2d 402 (Fla. 1992); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990); Buford v. State, 570 So.2d 923 (Fla. 1990). The trial Court was not free to completely reject as not mitigating Miller's abusive childhood experience.

C. Miller Was Addicted To Alcohol And Drugs.

The trial court improperly rejected Miller's alcohol and drug problem as a mitigating circumstance, and wrote:

> (9) The defendant had an alcohol and/or drug problem.
>
> It was shown that defendant did abuse alcohol and drugs during the course of his adult life. His family tried to offer the defendant assistance. He was asked to leave his mother's home because of his unwillingness to seek help and give up his use of alcohol and drugs. However, while the defendant admitted to using drugs and alcohol on the night of this homicide, there is no convincing evidence that defendant was intoxicated or under the influence of drugs or alcohol at the time of this attempted robbery and murder. It is apparent that the defendant, notwithstanding the offer of help from his family, intentionally chose his life on the street, including the use of drugs and alcohol. Therefore, the court does not consider this as a mitigating factor and shall not give it any weight in the consideration of the sentence to be imposed.

(R2:370-371)(App A)

Alcohol and drug abuse problems are mitigating circumstances as a matter of law. See, e.g., Mahn v. State, 714 So.2d 391, 400-401 (Fla. 1998); Clark v. State, 609 So.2d 513, 516 (Fla. 1992); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Dismissing Miller's alcohol abuse problem as his choice shows the court's misunderstanding of the disease of alcoholism. The trial Court was not permitted to reject Miller's alcohol and drug abuse problems as not mitigating. Ibid.

The trial court erroneously rejected three significant mitigating circumstances which the evidence proved and which are mitigating as a matter of law. Miller's alcohol and drug abuse problem, his abusive early childhood, and the unintentional nature of the homicide are factors which the trial court was not free to reject as mitigation. Miller's death sentence has been unconstitutionally imposed. Amends. V, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. He asks this Court to reverse his death sentence.

ISSUE III

THE TRIAL COURT ERRED IN SENTENCING MILLER TO DEATH SINCE A DEATH SENTENCE IS DISPROPORTIONATE.

In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. E.g., Urbin v. State, 714 So.2d 411, 416-417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Such a review demonstrates that this case does not involve one of the most aggravated and least mitigated of murders. See, Urbin, 714 So.2d at 416; State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Miller committed an unintentional killing during an attempted robbery. Even though Miller had a prior conviction for second degree murder, the record is silent on the circumstances of that offense, and Miller's early release from prison militates in favor of giving this factor less weight than such an aggravating circumstance might otherwise carry. See, Jorgenson v. State, 714 So. 2d 423 (Fla. 1998). The trial court found several nonstatutory mitigating circumstances, (R2: 366-374)(App A) , and at least three others should have been found. See, Issue II, *supra*. Miller's death sentence is not proportional and must be reversed. Art. I, Secs. 9, 17, Fla. Const.

Although the State prosecuted this case as a premeditated murder during an attempted robbery, the evidence was insufficient to prove the premeditation theory. See, Issue I, *supra*. This Court has reversed death sentences imposed simply for murders committed during a robbery or burglary. See, e.g., Clark v. State, 609 So.2d 513 (Fla. 1992); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Even the complete absence of mitigating factors has not changed this result. Rembert, 445 So.2d at 340.

Just as in those cases, David Miller's offense is disproportionate. He struck the victim during the commission of an attempted robbery. Evidence at trial supported that Miller unintentionally killed the victim. See, Issue I, *supra*. In his sentencing order, the trial judge concluded that the homicide here was not unintentional. (R2:367-368)(App A) However, his conclusion is contradicted by the evidence. See, Issue I, *supra*. Even if the State had proven an intentional, premeditated murder, a death sentence is still inappropriate. Miller's crime does not qualify for a death sentence when compared to similar cases where this Court held a death sentence disproportionate:

In Rembert v. State, 445 So.2d 337 (Fla. 1984), the defendant killed the elderly proprietor of a bait and tackle shop during a robbery. Rembert struck the victim with a club which resulted in severe brain injury and death. The trial court found four aggravating circumstances, but this Court disapproved three of them. Although the defense presented some evidence of nonstatutory mitigating circumstances, the trial court found no mitigating circumstances. Rembert's death sentence was reversed.

In Proffitt v. State, 510 So.2d 896 (Fla. 1987), the defendant stabbed his victim as he awoke during the burglary of his residence. The trial court found the homicide was cold, calculated and premeditated in addition to being committed during the burglary. This Court reduced his sentence.

In Richardson v. State, 437 So.2d 1091 (Fla. 1983), the defendant beat his victim to death during a residential burglary. This Court approved four of the six aggravating circumstances the trial court found. No mitigating circumstances were found to exist. His sentence was reversed for imposition of life imprisonment.

In Holsworth v. State, 522 So.2d 348 (Fla. 1988), the defendant stabbed two victims, killing one, during a burglary of a residence. Three aggravating circumstances were approved and no mitigating circumstances were found, but this Court concluded

that the jury could have based its life recommendation on evidence of childhood trauma, drug usage and past history of nonviolence. Holsworth's death sentence was reduced to life.

In Terry v. State, 668 So.2d 954 (Fla. 1996), one of two robbery victims was shot and killed. Terry's codefendant confessed that he and Terry were looking for a place to rob. The codefendant also said that Terry was the one who robbed the deceased victim while he held the other victim. DNA tests matched stains on Terry's shoes to the victim's blood. Evidence supported the "theory that this was a 'robbery gone bad.'" 668 So.2d at 965. The jury recommended death by a vote of eight to four. In aggravation, the trial court found two aggravating circumstances -- prior conviction for a violent felony based on a contemporaneous aggravated assault and homicide committed during a robbery. The trial court found no statutory or nonstatutory mitigating circumstances. This Court held the death sentence disproportionate.

In, Sinclair v. State, 657 So.2d 1138 (Fla. 1995), the defendant was convicted of murdering a taxicab driver during a robbery. The driver was shot twice in the head. An eleven to one vote from the jury returned a recommendation of death. The judge found three nonstatutory mitigating factors which he gave

little or no weight. However, this Court found the death sentence disproportionate.

In Clark v. State, 609 So.2d 513 (Fla. 1992), the defendant went drinking with two friends and another man, Carter, who had just been hired for a job which Clark had also sought. Clark stopped the car in a remote area and shot Carter once in the chest. Clark reloaded the shotgun and shot Carter again in the mouth. After the shooting, Clark said that he guessed he had the job now. The jury recommended death by a vote of ten to two. The trial court found no mitigating circumstances, however this Court concluded that evidence established nonstatutory mitigation. Clark's death sentence was reduced to life.

In McKinney v. State, 579 So.2d 80 (Fla. 1991), the robbery victim was shot seven times and suffered lacerations to the head. His body was dumped from a moving car into an alley. The victim was semiconscious when found and gave a description of his assailant before he died at the hospital. The jury recommended death by a vote of eight to four. This Court disapproved two of the three aggravating circumstances the trial court found which left only the circumstance that the murder occurred during a violent felony(robbery, kidnapping and burglary). The trial court found one statutory mitigator -- no significant criminal

history. The court also found nonstatutory mitigation, but gave it little or no weight. This Court vacated the death sentence.

Although Miller has a previous conviction for second degree murder as an aggravating circumstance, this does not render his death sentence properly imposed on these facts. Significantly, the State presented none of the facts underlying the prior second degree murder. (T11: 824-826) Consequently, there was nothing presented to evaluate the weight which might be properly afforded the circumstances of the crime. The record does show that the State of North Carolina deemed Miller should be released early from his 25 year sentence after approximately seven years. (T11:824-826, 858) The presentence investigation report prepared in this case reveals that the prior murder is Miller's only prior violent offense. (PSI at page 4) Consequently, on this record, the prior second degree murder conviction is entitled to less weight than it might otherwise be afforded. See, Jorgenson v. State, 714 So.2d 423, 428 (Fla. 1998); Chaky v. State, 651 So.2d 1169, 1173 (Fla. 1995). This Court has reversed death sentences as disproportional even though the defendant has a previous conviction for a violent felony. See, Jorgenson v. State, 714 So.2d at 428, (previous conviction for second degree murder); Chaky v. State, 651 So.2d at 1173, (previous conviction for attempted murder); Urbin v. State, 714 So.2d 411 (Fla.

1998)(previous conviction for armed robbery, burglary and kidnapping); Livingston v. State, 565 So.2d 1288 (Fla. 1988) (previous conviction for attempted murder); Fead v. State, 512 So.2d 176 (Fla. 1987)(previous conviction for murder); Wilson v. State, 493 So.2d 1019 (Fla. 1986)(previous conviction for murder). The facts of Miller's crime do not qualify for a death sentence, and the previous conviction for a violent felony, when weighed against the mitigating circumstances present, does not bring this case into the parameters of a death case.

Several significant mitigating factors are present in this case which compel a life sentence when weighed against the aggravation in this case. First, Miller did not intent to kill the victim. See, Issues I & II, *supra*. Second, Miller suffered from alcohol and drug addiction.(T11:898-899, 915-918) See,also, Issue II, *supra*. Third, Miller was drinking and using cocaine the night of the homicide. (T8: 450-451, 513, T11:915-918) Fourth, Miller suffers from a deficiency in his frontal lobe functioning which impairs impulse control. (T11:905-907) Alcohol and drug use exacerbates this impulse control impairment. (T11:908-909) Fifth, Miller turned himself in to the police, at a time when he was not even a suspect. (T8:417) Sixth, Miller fully confessed to the crime and cooperated completely with the investigation. (T8:417-491, 511-545) Seventh, Miller accepted

responsibility for his crime and expressed his remorse to the victim's family. (T8:482-483, T11:936-938)

Miller's death sentence is disproportionate. He asks this Court to reverse the sentence and remand for a life sentence.

CONCLUSION

For the reasons presented in this initial brief, David Miller asks this Court to reverse his judgment and sentence and remand his case to the trial court for a new trial or, alternatively, the imposition of a life sentence.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
Assistant Public Defender
Florida Bar No. 201170
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Richard B. Martell, Chief, Capital Appeals, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to Appellant, on this ____ day of March, 199.

W. C. McLAIN
Assistant Public Defender

Appendix

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

CASE NO. 97-6680-CF
DIVISION: CR-C

THIS INSTRUMENT IS NOT IN COMPUTER G. R.

STATE OF FLORIDA

vs.

DAVID MILLER JR.

Defendant

FILED
JUL 24 1998
CLERK CIRCUIT COURT

SENTENCING ORDER

The defendant, DAVID MILLER, was tried for the murder of ALBERT FLOYD which occurred in the early morning of March 6, 1997. The trial of the case commenced on Monday, June 22, 1998 and concluded on Thursday, June 25, 1998, wherein the jury returned a verdict finding DAVID MILLER guilty of murder in the first degree as charged in Count I of the Indictment. In Count II of the Indictment, defendant was charged with the crime of aggravated battery of LINDA FULWOOD for which he was also found guilty. The penalty portion of the case was held on Tuesday, July 14, 1998, and the jury, by a 7-5 vote, recommended to the court that the defendant should receive a sentence of death. A sentencing hearing was held before the court on Friday, July 17, 1998, at which time Mr. Miller was given the opportunity to make a further statement to the court. At the sentencing hearing both parties submitted memorandum for the court's consideration.

This court has heard the evidence presented at trial, in both the guilt phase and penalty phase, as well as the testimony presented by the defendant at the sentencing hearing. The court has had the benefit of memorandum submitted and arguments of counsel in favor of and in opposition to the

death penalty considering the facts and law applicable to this case. After due consideration of the above, the court finds as follows:

A. **AGGRAVATING FACTORS**

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to some person. Sec. 921.141 (5) (b) Fla. Statutes (1997).

The state has submitted proof of two separate crimes in support of this aggravating factor:

(a) On December 18, 1986, defendant was convicted of second degree murder in the state of North Carolina. The defendant was sentenced to serve 25 years in the North Carolina prison but was eventually paroled in February, 1993, some 7 years later.

(b) In this case, defendant was convicted of committing aggravated battery on Linda Fulwood. After defendant had struck the murder victim, he proceeded to strike Linda Fulwood with a metal pipe which caused her to suffer severe personal injuries.

Judgment and sentences for these separate convictions were introduced at the sentencing hearing. In addition, the trial testimony of Linda Fulwood in the guilt phase of this case proves beyond all reasonable doubt the existence of this aggravating factor. This aggravating factor has been given great weight in determining the appropriate sentence to be imposed in this case, particularly defendant's prior conviction for murder.

2. The capital felony was committed while the defendant was engaged in an attempted to commit robbery. Sec. 921.141(5) (d) Fla. Statutes (1997).

3. The capital felony was committed for pecuniary gain. Sec. 921.141 (5) (f) Fla. Statutes (1997).

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The testimony produced at trial proved beyond a reasonable doubt, defendant's intention was to rob Albert Floyd of his money or possibly his drugs. It is clear from the defendant's many confessions that he intended primarily to rob Floyd of his money so that defendant could buy drugs or alcohol for his personal consumption. The defendant actually, against the advice of his attorney, elected to testify at trial and reluctantly admitted, once again, that his purpose for committing the robbery was to obtain money. In order to carry through with his goal, the defendant grabbed an approximately six foot metal pipe. He came upon Albert Floyd and Linda Fulwood while they were sleeping and defenseless and began to strike first Floyd in the head and then Fulwood when she was awakened by the attack. Mr. Floyd suffered three blows to the head, each one causing a fracture to his skull and, unfortunately, resulted in his death. The defendant admitted he initially attacked Mr. Floyd in order to make sure he could not offer any resistance to the robbery.

As stated above, both of these aggravating factors have been proven beyond a reasonable doubt. However, pursuant to Florida law, since these aggravating factors have been proven by a single aspect of the offense, they are therefore merged and considered as supporting only one aggravating factor. See Castro v. State, 597 So.2d 259 (Fla.1992). This aggravating factor has been accorded considerable weight in determining the appropriate sentence to be imposed in this case.

None of the other aggravating factors enumerated by statute is applicable to this case, therefore, they have not been considered by the court in the determination of the sentence to be imposed.

B. **MITIGATING FACTORS**

1. STATUTORY MITIGATING FACTORS

The defendant did not request that the jury be instructed as to any statutory mitigating factors.

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Prior to the penalty phase, the court conducted a charge conference with counsel and the court and the attorneys concurred that the evidence submitted during trial did not give rise to any statutory mitigating factors. At the penalty phase defendant did not offer evidence of any statutory mitigating circumstances nor were any offered by defendant at the separate sentencing hearing before the court. The court has reviewed each statutory mitigating factor and finds that no evidence has been presented at each phase of this case to support any statutory mitigating factor, therefore, none have been considered by the court in determining the sentence to be imposed.

2. NON-STATUTORY MITIGATING FACTORS

During the penalty phase of the case, the defendant presented evidence and testimony concerning non-statutory mitigating factors for the jury's consideration. In addition, prior to the sentencing hearing, the court asked defendant to submit a memorandum regarding the non-statutory mitigators he felt had been presented during both phases of the trial and at the sentencing hearing. The memorandum submitted by defendant concerning non-statutory mitigation will be considered as listed by defendant.

(1) Defendant did not intend to kill the victim.

The defendant has stated that he did not intend to kill the victim. However, the court is not convinced that this has been proven. The defendant's conduct could lead one to believe otherwise. The defendant acknowledged that he initially struck the ~~defendant~~ victim in order to make sure the victim could not offer any resistance. With the amount of force that was used, one could reasonably believe defendant intended to kill the victim or at least should have known that death was likely to occur. Defendant brutally struck the victim three times with such a force that any of the blows could have caused death. Defendant's self serving statements are not credible in light of the expert and

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demonstrative evidence produced at trial which was uncontroverted. This mitigating factor has not been proven and will not be considered by the court.

(2) The victim was unconscious and did not suffer for any lengthy periods of time.

Giving the defendant the benefit of the doubt, the testimony of the medical examiner probably supports this statement. The expert testified that any of the three blows would have been fatal. One can only assume and hope the first blow did render the victim unconscious so that he did not suffer for any meaningful time. While this mitigator has been proven, the court shall give it very little weight. Defendant should not benefit from his evil intentions. Certainly there is no evidence to indicate the defendant did anything out of consideration of the victim's pain and suffering.

(3) The defendant turned himself into the police.

This fact has certainly been proven. Obviously, the police in Jacksonville had very little evidence to go on in light of the lack of witnesses to the crime and the circumstances of the parties involved. These parties lived in a sub culture for the most part. Defendant was homeless and a transient. The Jacksonville Sheriff's Office did not have a name or suspect. The crime might have gone unsolved but for the fact that the defendant voluntarily turned himself in to the police in Baton Rouge, Louisiana. While some consideration should be given to this fact, the actual weight to be given is reduced in consideration of the defendant's true motivation. It is apparent from the defendant's video confession when he first turned himself in to the police, his primary consideration was to protect himself. During the tape confession, defendant freely admitted that he was afraid some kin or friends of the victim were following him for the purpose of killing him. The defendant turned himself in for his protection and not some other altruistic reason. Therefore, only slight weight shall be given to this mitigating factor considering defendant's true motivation.

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(4) That there is no early release for first degree murder and the fact that a life sentence is without the opportunity of parole shall be considered together.

These are in essence the same argument looking at it from different sides of the coin. The court can only assume that a sentence to life in a case of murder in the first degree now means there is no release **period**. The jury was advised of this fact. This fact can be considered as a mitigator, however, it is given very little weight by the court as to the appropriate sentence to be imposed.

(5) The defendant has shown sincere remorse.

Defendant expressed his regrets and offered apologies to the victim's family at the sentencing hearing. In addition the defendant appeared to show some qualified remorse when he initially turned himself in to the police. The court believes the defendant is now truly sorry for his conduct which led to this terrible crime. The court has given this mitigating factor some weight in determining the appropriate sentence to be imposed.

(6) The defendant has cooperated with the police.

There can be no doubt as to defendant's cooperation. Obviously, this homicide would not have been solved as quickly as it was without the assistance of the defendant. Mr. Miller was open and candid with the police in Louisiana as well as in Jacksonville when he was returned to the city. He repeatedly provided the police with full confessions on tape as well as video. In addition, once he returned to Jacksonville, he took the homicide detective through a "walk through" in order to provide further assistance.

This mitigating factor has been proven and the court has given this factor some weight in determining the appropriate sentenced to be imposed.

(7) The defendant had an abusive childhood and the defendant's father was an alcoholic.

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While these two mitigating factors were listed separately by defendant they shall be considered as one by the court since they are so related.

Defendants' mother, brother and sister all testified regarding defendant's early childhood when the father was still in the home. The father apparently did abuse alcohol and on a few occasions he was abusive primarily to defendant's mother and sometimes to the children including defendant. The father was out of the home by the time defendant reached his thirteenth birthday. The defendant was raised in the home of his maternal grandparents. Their home was apparently filled with much love and support. However, defendant's brother and sister have been law abiding citizens and have earned professional careers even though they were raised in the same environment as the defendant. Defendant's sister is a law enforcement officer with the city of Durham, North Carolina. Defendant's mother indicated the defendant was bright and creative and that he was regularly taken to church and Sunday school. In fact, the witnesses described a very close, loving and supportive family. Although there is some aspects of the defendant's family background that may provide slight mitigation, the totality of the defendant's family background is not mitigating, thus the court has not considered it as such and given it no weight in determining the sentence to be imposed.

(8) The defendant did not resist arrest.

This issue has already been considered above in the discussion of defendant's cooperation with the police. The defendant did not resist arrest because he intentionally turned himself in to the police. This fact under these circumstances is not a mitigating factor and will not be given any weight in determining the sentence to be imposed.

(9) The defendant had an alcohol and/or drug problem.

It was shown that defendant did abuse alcohol and drugs during the course of his adult life.

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His family tried to offer the defendant assistance. He was asked to leave his mother's home because of his unwillingness to seek help and give up his use of alcohol and drugs. However, while the defendant admitted to using drugs and alcohol on the night of this homicide, there is no convincing evidence that defendant was intoxicated or under the influence of drugs or alcohol at the time of this attempted robbery and murder. It is apparent that the defendant, notwithstanding the offer of help from his family, intentionally chose his life on the street, including the use of drugs and alcohol. Therefore, the court does not consider this as a mitigating factor and shall not give it any weight in the consideration of the sentence to be imposed.

(10) The defendant was employed at labor pools.

The court can only assume this mitigating factor is offered to show that the defendant is a good worker. The evidence does reflect that defendant obtained his limited income and substance from his periodic work with labor pools as a day laborer. The defendant was basically one of the many homeless individuals in this city who live in a sub-culture. Certainly, there was not any evidence produced to show defendant's work history nor his attributes as a day laborer. Thus the court does not consider this as any mitigating factor and shall give it no weight in the consideration of the sentenced to be imposed.

(11) The defendant was very close with his cousin and older sister and emotionally distraught upon their deaths.

Certainly from the testimony of defendant's family members, it is proven that defendant was upset by these deaths, as were his brother and sister. This is only natural and is to be expected. However, these deaths occurred many years ago during defendant's youth. There was no evidence produced at trial, either during the guilt or penalty phase, or before the court to indicate that

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defendant was emotionally traumatized by these events other than what would normally be expected. Thus this mitigating factor shall be given little weight by the court.

(12) The defendant has a "frontal lobe deficit" which may have hampered his ability to stop his actions, once started.

This evidence was produced at the penalty phase through the testimony of Dr. Harry Krop a clinical psychologist. At the request of defendant's attorney, Dr. Krop performed a battery of tests on the defendant for the purpose of testifying at the penalty phase of the trial. In the doctor's opinion, the defendant's frontal lobe, the front portion of the brain, had not fully developed. This is the part of the brain which normally controls impulses or inhibitions. Dr. Krop's testimony was uncontroverted by the state. However, Dr. Krop did state that defendant was able to make his decisions and more importantly, that defendant did not suffer from any major mental illness, such as any anti-social personality disorder but did show signs of a mixed personality disorder. In the doctor's opinion, the defendant was competent to proceed and was legally sane at the time of the murder in that he knew the difference between right and wrong. His primary diagnosis of the defendant was that he suffered from alcohol abuse and depression.

The most important aspect of Dr. Krop's testimony to the court, as it pertains to the issues in this case, is the fact that defendant's actions were by his own making or choice. That is, Mr. Miller purposely chose to try to rob the victim and made the decision to effectuate the robbery by the use of violence which, unfortunately, lead to Mr. Albert's untimely death. This mitigating factor has been proven, however, because of the other findings of Dr. Krop, it shall be given modest weight in the determination as to what sentence shall be imposed.

(13) The defendant's psychological history reveals that he is capable of adapting well to long-term incarceration.

The court is of the opinion that this is most likely true in consideration of Dr. Krop's testimony. However, no other testimony was offered by defendant regarding his adjustment to prison life while he was in prison in North Carolina. This mitigating factor as proven is given very little weight by the court in the determination of the appropriate sentence to be imposed.

(14) The defendant is loved by his family, has a family and has done good deeds.

Certainly, in spite of his past behavior and notwithstanding the fact that defendant has now been twice convicted of murder, this defendant is still loved by his family. However, this is the beauty of families, that is they can love the unlovable. But even defendant's family has had to exercise some tough love by evicting defendant from their homes based on his conduct. The evidence of defendant's good deeds pertains to the distance past during his childhood and young adulthood. There was not any evidence reflecting defendant's proclivity toward good deeds in his recent past. No doubt, the defendant will continue to enjoy the love and support of his family regardless of his history and convictions for violent crimes. However, the court shall only give slight weight to this mitigating factor for it appears the love and support of the family has been basically one way. That is, the family has continued to show love and support for the defendant but he has given little in return. This defendant is a taker and not a giver.

(15) Defendant has adjusted well while incarcerated.

As stated above, it is a mitigating circumstance that the defendant can adapt well to incarceration. However, defendant has failed to call correctional officers or offer documentary evidence of his behavior in the Duval County Pre-Trial Detention Facility while he was awaiting trial

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this past year. The court will acknowledge that defendant has at all pre-trials and during all stages of his trial conducted himself well and has always been respectful to the court. It has been the experience of the court, that most defendants awaiting trial for such serious offenses are normally well behaved, at least when they appear before the court. Therefore, this mitigating factor, in light of the circumstances, will be accorded slight weight in consideration of the sentence to be imposed by the court.

CONCLUSION

The Court has now considered all of the aggravating factors and mitigating factors that are applicable to this case. The aggravating factors that have been proven beyond a reasonable doubt in this case far outweigh the mitigating factors. In weighing the aggravating factors against the mitigating factors the court understands the process is not simply an arithmetic formula. Certainly, the process is more involved than simply weighing the number of aggravating factors against the number of mitigating factors. The court must primarily consider the nature, type and quality of aggravating factors and mitigating factors which have been proven to exist.

The court, in determining the appropriate sentence to impose in this case, has adhered to this method. In the opinion of this court, every one of the aggravating factors proven, standing alone, would be sufficient to outweigh the paucity of the mitigation shown to exist.

The defendant's prior conviction for murder is most appalling and has been given great weight. The court cannot imagine a greater aggravating factor unless it pertains to the method of the prior murder or the nature of the victim. This second murder by the defendant occurred approximately four years from the date of defendant's early release from prison after serving a mere seven years of his twenty-five year sentence. The Supreme Court of Florida has previously held that

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the death sentence is appropriate, not mandatory but appropriate, in cases wherein one of the aggravating factors proven is the defendant's prior conviction for murder. See Ferrell v. State, 680 So.2d 390 (Fla. 1996) and Duncan v. State, 619 So.2d 279 (Fla. 1993).

Lastly, the court is cognizant of the fact, by law, great weight must be given to the recommendation of the jury. The jury's decision to recommend death in this case was appropriate given the nature of the aggravating factors and the lack of mitigating factors. This court shall not over-rule their decision.

Therefore, it is;

ORDERED AND ADJUDGED:

1. That the defendant, **DAVID MILLER,** is adjudicated guilty of murder in the first degree for the murder of **ALBERT FLOYD** and the defendant is hereby sentenced to death.

2. The defendant shall be transported to the Department of Corrections to be securely held by them on Death Row at Florida State Prison until you, **DAVID MILLER,** are executed as provided by law.

3. The court now advises you the judgment and sentence of this court is subject to automatic review by the Supreme Court of Florida.

MAY GOD HAVE MERCY ON YOUR SOUL

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 24 day of July, 1998.

L. HALDANE TAYLOR
CIRCUIT JUDGE

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