

IN THE SUPREME COURT OF FLORIDA

WILLIE B. MILLER,

Appellant,

v.

CASE NO. SC01-837

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

BARBARA J. YATES

ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 293237

OFFICE OF THE ATTORNEY

GENERAL

THE CAPITOL  
TALLAHASSEE, FL 32399-1050  
(850) 414-3300 Ext. 4584

COUNSEL FOR APPELLEE

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## STATEMENT OF THE CASE AND FACTS

The basic facts of this case are set out in this Court's opinion affirming Miller's convictions and remanding for resentencing:

Miller (34 years old) and his nephew Samuel Fagin (16 years old) entered the Jung Lee grocery store at around 4:30 p.m. on July 5, 1993. Miller's brother had given them the idea to rob the store and had given Miller and Fagin a .22 caliber rifle. James Jung (who ran the store) testified that he, both his parents (who owned the store), the store's security guard (James Wallace), Mary McGriff, and two children were inside.

Fagin testified that after entering, Miller put the rifle up to Wallace's face, then Fagin took Wallace's .38 caliber gun. Fagin said he heard a gunshot, then saw blood coming from Wallace's face. Fagin then shot James Jung—he claimed accidentally—who was behind the counter. Miller took the money from the cash register. Miller and Fagin then left. Jung was hospitalized but ultimately recovered from the gunshot wound. Wallace developed other ailments during his hospitalization and died on January 1, 1994. His doctor testified that he died of pneumonia and respiratory failure; the medical examiner testified that the cause of death was a gunshot wound to the head.

Fagin testified that he and Miller split the money. Eric "Bobby" Harrison testified that he bought the .38 caliber gun from Fagin. Also testifying were: firearms experts, a fingerprint expert who testified that a print on the cash tray belonged to Miller, and several jailhouse informants who testified as to conversations with Miller where he said he had shot Wallace. Sheila Rose testified that she was across the street from the grocery when her grandmother Mary McGriff ran over and told her Wallace had been shot. Rose said that through the window she saw a man jump across the counter and that then she saw two men exit the store. She described both men. The defense did not call any witnesses, and Miller did not testify in his own defense. The jury deliberated for approximately two hours before returning the guilty

verdicts.

At the penalty phase, the State called court operations supervisor Hanzelon to testify as to Miller's prior armed robbery conviction. The State called Fertgus, who testified that the fingerprints affixed to the prior judgment matched the prints he took from Miller in 1995, and Detective Goodbred, who recounted the details of the 1984 offense. The defense called no witnesses. The jury deliberated for half an hour before returning its twelve-to-zero vote.

After submitting sentencing memoranda, the defense submitted a copy of Miller's school records at the sentencing hearing and noted that Miller had been examined by Dr. Krop and Dr. Miller. At sentencing, the defense introduced a letter from Miller's G.E.D. instructor.

Miller v. State, 733 So.2d 955, 955-56 (Fla. 1998). The trial court found that three aggravators had been established - prior violent felony, felony murder/burglary, and pecuniary gain- and sentenced Miller to death. On appeal this Court reversed the burglary conviction, struck the felony murder/burglary aggravator, and directed that Miller be resentenced. Id. at 957.

Miller's resentencing took place in January 2001. James Jung, the surviving victim, co-defendant Samuel Fagin, the medical examiner, assistant court clerk, fingerprint expert, and the detectives who worked both Miller's prior armed robbery and the instant criminal episode testified for the state. (IV 358-99, V 406-87).<sup>1</sup> Miller

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<sup>1</sup> "IV 358-99" refers to pages 358 through 399 of volume IV of the record on appeal. That record consists of volumes I through VII, pages 1 through 840.

presented testimony from psychologist Harry Krop (V 502-66) and three of his sisters. (VI 611 et seq.). The jury unanimously recommended that Miller be sentenced to death. (I 159; VI 783).

Each side submitted a sentencing memorandum (I 163, 168), and the court held a Spencer hearing<sup>2</sup> on March 5, 2001. (VI 790-99, VII 804-27). Actual sentencing took place on March 9, 2001. (VI 828 et seq.). The trial court found two aggravators (prior violent felony conviction and committed for pecuniary gain), one statutory mitigator (age), and numerous nonstatutory mitigators and sentenced Miller to death. (I 194C-194H).

### SUMMARY OF THE ARGUMENT

I. The trial court found and considered Miller's modest intellectual abilities as mitigation. The recently enacted statute prohibiting execution of mentally retarded killers is prospective and inapplicable to this case. Even if the statute were applicable, however, the statutory requirements were neither followed nor met. No relief is warranted.

II. Miller's death sentence is proportionate. The trial court considered all of the proposed mitigation, and Miller has shown no abuse of discretion in the weighing process.

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<sup>2</sup> Spencer v. State, 615 So.2d 688 (Fla. 1993).

III. The trial court did not err by allowing a detective to testify about Melvin Green's statement. Green's statement was admitted into evidence and read by Green during his guilt-phase testimony, and Green was unavailable at resentencing.

IV. This issue has not been preserved for review because Miller failed to object to the prosecutor's comments that he complains about on appeal. No fundamental error occurred, and no relief is warranted.

## ARGUMENT

### ISSUE I

Whether Miller's Death Sentence  
Constitutes Cruel and Unusual  
Punishment.

Miller argues that because he is retarded his death sentence constitutes cruel and unusual punishment. However, he has shown no reversible error, and this claim should be denied.

At the resentencing Miller's chief witness was psychologist Harry Krop, who testified that Miller had an IQ of 64. (V 533). Among other things, however, Krop also testified that: Miller refused to talk with him the first time they met because Miller was concerned about the confidentiality of their conversation (V 508); Miller told him the gun went off accidentally and the victim died because of poor medical care (V 511); Miller had no major mental illness (V 520); Miller was malingering when

Krop evaluated him in 1994 prior to trial (V 523-24); Miller has the ability to bank and shop for himself (V 540); Miller has “street” sense and a familiarity with the criminal justice system (V 541); Miller “communicated clearly and appropriately” and knows the difference between right and wrong (V 543-44); and Miller has an antisocial personality disorder. (V 555).

Defense counsel argued to the jury that Miller’s low intellectual ability warranted less than a death sentence. (VI 750-53, 761-63, 766-71). In his sentencing memorandum counsel argued that the statutory mitigator of age applied because of Miller’s mental age and that Miller’s mild retardation should be found as nonstatutory mitigation. (I 164-65).

Thereafter, the trial court found Miller’s age as a mitigator based on his mental age:

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

The evidence is clear that the defendant was an adult 34 years of age at the time of the commission of these crimes. However, the defendant presented testimony of Harry Krop, a psychologist, who opined that the defendant had a full scale I.Q. of 64, which related to a mental age of 14 or 15 years old. As a result of the low I.Q., Willie B. Miller was functioning in the mild retarded range. Dr. Krop reviewed the defendant’s school records and testified that Willie B. Miller had been retained in some elementary grades and that he was placed in some special classes and had exhibited very serious behavior problems. It was Dr. Krop’s opinion that these school records were reflective of the

defendant's intellectual deficit and possible impairment of his cognitive abilities due to diffuse brain damage, with unknown causation, probably from birth. In addition, Dr. Krop was provided with family background information indicating that the defendant and his siblings were physically abused by their mother. The mother's abuse ultimately resulted in the death of the defendant's twin brother, Michael, at age twelve. While not connecting the traumatic death of the defendant's twin brother with the 1993 murder of James Wallace, Dr. Krop did testify and note that Willie B. Miller's criminal acts did not commence until after the death of his twin brother. Dr. Krop further testified that Willie B. Miller exhibited deep-seated "anti-social personality disorder" prominent features of which are a disregard for the law and rights of others. Dr. Krop testified that this anti-social personality disorder is not a mental illness and does not interfere with one's ability to understand the difference between right and wrong, or to appreciate the nature or quality of one's conduct. Dr. Krop did testify that he believed that the defendant, Willie B. Miller, fully appreciated the nature and quality of his acts on July 15, 1993, when he committed the Armed Robbery of the Jung Lee Grocery Store and the Murder of James Wallace. Dr. Krop fully acknowledge that the defendant had the ability to engage in goal-oriented activity including significantly planning the commission of a crime. In reviewing the police reports and the trial transcript, Dr. Krop agreed that this was a planned criminal episode as opposed to some kind of impulsive activity. During the period of time that the defendant was incarcerated in the Duval County Jail prior to the guilt phase, he wrote a letter to his nephew, co-defendant, Samuel D. [Fagin], advising him to "get rid of the gun and to make no statements". This letter was presented to Dr. Krop who indicated that even though Willie B. Miller had a mental age of 14 or 15, this letter was indicative of a higher level of function in that the letter further reflected a coherent, concrete thought process, "street sense", and an individual "familiar with the criminal justice system". Dr. Krop had examined Willie B. Miller on at least two occasions, the first occasion was in 1994, prior to the first trial, and rendered an opinion that he believed that the defendant was "malingering in order to avoid responsibility".

While the Court is not satisfied that the defendant has proved this

mitigator, the Court gives the testimony and evidence concerning this mitigator some weight.

(I 194D-194E). Among other things, the trial court found the following as nonstatutory mitigation:

D. THE DEFENDANT IS MILDLY RETARDED AND HAS AN I.Q. OF 64.

This was proven by the defendant through Dr. Krop, a noted psychologist. The Court gives this factor some weight.

(I 194G).

Miller received a full and fair hearing on his alleged retardation. The trial court fully considered that proposed mitigation, and Miller's death sentence is both lawful and appropriate. See Penry v. Lynaugh, 492 U.S. 302 (1989); Thompson v. State, 648 So.2d 692 (Fla. 1994); Hall v. State, 614 So.2d 473 (Fla. 1993). Indeed, Miller makes no complaint about the trial court's consideration of his proposed mitigation. Instead, he argues that sentencing retarded killers to death is unconstitutional and asks that his death sentence be reduced to a sentence of life imprisonment.

In its 2001 general session the Florida Legislature adopted section 921.137, Florida Statutes, prohibiting imposition of the death penalty on a mentally retarded defendant.<sup>3</sup> However, this new statute is prospective only. § 921.137(8). The

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<sup>3</sup> § 921.137 is attached to this brief as appendix A.

statute became effective on June 12, 2001, but Miller was sentenced to death on March 9, 2001. Thus, Miller does not come within the statute's purview.

The right of a retarded killer not to be sentenced to death is substantive. As this Court has held numerous times, a substantive statute is presumptively prospective unless there is a clear legislative intent that it apply retroactively. E.g., Memorial Hospital v. News-Journal Corp., 784 So.2d 438 (Fla. 2001); Singletary v. Van Meter, 708 So.2d 266 (Fla. 1998); VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983). The legislative intent that section 921.137 be applied prospectively is unmistakably clear.

Even if this Court were to hold that the new statute should be retroactive, it cannot grant the relief Miller asks for because he has met none of the statute's requirements. Regardless of failing to meet the statute's notice requirements, the evidence introduced at resentencing did not meet the statutory definition of "mental retardation," and Miller did not carry the statutory burden of establishing retardation by clear and convincing evidence. § 921.137(4).

The trial court found as nonstatutory mitigation that Miller "is mildly retarded and has an I.Q. of 64." (I 194G). However, under the statute "mental retardation" is "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period of conception to age

18.” § 921.137(1). Moreover, “significantly subaverage general intellectual functioning” is defined as “two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services.” § 921.137(1). The legislature also defined “adaptive behavior” as “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.” § 921.137(1). The evidence introduced at resentencing did not meet these statutory definitions required to demonstrate retardation.

In arguing generally that retarded killers should not be sentenced to death, Miller states “that juries reflect the societal opposition to executing the mentally retarded” (initial brief at 38) and that “a defendant with mental retardation who receives a death sentence does not arrive at this fate on any principled basis reflecting personal culpability, but rather because his lawyer failed to present mental retardation as a mitigating factor or to do so effectively; because the jury misconstrued the defendant’s inappropriate behavior as callousness or lack of remorse; or because the prosecutor was able to convince the jury that a defendant with poor impulse control represents a grave threat to society.” (Initial brief at 48-49). The facts of this case belie these sweeping generalizations. Resentencing counsel presented evidence of

alleged mental retardation. The only inappropriate behavior that occurred was Miller's callous killing of an unarmed man. The jury did not misconstrue that behavior. The prosecutor did not convince the jury that Miller was a threat to society. Instead, his cold-blooded, unprovoked murder of the unarmed victim was an ample demonstration that Miller was a threat to society. Moreover, by its unanimous death recommendation Miller's jury demonstrated society's support of executing allegedly retarded killers.

Miller has not shown that his death sentence is unconstitutional, and it should be affirmed. If this Court decides to apply section 921.137 retroactively, it should send this case back to the trial court for a full hearing under that statute.

## ISSUE II

### Whether Miller's Death Sentence Is Proportionate.

Miller argues that his death sentence is disproportionate because the aggravators are "relatively" weak, and the mitigation is "substantial." (Initial brief at 62). There is no merit to this claim.

Contrary to Miller's contention, the prior violent felony and pecuniary gain aggravators are not weak. Miller mischaracterizes his 1984 armed robbery conviction. (Initial brief at 64-65). The \$160 he took during that convenience store

robbery (V 484) is considerably more than “petty cash.” Moreover, the disingenuous parenthetical that “we don’t even know if the pistol was loaded” ignores that fact that the clerks were robbed at gunpoint. (V 483). That the clerks “were not touched or harmed” was a mere fortuity.

Miller does not argue that the trial court improperly found the aggravators in this case. Moreover, the two paragraphs in which he sloughs off those aggravators ignores the fact that armed robbery is an extremely serious crime.<sup>4</sup> Robbery with a firearm is, itself, a first-degree felony and punishable by up to life imprisonment. §§ 812.13, 775.082, 775.083, 775.084, Fla. Stat. (1993). One who, like Miller, commits murder during an armed robbery has committed two very serious offenses.<sup>5</sup>

Committing an additional serious offense in addition to murder is a factor that narrows the class of persons eligible for the death penalty. Furthermore, the fact that this murder involved the contemporaneous commission of the additional serious offense of robbery reasonably justifies a more severe penalty for the murder. The

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<sup>4</sup> Miller’s reliance on Rembert v. State, 445 So.2d 337 (Fla. 1984), is misplaced. There was only a single aggravator in Rembert and the state conceded that lesser sentences had been imposed in other cases on similar facts. The facts of this case are vastly different from those in Rembert, and the state makes no concession regarding Miller’s death sentence.

<sup>5</sup> In contrast the cold, calculated, and premeditated aggravator, which Miller considers a more serious aggravator, merely describes the murder and can be established where a defendant commits only a single crime, i.e., a murder.

contemporaneous felony aggravator fully meets the test of a valid aggravator. Zant v. Stephens, 462 U.S. 862, 877 (1983) (“To avoid this constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”); Lowenfield v. Phelps, 484 U.S. 231 (1988) (by finding “at least one aggravating circumstance” before imposing a death sentence, the sentencer “narrows the class of persons eligible for the death penalty according to an objective legislative definition;” fact that “the aggravating circumstance duplicate[s] one of the elements of the crime” does not make a death sentence constitutionally infirm).

Armed robbery is a seriously antisocial act. Murders committed during armed robberies by their nature tend to be some of the most cold-blooded murders because they are committed against someone the defendant does not even know and who has given the defendant no pretense of moral or legal justification to kill. Moreover, “the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves.” Tison v. Arizona, 481 U.S. 137, 151 (1987). The legislature was justified in providing that the contemporaneous commission of robbery can justify a

death sentence for murder.<sup>6</sup> The state rejects any characterization of an aggravator based on armed robbery as inherently “weak.”

The weight properly accorded to an aggravator depends on a consideration of “the totality of circumstances in a case.” Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). This is not a case in which no one saw the actual shooting. See Thompson v. State, 647 So.2d 824 (Fla. 1994); Sinclair v. State, 657 So.2d 1138 (Fla. 1995); Terry v. State, 668 So.2d 954 (Fla. 1996). In this case, eyewitnesses testified that the victim did nothing to provoke Miller, that he did nothing to threaten Miller, and that he did not attempt in any manner to physically resist Miller. Moreover, this case is not one in which a defendant has been found guilty of felony murder merely on the

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<sup>6</sup> As observed in Tison, 481 U.S. at 157: “A narrow focus on the question of whether or not a given defendant ‘intended to kill,’ however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all - those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty - those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all - the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim’s property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an ‘intent to kill.’ Indeed, it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders.”

basis of the commission of a felony without any additional act on his part to effect the death of the victim (as, for example, the defendant who confronts an intended robbery victim who then keels over dead with a heart attack). Nor is this case one in which a death sentence was given to a defendant who merely aided and abetted in the most limited way a felony during the course of which a murder was committed by others but who did not himself kill, attempt to kill, intend to kill, or contemplate that a life would be taken. Enmund v. Florida, 458 U.S. 782 (1982) (holding that a death sentence in such a case was disproportionate in light of fact that juries nationwide have overwhelmingly rejected death sentence for felony murder where defendant had no intent to kill and was not the triggerman); cf. Tison (holding that even where defendant did not kill or even intend to kill, death penalty for felony murder is not disproportionate so long as state proved that defendant had major personal involvement in felony and was recklessly indifferent to human life). Unlike Enmund, and unlike even Tison (whose death sentence was affirmed), Miller himself killed the victim. Furthermore, this is not a case where the defendant had no intent to kill. The evidence shows that Miller intentionally shot the victim after disarming him. Miller did not receive the death sentence for “felony murder simpliciter,” Tison, 481 U.S. at 155, but for an intentional murder committed during an armed robbery.

Turning to the proposed mitigating evidence presented at resentencing, Miller

claims that it was “extensive and compelling.” (Initial brief at 65). However, he does not argue that he was prevented from presenting any such evidence or that the trial court failed to consider any of the proposed mitigation. Instead, his argument is that the trial court did not give sufficient weight to the mitigating evidence. (E.g., initial brief at 69). As this Court has held repeatedly, the weight given to mitigation is within the trial court’s discretion and will not be disturbed absent an abuse of discretion. E.g., Morton v. State, 789 So.2d 324, 331-32 (Fla. 2001); Stephens v. State, 787 So.2d 747, 761 (Fla. 2001). Miller, however, has shown no abuse of discretion in the trial court’s consideration of the mitigators.

The cases that Miller relies on in his proportionality argument (initial brief at 63) are factually and legally distinguishable from the instant case. For example, Sinclair v. State, 657 So.2d 1138 (Fla. 1995), Thompson v. State, 647 So.2d 824 (Fla. 1994), and Jackson v. State, 575 So.2d 181 (Fla. 1993), are all single-aggravator cases, and Miller does not claim that the two serious aggravators in this case are not supported by the evidence.<sup>7</sup> Although the state established two aggravators in both Curtis v. State, 685 So.2d 1234 (Fla. 1996), and Livingston v. State, 565 So.2d 1288 (Fla. 1988), those cases are also distinguishable. Both Curtis and Livingston were

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<sup>7</sup> To all extents and purposes, Terry v. State, 668 So.2d 954 (Fla. 1996), is also a single-aggravator case.

only seventeen years old when they murdered their victims. Miller, on the other hand, was thirty-four. Moreover, Curtis' co-defendant actually killed their victim. Here, Miller shot Wallace, the victim who died, after disarming him.

Cases other than those cited by Miller are more appropriate for a proportionality review of his death sentence. The following cases all have two aggravators similar to those established in this case and at least as much, if not more, in mitigation as Miller presented: Miller (David) v. State, 770 So.2d 1144 (Fla. 2000) (prior violent felony and felony murder/pecuniary gain aggravators; numerous nonstatutory mitigators); Sliney v. State, 699 So.2d 662 (Fla. 1997) (felony murder/robbery and avoid arrest aggravators; two statutory and numerous nonstatutory mitigators); Consalvo v. State, 697 So.2d 805 (Fla. 1996)(avoid arrest and felony murder/burglary aggravators; nonstatutory mitigation); Pope v. State, 679 So.2d 710 (Fla. 1996) (pecuniary gain and prior violent felony aggravators; two statutory and three nonstatutory mitigators); Heath v. State, 648 So.2d 660 (Fla. 1994) (prior violent felony and felony murder/robbery aggravators; statutory mental mitigator); Melton v. State, 638 So.2d 927 (Fla. 1994) (pecuniary gain and prior violent felony aggravators; nonstatutory mitigators); Stewart v. State, 588 So.2d 972 (Fla. 1991) (prior violent felony and felony murder/robbery aggravators; nonstatutory mitigators). In each of the just-listed cases the defendants murdered their victims

during the commission of a serious felony, usually robbery, just as Miller did.

Moreover, David Miller, Pope, Heath, Melton, and Stewart all had prior convictions for violent felonies, just as Miller does.

When placed beside truly comparable cases, it is obvious that Miller's death sentence is both proportionate and appropriate. His sentence, therefore, should be affirmed.

### ISSUE III

#### Whether the Trial Court Properly Admitted Melvin Green's Statement.

In this claim Miller argues that the trial court erred by admitting Melvin Green's statement through Detective Hallam's testimony because he had no opportunity to cross-examine Green about that statement. There is no merit to this claim.

Melvin Green, a former cellmate of Miller's, testified at trial that Miller confessed to him that, after disarming Wallace, Miller shot him in the face, Fagin then shot Jung with Wallace's pistol, and Miller took the money from the cash register. (DAR XXI 667-72).<sup>8</sup> Miller cross-examined Green extensively about his testimony and the written

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<sup>8</sup> "DAR XXI 667-72" refers to pages 667 through 672 of volume XXI of the record on direct appeal of Miller's convictions and death sentence, case no. 85,744. For the Court's convenience Green's testimony, DAR XXI 661-723, is attached to this brief as appendix B.

statement he gave to Detective Hallam and strongly suggested that Green's testimony was recently fabricated. (DAR XXI 691-710). On redirect examination the state introduced Green's written statement over Miller's objection, and Green read his written statement to the jury. (DAR XXI 712-15).

At resentencing Miller objected to the introduction of Green's written statement. (IV 387). The prosecutor explained that Green testified at trial and that, in spite of diligent efforts to do so, the state had not been able to locate Green to testify at the resentencing. (IV 388-89). The trial court overruled Miller's objection. (IV 390). Thereafter, Hallam read Green's written statement (IV 396-98), and Miller cross-examined him about the statement. (V 413).

Miller's reliance on Rodriguez v. State, 753 So.2d 29 (Fla. 2000), is misplaced. In Rodriguez, this Court held on direct appeal of a conviction and sentence that a trial court erred in allowing a detective to introduce a nontestifying cellmate's statement about what Rodriguez told him. Rodriguez is factually distinguishable, and Miller ignores the fact that Green testified at trial and that he cross-examined Green extensively about his written statement.

Cases other than Rodriguez are directly on point. In Foster v. State, 778 So.2d 906, 916 (Fla. 2000), this Court approved the admission of a witness' taped statement on redirect examination where the cross-examination implied bias or recent fabrication.

This Court also considered the admission at resentencing of an unavailable witness' statement in Lawrence v. State, 691 So.2d 1068, 1073-74 (Fla. 1997). In Lawrence this Court noted that the defense cross-examined the witness at trial and stated: "But for this being a resentencing, the sentencing jury would have heard this testimony in the guilt phase." Id. The same sequence of events that happened in Lawrence's trial and resentencing occurred in Miller's trial and resentencing.

The admission of evidence is within a trial court's discretion and will not be reversed absent a clear abuse of discretion. Evans v. State, 26 Fla.L.Weekly S675 (Fla. October 11, 2001). Miller has demonstrated no abuse of discretion in the admission of Green's statement, and this claim should be denied.<sup>9</sup>

#### ISSUE IV

#### Whether the Prosecutor's Closing Argument Was Improper.

In his final claim Miller argues that three comments made by the prosecutor were improper. As Miller admits, he did not object to the comments that he complains about on appeal. Instead, he argues that the comments constituted fundamental error. There is no merit to this claim.

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<sup>9</sup> Even if the trial court erred in admitting Green's statement, any error would be harmless due to the overwhelming evidence of Miller's guilt. See Bowles v. State, 26 Fla.L.Weekly S659 (Fla. October 11, 2001); Lawrence v. State, 691 So.2d 1068 (Fla. 1997).

Closing argument “must not be used to inflame the minds and passions of the jurors.” Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1988). Rather, the purpose of such argument “is to review the evidence and explicate those inferences which may be reasonably drawn from the evidence.” Id.; see Ruiz v. State, 743 So.2d 1,4 (Fla. 1999) (“The role of the attorney in closing argument is to assist the jury in analyzing, evaluating and applying the evidence . . . . The assistance permitted includes counsel’s right to state his contention as to the conclusions that the jury should draw from the evidence.” (quoting United States v. Morris, 568 F.2d 396, 401 (5<sup>th</sup> Cir. 1978), emphasis in original)). To that end, wide latitude is allowed, and counsel may advance all legitimate arguments and draw logical inferences from the evidence. Franqui v. State, 26 Fla.L.Weekly S695, S697 (Fla. October 18, 2001); Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996).

This Court has consistently held that the failure to object to argument precludes challenging counsel’s comments on appeal. E.g., Card v. State, 26 Fla.L.Weekly S670 (Fla. October 11, 2001); Morton v. State, 789 So.2d 324 (Fla. 2001); Gonzalez v. State, 786 So.2d 559 (Fla. 2001); Rogers v. State, 783 So.2d 980 (Fla. 2001). The only exception to the contemporaneous objection rule is when the comments amount to fundamental error, i.e., “error that reaches down to the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been

obtained without the assistance of the alleged error.” Card, 26 Fla.L.Weekly at S672. Morton; Rogers. Contrary to Miller’s argument, the complained-about comments do not constitute fundamental error.

Miller first argues that the prosecutor improperly used the word “executed” five times in a thirty-one-page argument. (VI 710, 721, 722, 724). Instead of being “designed to invoke an emotional or retaliatory response” (initial brief at 76), however, “executed” is simply an accurate description of this murder. Miller, armed with a sawed-off .22 rifle, entered the Jungs’ store with his unarmed cousin after the premises had been checked out to see who was there. Miller told Fagin to take Wallace’s .38 pistol while Miller held Wallace at gunpoint. After Fagin took Wallace’s weapon, Miller shot him between the eyes. (E.g., V 422-29). With both Miller and Fagin armed and Wallace, the security guard disarmed, the robbery could have proceeded with no injury or loss of life. Although Wallace did not die immediately, Miller’s shooting an unarmed man in the face was nothing less than an execution. The prosecutor’s remarks were fair comment on the evidence, not fundamental error.<sup>10</sup>

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<sup>10</sup> The condemnation of using the word “executed” in Brooks v. State, 762 So.2d 879 (Fla. 2000), and Urbin v. State, 714 So.2d 411 (Fla. 1998), does not mean that “executed” was used improperly in this case. Brooks and Urbin are distinguished by the sheer number of comments complained about on appeal - at least a dozen in Brooks and nine in Urbin. In this case, on the other hand, counsel only found three things to raise. Moreover, the prosecutor in the instant case was not the assistant state

Miller next claims that the prosecutor mischaracterized Krop's testimony by arguing that the letter Miller wrote to Fagin while in jail demonstrated a higher level of functioning, street sense, and familiarity with the criminal justice system than might be expected from someone who was allegedly retarded. (Initial brief at 77-78). The five sentences of argument quoted by Miller are based on Krop's testimony, as is the rest of the argument about what Krop said. The rest of the argument on this point was as follow:

Dr. Krop commented on this letter, and he said he was surprised but he had to agree that this letter which Detective Hallam told you was examined by a qualified questioned documents examiner in the crime lab with this defendant's handwriting exemplars and samples and concluded this letter was indeed written by this defendant, so Dr. Krop says, yes, I am surprised seeing this because he said he could not write or spell.

What this shows is a higher level of functioning with street sense, someone familiar with the criminal justice system. That was Dr. Krop's testimony about this letter.

So when this defendant told Dr. Krop that he couldn't write or spell you know better. This defendant wasn't being honest. He may not be able to write novels or be sophisticated enough to publish anything but he writes and spells well enough to communicate with others. That's exactly what this defendant was doing from that jail in communicating to his 16 year old nephew to get rid of that .22 rifle.

He was not being honest with Dr. Krop. Let's go back to the 1994 interview of this defendant by Dr. Krop that he told you frankly he had

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attorney who prosecuted both Brooks and Urbin.

forgotten about and certainly this defendant didn't say, hey, Dr. Krop, it's good seeing you again. It has been a couple of years. Remember me?

No. Dr. Krop said he didn't bring this to my attention, and I had forgotten, but what was Dr. Krop's conclusion then when he asked this defendant – when he was talking about visions, this, that and the other when he was deliberately not answering the questions, right? Dr. Krop said he was malingering. He was manipulating. That's what he was doing in 1994.

(VI 729-30).

Krop testified that the letter to Fagin reflected Miller's street sense and familiarity with criminal prosecutions. (V 541). Krop also testified that, when he evaluated Miller prior to trial, Miller lied and was malingering. (V 522-25). Again, the prosecutor's argument was only fair comment on the evidence that the jury had already heard.

Finally, Miller argues that the prosecutor erred in telling the jury that he is dangerous, has no mental disorder, and is just mean. (Initial brief at 79). Again, however, Miller quotes only a small portion of the argument, thereby removing it from the context it was made in:

What did this defendant tell Dr. Krop? Dr. Krop said he said he has got a robbery problem. It's an understatement. Now how long has this defendant exhibited this anti-social personality disorder? Remember Dr. Krop had all these records including school records which parenthetically and we will address this later, these school records predate the unfortunate abuse and death of this defendant's twin when they were 12 years old, and we will talk about that.

These school records predate that. And what do the school records

tell us? Willie has the ability to do his words. Needs much individual attention and supervision. Does not get along well with other children. Willie does not consider the rights of others. Needs to learn to accept responsibility for his own acts. Needs an unusual amount of prodding to get work completed. Is a bully and picks on others.

Dr. Krop told you this anti-social personality disorder goes way back. It's deep seated, and you know that from these records, the school records that Dr. Krop testified to yesterday, so I suggest to you based upon the characteristics of anti-social personality disorder, Dr. Krop talked about them yesterday, what they translate to, ladies and gentlemen, is simply this:

This defendant is dangerous. Human life means nothing to him. The rights of others has absolutely nothing – meant nothing to him for years and years and years and years. Now life itself means nothing to him. This defendant robs and he kills out of pure meanness. Imagine that. Not any mental disorder. It's just pure meanness.

If this defendant's low intellectual level is any mitigation at all, ladies and gentlemen, I suggest to you it carries little weight because you know from Dr. Krop that this defendant knew right from wrong, knew the nature and quality of what he was doing on July the 15<sup>th</sup> of 1993, absolutely without a doubt.

(VI 734-35).

These remarks were also fair and accurate reflections of the evidence. There can be no doubt that Miller is dangerous; he shot an unarmed man in the face for no apparent reason. Moreover, Krop diagnosed Miller as having an antisocial personality disorder (V 555), which is not a mental illness or disease, and admitted that Miller's school records reflected that his difficulties in school were caused by his misbehavior and

meanness. (V 517).

This Court does “not examine allegedly improper comments in isolation.” Card, 26 Fla.L.Weekly at S671. Instead, it looks at the total argument to see “whether the cumulative effect of the numerous improprieties deprived the defendant of a fair penalty hearing.” Id. Here, the facts were well known by the jury. The attorneys at a trial are advocates, not witnesses. What they say is argument, not evidence. The fact that counsel did not object to the comments Miller complains about now is a strong indication that counsel did not consider the comments to be improper. See Williams v. Kemp, 846 F.2d 1276, 1288 (11<sup>th</sup> Cir. 1988)(fact that no objection was made at trial is a relevant indication that the argument was not fundamentally unfair); see also Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (“a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations”).

When considered in the context of the entire argument and the evidence presented, the complained-about comments do not rise to the level of fundamental error. This claim, therefore, should be denied.

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm Miller's death sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

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BARBARA J. YATES  
ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 293237

OFFICE OF THE ATTORNEY

THE CAPITOL  
TALLAHASSEE, FL 32399-1050  
(850) 414-3300 Ext. 4584

GENERAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Nada Carey, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, Tallahassee, FL 32301, this 28<sup>th</sup> day of December 2001.

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BARBARA J. YATES  
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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BARBARA J. YATES  
Assistant Attorney General