

IN THE SUPREME COURT OF FLORIDA

WILLIE MILLER,

Appellant,

v.

Case No. **SC01-837**

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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STATEMENT OF THE CASE AND FACTS¹

This is an appeal of the trial court's order imposing the death penalty on Willie Miller, entered after a new penalty phase hearing before a new jury.

On August 18, 1993, the state charged Miller with attempted first-degree murder and two counts of armed robbery, stemming from the July 15, 1993, robbery of the Jung Lee Grocery and the shootings of James Jung and James Wallace. I 5-6. Armed burglary was added to the information in November of 1993. I 7-8. James Wallace died as a result of his injuries on January 19, 1994, and Miller was indicted for first-degree murder, attempted first-degree murder, two counts of armed robbery, and armed burglary. I 11-14.

¹ References to the seven-volume record on appeal are designated by the volume number in Roman Numerals, followed by the page number. All proceedings were before Duval County Circuit Judge William Wilkes.

The facts established during the guilt phase of Miller's trial were set forth in Miller v. State, 733 So. 2d 955, 955-56 (Fla. 1998)(Appendix A):

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 15, 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.

On February 21, 1995, the jury returned a verdict of guilty on all counts. On April 28, 1995, the trial judge sentenced Miller to death, following the jury's twelve-to-zero vote for death. The court also sentenced Miller to sentences of life imprisonment for the attempted murder of Jung, the two counts of armed robbery, and the armed burglary. I 18-35.

On appeal, this Court reversed the burglary conviction. The Court further found the burglary aggravator invalid, vacated the

death sentence, and remanded for a new sentencing proceeding.²
Miller, 733 So. 2d at 957.

A new penalty phase proceeding took place before a new jury January 29-31, 2001. During its case-in-chief, the state presented four witnesses to explain the facts underlying Miller's first-degree murder conviction.

James Jung, the surviving victim, testified he was behind the counter when Miller and Fagin entered the store together and looked to the left where Wallace was seated on a crate. Miller stood by the corner while Fagin went to the security guard.³ Both men had their backs to Jung. Jung heard a "pop" and saw Fagin leaning over Wallace. IV 363-366. Fagin stood up, and the men "paired up again" and came towards the counter. Fagin had a revolver; Miller had a sawed-off rifle. Jung heard a second shot and felt a bullet strike him. IV 367. The men approached Jung, and Fagin stood in front of Jung's father, while Miller came around the counter. He told Jung to open the cash register or he would shoot. Jung took out the cash tray,

² The Court ordered new counsel appointed for the new penalty phase proceeding. Justice Anstead noted defense counsel called no witnesses during the penalty phase hearing before the jury despite extensive evidence of compelling mitigation. 733 So. 2d at 958 (Anstead, J., concurring).

³ Jung described Miller as shorter and lighter and Fagin as darker and heavier set. IV 363, 366.

and Miller grabbed the money, hopped over the counter, then walked out with Fagin. IV 368. Forty dollars was taken. IV 370.

Samuel Fagin testified that he, Willie, and another uncle, Ezekiel ("Zeek"), talked about robbing the grocery store earlier that day. Zeek lived a few blocks from the store and planned the whole thing. V 423-424, 436. Fagin and Willie went to Zeek's house before the robbery, and Zeek gave them a .22 rifle and bullets. V 424. Willie told Fagin to go into the store before the robbery to see how many people were in the store. V 426. When they went back inside, they went straight to the security guard. Willie pulled the rifle on the guard, and the security guard got shot. Before the guard got shot, Fagin shot Jung with the security guard's .38.⁴ Fagin had taken the guard's revolver before the guard got shot because Willie told him to take it. V 427-429, 435-436. Fagin said he shot Jung because "I really thought that he was going for something." V 429. Willie got the money out of the counter, and they left. They went back to Zeek's house, returned the rifle, and left. They divided the money and sold the handgun

⁴ Fagin's testimony in the present proceeding regarding the sequence of shots fired differed from his testimony during the guilt phase trial and from Jung's testimony here and during the guilt phase.

to Mr. Bob, a Jamaican, for \$40. After the state waived the death penalty, Fagin pled guilty and was sentenced to life in prison. V 430-432.

Sergeant Michael Hallam, the lead detective, testified that Wallace's .38 caliber pistol was used to shoot Jung. The pistol was recovered from Eric Harrison, a man of Jamaican descent. V 409. Wallace was shot with the sawed-off rifle, which was never recovered. V 409-410. Hallum further testified that after a fingerprint on the cash tray was identified as Miller's, he pulled Miller's records to find an address. IV 385-386. Miller was arrested on charges of robbery and aggravated battery, at which time Miller denied any involvement in the crime. IV 394-395. On September 17, 1993, Hallam obtained a statement from Melvin Green, a jailmate of Miller's. IV 395. Over defense counsel's objection, IV 387-390, Hallam read Green's statement to the jury, as follows:

I have had the opportunity to talk to Willie Miller over the last few weeks while we have been in jail. I know Willie from the streets. Willie told me why he was in jail and told me what he did. He said he and his nephew Samuel Fagin age 16 went to the Chinese store on Acorn Street to rob it. Willie carried a sawed-off single shot .22 caliber rifle with one hollow-point bullet inside a tote bag.

Once inside Willie allowed an old lady to leave, then pulled the rifle on the security guard who was sitting on a crate. He told the guard to give it up and Samuel

took the guard's .38 caliber revolver. Willie then shot him between the eyes with the .22 for no reason. Samuel then pointed the .38 at the store owner and said give up the money. The owner hesitated and Samuel shot him in the side.

Willie got some blood on him from the store owner and he wiped it off his arm on the owner's head. Willie then put his hand under his shirt and removed the cash drawer. Samuel removed some money under the drawer, and it was approximately \$140. They then ran out the door and ran to his brother's apartment on Logan Street. They had been there before the robbery to pick up the .22 rifle that belonged to his brother. Willie's brother is Ezekiel Miller.

Willie gave him \$50 and Ezekiel and his girlfriend walked Willie and Samuel to the bus stop and Beaver Street. Prior to getting to the bus stop someone stopped and gave them a ride to Cleveland Arms where Samuel lives in apartment 224. Willie gave his sister Vercell Miller, Samuel's mother, \$20 but did not tell her what they did. Samuel took the .38 and sold it to a dread in the Cleveland Arms for \$35.

IV 396-397.

Hallam said Fagin was arrested on February 4, 1994. IV 398. Before Fagin was arrested, however, Melvin Green gave police a letter Miller reportedly had written to Fagin but was never sent. Green knew about the letter because he helped Miller with spelling, constructing sentences, and the like. IV 398, V 413-414. Hallum testified that a documents expert had determined that Miller penned the letter. V 407. The letter

was admitted into evidence⁵ and Hallam read it to the jury:

Dear man-Samuel Fagin,

I am just writing to let you know that you are dead wrong for looking out for me while I am taking this armed robbery and this attempted murder charge by myself and tell Zeek the same thing because you know we gave him \$50 that same day.

Everything happened because he is the one that set the robbery up and that .22 gun was his gun that we use. So tell Zeek to at least bring me some money and clothes because when he was locked up I am the one that helped him out, so, Man, I didn't tell the police about you was with me so don't worry but at least help me while I am here because all they got is my fingerprint off the cash register, and that's not enough.

Write back. Your uncle, Willie Miller.

P.S., Samuel, we don't have to worry about the .38 gun we got from the security guard but go tell Zeek to move the .22 we used because they are going to be looking for it hard.

V 408-409.

Dr. Floro, the medical examiner, testified that Wallace received a single gunshot wound to the face just above the tip of the nose. V 450. The gunshot killed the right side of his brain, leaving the left side of his body paralyzed. V 454-455. Wallace remained in the hospital on a ventilator until he died of pneumonia. V 456-458.

The state also introduced documentary evidence showing

⁵ A copy of the actual letter is attached herein as Appendix B.

Miller was convicted of armed robbery in 1984. V 466.

Detective Goodbread testified about the facts surrounding the 1984 robbery. Two people were working at a Lil' Champ Store in Jacksonville, Florida, when Miller walked into the store with a pistol and robbed them at gunpoint of \$160. V 482-485.

A victim impact statement by Thelma Wallace, the victim's wife, was read to the jury. V 501-502.

The defense then presented its case. Dr. Harry Krop, a clinical psychologist, testified as an expert in forensic psychology. V 507. Dr. Krop's first contact with Miller was in February 1994, prior to the guilt phase trial in this case. At that time, Dr. Krop was asked to evaluate Miller to determine whether he was sane at the time of the murder and competent to stand trial. As a result of that interview, Dr. Krop reported to the judge that in his opinion, Miller was malingering, or purposely trying to appear mentally ill so that he could be sent to a hospital.⁶ Dr. Krop met with Miller again in March 1995 to do a follow-up evaluation. At that time, Miller would not provide a reliable history and was uncooperative with testing procedures. V 522-525.

⁶ Miller did this by "describing in a very naive manner psychotic symptoms such as hallucinations and delusions." V 524.

In July 2000, Dr. Krop was asked to evaluate Miller by his new counsel. Dr. Krop initially met with Miller for two-and-a-half hours to obtain background information and to conduct a mental status examination to assess his competency to proceed. V 509-510. Dr. Krop thereafter reviewed various materials gathered in Miller's case, including school records, psychology reports, and the incident report of his twin brother's death. Miller later was brought to Dr. Krop's office for a neuropsychological evaluation. V 521. Miller's demeanor during the 2000 evaluation was completely different from his demeanor during the 1994 and 1995 evaluations.⁷ This time, Miller was cooperative and appeared to be putting forth maximum effort. The test results confirmed that Miller was not malingering, as the results of the various neurological tests were consistent, and the IQ test result was consistent with IQ tests performed when Miller was 17 years old. V 527-528.

Miller gave his family history and version of the crime in a fairly simplistic, step by step fashion. He was coherent and semi-organized. V 543. He told Dr. Krop he did the

⁷ In fact, Dr. Krop did not even realize during the later evaluation that he previously had evaluated Miller. The previous evaluation was brought to his attention the day before his testimony in the present proceeding. V 522.

robbery because he needed money. He said the gun had a hair trigger and accidentally went off, hitting the security guard in the face. He said the victim had several serious medical problems and attributed his death to incompetent care in the hospital. V 511. Miller also told Krop his mother beat him and his siblings and had beaten his twin brother to death in August 1972. V 512. According to the incident report, see Appendix C, his mother tied him up and beat him with a board for thirty to forty-five minutes. The boy at one point passed out, then became conscious again, and the mother continued to beat him until he passed out a second time. At that point, he was taken to the hospital, where he was pronounced dead. The charges against the mother were dismissed. V 515-516.

School records showed that Miller was in special education classes, and at age 17, was still in the seventh grade, which he never completed. Willie told Krop he did not go to school after his twin died, had always gotten poor grades, was suspended a lot, and had trouble sitting still and concentrating. In Dr. Krop's opinion, Miller probably had Attention Deficit Hyperactivity Disorder. According to school records, he was diagnosed as having severe emotional and academic problems in the early grades. V 516-517.

Dr. Krop testified Miller had both mental retardation and

organic brain damage. As part of a battery of neuropsychological tests, Krop administered three tests to assess frontal lobe functioning. The frontal lobe region is the last area of the brain to develop, and its primary function is impulse control. People with frontal lobe damage have difficulty inhibiting behavioral responses in the first place as well as stopping behaviors once they have started. In Miller's case, all three frontal lobe tests showed impairment. In fact, all of the neuropsychological testing showed impairment, indicating diffuse brain damage, or damage across the entire brain, which likely had existed since birth. V 529-533. The specific term for this type of brain damage is cognitive disorder NOS (not otherwise specified), meaning of unknown origin. V 535. Diffuse brain damage results in poor impulse control, trigger temper, poor coping skills, and poor judgment. V 564-565.

Miller also had mental retardation. Krop measured Miller's IQ at 64, which was consistent with tests performed when he was 17, which indicated an IQ of 60 and 59. Persons with an IQ below 70 are mentally retarded, with IQ's in the range of 55 to 69 designated as mild mental retardation, and IQ's under 55 designated as moderate or severely retarded. V 533-534. Dr. Krop explained that Miller's retardation was not

"mild" but that he was in the mild range, "which is basically a statistical range." V 537. Miller's IQ placed him in the bottom 1% of the population, which was roughly equivalent to a mental age of 14 or 15. V 534. Most people with IQ's above 55 can function independently for the most part though they usually need some assistance. V 537.

Krop also diagnosed Miller as having antisocial personality disorder, which is considered a mental disorder though not a mental illness. V 555-556.

When asked on cross-examination about the letter allegedly written by Miller to Samuel Fagin, Dr. Krop said the letter surprised him when the prosecutor had shown it to him the previous evening because it "seemed to be a somewhat higher level than I would expect for a person who claims he can't read or write." By higher level, he meant that the words were spelled correctly and full sentences were formed. V 540-541. Miller had told Krop he could not read or write, and Miller's school records indicated he read and wrote only at a second grade level. V 538. Dr. Krop said he was not surprised by the thought processes in the letter, only by the level of writing and spelling. The letter reflected street sense and familiarity with the criminal justice system and things such as evidence. The letter did not indicate a high

level of intellectual ability, only that he knew the trouble he was in. V 541. On redirect, Dr. Krop agreed the letter would make more sense if someone had helped Miller write it. V 564.

Krop attributed Miller's poor work history to a combination of his problems with poor impulse control, frustration, and low intellectual ability and skill level. V 560. Persons with Miller's IQ often can function in a job for long periods of time. For Miller, it was the combination of retardation, antisocial traits, and cognitive impairment that caused his problems. Miller likely would do better in a highly structured situation, such as prison. And, according to Department of Corrections records during the last six years, Miller has done well in the prison environment. V 561, 566.

After presenting the testimony of Dr. Krop, the defense presented the testimony of Maureen Hannon, a licensed private investigator who assisted defense counsel in the investigation of mitigation in Miller's case. Ms. Hannon had visited Miller in jail or prison six times during the previous year. V 585. Ms. Hannon testified that Willie was polite and courteous during the visits but was immature and "acts like a teenage boy, someone that might be in middle school." V 586. Willie

provided her with some family history but did not know his sisters' married names or where they were. V 587. Ms. Hannon eventually located and met with several of the siblings and summarized for the jury what her investigation revealed about Willie's background.

Willie was one of twelve children, ranging in age from 53 to 39. Willie's mother, Estell Miller, died in October 2000. His father, who was never involved in his life, had also passed away. V 587-589. Willie's mother was extremely abusive. According to Ms. Hannon, she "made Joan Crawford look like a soccer mom." V 590. Six children were fostered out, though some of them still had contact with Estell. An aunt raised Willie and several other children until Willie was 10, at which time they went to live with their mother again. All of the children were traumatized by the abuse. Estell apparently liked to tie the children down and beat them with whatever was at hand, including extension cords and fan belts. When they hid under the bed, she threw hot water under the bed to get them out. One sister, Paulette, who was raised in the same household as Willie, was placed in University Hospital at the age of 17 for psychological problems due to witnessing her mother beat Willie's twin brother, Mike, to death. V 591-592. After Mike was killed, Willie shut down. He ran away

frequently and spent weeks in the woods hiding from his mother. He began to drink alcohol as a way to cope with the abuse. He was intimidated about filling out job applications because he could not read them, and consequently did not work very often. This was a form of embarrassment for him. V 598.

The defense next presented the testimony of three of Willie's sisters. Elizabeth Gooding was the fifth of the twelve children and four years older than Willie. The Department of Health and Human Services gave Elizabeth and some of the other children, including Willie, to their aunt, Mary Powell, when they were babies or toddlers. Mary did not beat them, but she allowed their mother to beat them. Their mother tied them down, gagged them, and whipped them with extension cords, boards, and other objects. She put hot irons on them and inflicted other punishments on them. They were so fearful of their mother, they trembled when she looked at them. They were afraid to talk or laugh out loud around her and would get in a huddle and talk real low when she was around. By the time she was 7, Elizabeth was working at Mary's washing mat after school every day. She washed and ironed clothes and cleaned sewers. The other children did the same when they reached school age. Other children laughed and threw sticks and rocks at them. When Elizabeth was 14, Mary

had a stroke and became bedridden. Instead of contacting HRS, Mary sent the children back to their mother. About that time, Elizabeth got tired of going to school with marks on her body and began living upstairs with her godmother. VI 612-617, 620-21.

The night Mike was beaten to death, Elizabeth was at her sister's apartment, next to her mother's. Willie and his siblings were supposed to be home by dark. Willie came inside and got his beating. Michael came to Elizabeth though and begged and pleaded with her not to send him home. Elizabeth talked him into going home by saying she would stay there with him. When they got inside, their mother was cursing. Paulette, Willie, and Zeek were there, too. Their mother gagged Mike and tied his hands. After Mike died, Elizabeth ran away. She still felt responsible for his death. VI 622-623.

Willie was often beaten the same way, with extension cords, ironing cords, belts twisted together. He was tied down and beaten "like you are nothing." She held Willie down while their mother beat him when she was still afraid of her mother. She did what she was told to do. Willie and Mike, who were identical twins, were inseparable. After Mike's death, Willie went into a shell. He closed down and was never

the same again, "like he lost all hope." VI 624. After Elizabeth ran away from home, she saw Willie off and on. He stayed with her once when he was in his twenties. There were no problems but he "was like a little boy in a grown person body." He "never, never acted like a grown person." VI 625-626. At one point, Elizabeth worked at night and went to school during the day. Willie watched her kids at night in return for room and board. Willie and her kids were "very, very close." Willie was like a child himself and played with her children. He could not read to them because he didn't know how to read but he played with them and was really good to them. VI 632. Willie was grown but "didn't have the capabilities of thinking like an adult." VI 635.

Elizabeth further testified that her sister, Vercell, Samuel Fagin's mother, "used anybody to do what she wanted them to do to get what she wanted." She had Sam selling drugs for her when he was 11 or 12 years old. Samuel had a reputation for not being truthful. Willie was mentally slower than Sammie. VI 627-630.

Vestolla Miller, 49, grew up with Willie but lived in a different household. Vestolla lived with Estell. Estell punished her by tying her to the bedpost and whipping her with an extension cord or platted switches. Sometimes she wet or

frayed the ends. Vestolla still had marks from the extension cord beatings. Her mother beat her until she got tired or someone pulled her off or until Vestolla passed out. Vestolla last saw Willie when he was 9 or 10. Willie and Mike were "like the rug is to that floor." Mike was the aggressor, Willie the follower. After Willie was grown, Vestolla heard from their brother, Mark, that Willie "wasn't quite right in the head." An uncle said the same thing. VI 638-646.

Paulette Jones, 45, testified⁸ she was raised by Mary Powell. VI 657. Of the twins, Mike was the leader. Everything Mike did, Willie was "right behind him." Mike was quick but Willie was slow. Willie started having problems in second grade because he was slow. He got upset when he couldn't read and children teased him about it. VI 652-653. When Aunt Mary died, Paulette, Willie, Mike, and Zeek moved back in with their mother. Paulette witnessed Willie get beaten with an extension cord. Their mother would put the end in boiling water. Willie got beat all across his back and still has the marks on him. They all ran away many times but

⁸ Paulette's deposition was read to the jury, and she testified in person briefly the day after her deposition was read to explain she was unable to testify the previous day because she had to be hospitalized for bronchitis. She also told the jurors she loved her brother and would visit him in prison. VI 697-698.

were always brought back by police or welfare people. VI 663-664. Paulette saw their mother beat Mike to death. According to Paulette, Willie was in a detention facility at the time.⁹ VI 670-671. When Paulette was 13, she was beaten so badly, she took pillows to school to sit on. VI 661. When she got home that day, her mother told her, "I ought to kill you, just like I killed your brother." Paulette ran away that night barefoot and in her nightclothes. VI 676. She lived on the streets by hustling and never went back. VI 665. At 16, she was admitted to the mental health unit of University Hospital for two weeks because of the beatings and seeing Mike get beaten to death. When she left the hospital, she began seeing a psychiatrist in Jesup, whom she still saw on occasion. VI 677. When Willie was about 22, he stayed with Paulette and her husband in Georgia for two-and-a-half years. Her husband helped Willie get a job pouring concrete. Willie also worked odd jobs on the weekend. Willie worked, went to church, and was doing well. Paulette gave him spending money. VI 666-669.

The defense also read to the jury a letter from Willie's sister, Francis Corbett, who was unable to attend the hearing.

⁹ This is contrary to Elizabeth Gooding's testimony. The PSI indicates Willie did not go to Dozier until he was 13.

In the letter, Francis said she was Estell's first child and did not grow up with the rest of her siblings because she was given away to a couple when she was about six months old. She was told Estell "didn't care if I died because all she wanted to do was have a good time." When Mike died, she was told Estell initially was arrested for murder, then was charged with aggravated assault, then was home. One of the detectives told Francis over the phone it was "one less black male for the Court to deal with." Francis was told Estell made Willie sleep outside in the cold and snow in Philadelphia. She also was told that after Mike's death, Willie didn't want to live any more. Estell kept a house full of food but would not let them eat. All the children needed psychological help after Mike was killed, but since they were black, no help was given. Estell was herself physically, mentally, and sexually abused by her own brothers. She and her brother were small when their mother died, and they went to live with their older brother John, who was the abuser. V 594-597.

At the conclusion of the penalty phase hearing, the jury, after deliberating for three and a half hours, recommended that Miller receive the death penalty by a vote of twelve to

zero.¹⁰ I 159, VI 783.

On March 5, 2001, the trial court held a Spencer¹¹ hearing, and both parties presented additional argument. The trial court denied Miller's motion for new trial. I 160-162, VII 815.

On March 9, 2001, the trial judge followed the jury's recommendation and sentenced Miller to death. The trial court found two aggravating circumstances: (1) Miller was previously convicted of a violent felony, the 1984 armed robbery; (2) the capital felony was committed for pecuniary gain. The trial court found one statutory mitigating circumstance, Miller's age, based on Dr. Krop's testimony that Miller has a mental age of 14 or 15. The trial court also found eight nonstatutory mitigating factors: (1) the co-defendant, Samuel Fagin, received a life sentence; (2) Miller's father was absent during Miller's childhood; (3) Miller is mentally retarded, with an I.Q. of 64; (4) Miller has a cognitive brain disorder; (5) Miller was very close to his twin brother, whom his mother murdered, and was emotionally distraught upon his death; (6) Miller is loved by

¹⁰ Defense counsel noted how unusual it was that the jury deliberated for 3-1/2 hours, then returned a 12 to 0 verdict.

¹¹ Spencer v. State, 615 So. 2d 688 (Fla. 1993).

his family; (7) Miller has a severely dysfunctional family;
(8) Miller completed seventh grade. I 194A-194G, Appendix D.

SUMMARY OF ARGUMENT

I. This Court should hold that executing Miller would constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution. A majority of jurisdictions now prohibit the execution of mentally retarded persons, reflecting a national consensus against such executions. Evidence also demonstrates that a case-by-case approach has failed to prevent the execution of mentally retarded persons who lack the personal culpability required by the Eighth Amendment, and has made the death penalty for such offenders infrequent and haphazard, and thus cruel and unusual.

Even if there were no national consensus against executing mentally retarded persons, this Court should hold that executing Miller would constitute cruel and unusual punishment under Article I, section 17, of the Florida Constitution. Although it does not apply to Miller, the recent passage in Florida of a law prohibiting the imposition of the death penalty on mentally retarded persons is powerful

evidence of a statewide consensus against such executions. Executing a mentally retarded person also would constitute "unusual" punishment under our state Constitution because no mentally retarded defendants have been executed in Florida in the last quarter of a century.

II. The death penalty is a disproportionate punishment for this robbery-murder. Willie Miller, who is mentally retarded and has diffuse brain damage, committed this crime at the direction of his older brother. Miller was abused throughout his childhood, and he witnessed his mother beat to death his twin brother. The two aggravating factors in this case are relatively weak, and the mitigation is substantial. This case is not one of the most aggravated and least

~~mitigated~~ **III.** The trial court erred in allowing Detective Hallam to testify to the hearsay statements of Melvin Green. Green did not testify at this proceeding, and Miller therefore had no opportunity to rebut the hearsay. Because the hearsay was introduced during the guilt phase as rebuttal evidence, Miller had no fair opportunity to cross-examine Green regarding the specific statements in it at that proceeding. The admission of Green's hearsay statement violated Miller's right of confrontation under the state and federal constitutions.

IV. The prosecutor's improper closing argument deprived

Miller of a fair sentencing proceeding. During closing argument, the prosecutor repeatedly used the word "execute" for the sole purpose of inflaming the jury; mischaracterized Dr. Krop's testimony by telling the jury Dr. Krop said the letter to Fagin showed Miller had a higher level of functioning; mischaracterized the evidence by telling the jury Miller lied to Dr. Krop about his reading and writing ability; mischaracterized the evidence by telling the jury Miller had no mental disorders; and denigrated Miller and inflamed the jury by saying Miller was dangerous and committed the crimes out of "pure meanness." These improper arguments have no place in a capital trial and rendered the proceeding fundamentally unfair.

ARGUMENT

ISSUE I

THE IMPOSITION OF THE DEATH PENALTY ON WILLIE MILLER, WHO IS MENTALLY RETARDED, WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17, OF THE FLORIDA CONSTITUTION.

Willie Miller has an IQ of 64 and is mentally retarded. This Court should hold that executing Miller would constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article I, section 17, of the Florida Constitution. A majority of jurisdictions, including Florida, now prohibit the execution of mentally retarded persons, reflecting both a national and a statewide consensus against such executions. Evidence also demonstrates that a case-by-case approach has failed to prevent the execution of mentally retarded persons who lack the personal culpability required by the Eighth Amendment, and has made the death penalty for such offenders infrequent and haphazard, and thus cruel and unusual.

A. Mental Retardation and Willie Miller

Mental retardation is a well-defined condition that, according to the standard diagnostic texts, has three components. First, mental retardation involves a severe cognitive impairment, defined as "significantly subaverage intellectual functioning." AAMR, Mental

Retardation: Definition, Classification, and Systems of Support 1 (9th ed. 1972); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 39 (4th ed. 2000)("DSM-IV-TR"). To be mentally retarded, a person must possess the very lowest intelligence in the population, as measured by standard intelligence tests.¹² This cognitive impairment affects the ability to reason (especially abstract reasoning), to make logical connections, and to understand cause and effect; it affects moral reasoning as well. AAMR, Mental Retardation at 9; see also Josephine C. Jenkinson, Factors Affecting Decision-Making by Young Adults With Intellectual Disabilities, 104 Am. J. on Mental Retardation 320, 321 (1999). It also impairs short-term memory, as well as the ability to concentrate, focus, and employ basic problem-solving skills. AAMR, Mental Retardation at 15, 40.

Second, for someone to be considered as suffering from mental retardation, the deficiency must manifest itself during the developmental period. AAMR, Mental Retardation at 1; DSM-IV-TR at 39. This definitional limitation results from the clinical

¹² According to the American Psychiatric Association, a person possesses "significantly subaverage intellectual functioning" if he or she has an IQ of 70 or below, plus or minus 5 points. DSM-IV-TR at 39; see also id. at 39-40 ("[I]t is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."). Similarly, the AAMR states that a person possesses the intellectual-deficit component of mental retardation if he or she has an IQ of "70 to 75 or below." AAMR, Mental Retardation at 5.

understanding that brain function plays a critical role during development. AAMR, Mental Retardation at 16-17.

Finally, mental retardation involves deficits in adaptive functioning, i.e., one's ability to "cope with common life demands." DSM-IV-TR at 41; AAMR, Mental Retardation at 38; City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442 (1985)("[I]t is undeniable ... that those who are mentally retarded have a reduced ability to cope with and function in the everyday world."). While a person must display both the cognitive impairment and deficiencies in adaptive behavior to be mentally retarded, the two are often interrelated, as a person's cognitive limitations affect his ability to perceive, focus on, and understand the world around him. See AAMR, Mental Retardation at 9, 15.

Moreover, since the cognitive limitation manifests itself in early years, there is often a chain reaction: Because of cognitive and adaptive disabilities, the individual receives negative feedback in early social development, which serves further to impair emotional and adaptive development. Johnny L. Matson & Virginia E. Fee, "Social Skills Difficulties Among Persons With Mental Retardation," in Handbook Of Mental Retardation 471 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991); see also Harvey N. Switzky, Mental Retardation and the Neglected Construct of Motivation, 32 Educ. and Training

in Mental Retardation and Developmental Disabilities 194, 195 (1997). As a result, individuals with mental retardation are often distractible, possess poor judgment, and exhibit contextually inappropriate behavior. See Jenkinson, 104 Am. J. on Mental Retardation at 321. They are also prone to impulsive behaviors. See, e.g., Thomas L. Whitman, Self Regulation and Mental Retardation, 94 Am. J. of Mental Retardation 347, 360 (1990). This interplay between cognitive and adaptive deficiencies during the developmental period impairs moral development as well. AAMR, Mental Retardation at 9, 40.

Passivity and dependence are common characteristics of the mentally retarded; as a result, persons with mental retardation are often vulnerable to abuse. DSM-IV-TR at 42. Moreover, out of a desire to please, they typically acquiesce readily to the directions or requests of others, especially to those in authority. L.W. Heal & Carol Sigelman, Response Biases in Interviews of Individuals With Limited Mental Ability, 39 J. Intellectual Disability Res. 331, 339 (1995); see also John Dattilo et al., Interviewing People With Mental Retardation: Validity and Reliability Strategies, 30 Therapeutic Recreation J. 163, 169 (1996). Notwithstanding these characteristics -- and perhaps because of them -- persons with mental retardation often adapt well in structured environments. AAMR, Mental

Retardation at 7, 145.

While mentally retarded individuals are of course diverse, they all suffer from a severe disability. Reflecting this reality, the American Association of Mental Retardation in 1992 developed a revised definition of mental retardation that eliminates the previous categories of "mild," "moderate," "severe," and "profound" retardation, which figured in the United States Supreme Court's analysis in Penry v. Lynaugh, 492 U.S. 302 (1989). AAMR, Mental Retardation at 34. In lieu of these categories, the AAMR defined a single class of persons with mental retardation, whose membership is determined by the three diagnostic criteria summarized above. Id. at 5-6; see also id. at 34 ("[T]he use of a single diagnostic code of mental retardation removes the previous, largely IQ-based labels of mild, moderate, severe, and profound. The person either is diagnosed as having or not having mental retardation based upon meeting the three criteria.").

Although a severe disability, mental retardation is often overlooked. In part, this is because "[t]here are no specific physical features associated with Mental Retardation," DSM-IV-TR at 46; thus, with some exceptions like those who suffer from Down's Syndrome, most of those with mental retardation do not "look" retarded. Moreover, because mental retardation is a developmental

disability -- and not a mental illness -- even psychologists and psychiatrists rarely receive the specialized training needed to recognize retardation. AAMR, *Mental Retardation* at 35, 149. Finally, the failure to recognize mental retardation is often exacerbated by the conduct of those with mental retardation themselves, who commonly strive to appear "normal." Because of their cognitive limitations, they often cannot understand the consequences of hiding their disability. James R. Dudley, *Confronting the Stigma in Their Lives: Helping People With a Mental Retardation Label* 55, 74 (1997).

As the record in this case makes clear, Willie Miller exhibits the typical characteristics of mental retardation. His cognitive impairment, reflected in his IQ in the range of 59 to 64, manifested itself at an early age (special classes; failing grades). Miller also displayed adaptive difficulties at a young age. He had problems with his temper and impulse control and was dependent on others (his twin brother). These adaptive difficulties continued into his adulthood (poor work history). Miller continued to take direction and instruction from others (his sister gave him an allowance; he committed the instant offense at the direction of his older brother).

B. Execution of Mentally Retarded Persons Violates the Eighth Amendment Because the Actions of Numerous State Legislatures Demonstrate a National Consensus Against Such Executions and Because It is Disproportionate.

The Eighth Amendment requires that the "extreme sanction" be reserved not only for "the most extreme of crimes," Gregg v. Georgia, 428 U.S. 153, 187 (1976), but also for the most personally culpable defendants. The Eighth Amendment therefore requires a rational separating "between those individuals for whom death is an appropriate sanction and those for whom it is not." Parker v. Dugger, 498 U.S. 308, 321 (1991). To be constitutional, a capital-sentencing scheme must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 875 (1983).

In general, the Eighth Amendment requires only that sentencers in capital cases be given all relevant information so that they can make a "reasoned moral response," deciding whether death is the appropriate sanction in a given case. See Penry v. Lynaugh, 492 U.S. 302 (1989); Eddings v. Oklahoma, 455 U.S. 104, 110-16 (1982). However, with respect to certain categories of defendants, the United States Supreme Court has recognized that objective evidence of prevailing moral standards and the Court's own judgment compel a determination that the death penalty violates "evolving standards of decency that mark the progress of a maturing society." See Trop v. Dulles, 356 U.S. 86 (1958)(plurality).

To discern those standards, the Court has looked to objective evidence of how our society views a particular punishment today. Penry; Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988). Specifically, the Court has looked to legislative action, sentencing behavior, and international opinion. Penry; Thompson. The Court also has asked whether the punishment is unconstitutionally excessive because it is disproportionate given the culpability of a particular class of offenders, or because it serves no legitimate penal goal. Thompson; Penry; Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982).

In Thompson, the Court applied this analysis in holding the Eighth Amendment banned the execution of a 15-year-old defendant. The Court found relevant that all states had enacted legislation designating a maximum age for juvenile court jurisdiction at no less than 16, noting, too, that this legislation was consistent with a long history of our law that 15-year-olds are not prepared to assume the responsibilities of an adult. The Court also found significant that of the 18 states that expressly established a minimum age in their death penalty statutes, all required the defendant have attained the

age of 16 at the time of the capital offense.¹³ As for sentencing behavior, the Court noted the last execution of a person under the age of 16 took place in 1948, and of 1,393 persons sentenced to death between 1982 and 1986, only 5 were under 16 at the time of the offense. Next, the Court conducted a proportionality analysis, asking whether a juvenile's culpability should be measured by the same standard as an adult's, and whether the execution of juveniles measurably contributes to the social purposes served by the death penalty. The Court concluded less culpability should attach to crimes committed by juveniles because "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." 487 U.S. at 835. Given the juvenile's lesser culpability, retribution would be inconsistent with "our respect for the dignity of man." Moreover, due to the juvenile's immaturity and the rarity of juvenile executions, the execution of 15-year-olds would not measurably contribute to the deterrence of capital crimes.

¹³ At that time, capital punishment was not authorized at all in 14 states, and in 19 states, no minimum age was expressly stated. 487 U.S. at 826.

The following year, in Stanford v. Kentucky, the Court concluded the execution of 16- and 17-year-old defendants was permissible under the Eighth Amendment. In concluding such executions were permissible, the four-justice plurality noted that of the 37 states that permitted capital punishment, 15 did not impose it on 16-year-olds and 12 did not impose it on 17-year-olds. The Court concluded this did not establish the degree of national consensus required to label a punishment cruel and unusual.¹⁴

That same year, the Court in Penry declined to hold the Eighth Amendment categorically prohibited the execution of mentally retarded persons. At that time, only Georgia and Maryland had enacted statutes banning the execution of retarded persons. The Court concluded that "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 states that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." 492 U.S. at 334. The Court

¹⁴ In concluding such executions were permissible, the four-justice plurality, made up of Justices Scalia, Rehnquist, White, and Kennedy, looked solely to legislative enactments, abandoning the second and third Thompson factors. Justice O'Connor wrote separately, stating that in her view, the Court did have a responsibility to conduct a proportionality analysis, although she did not believe "these particular cases can be resolved through proportionality review." 492 U.S. at 382 (O'Connor, J., concurring).

also addressed whether the execution of a mentally retarded person would be cruel and unusual because it is disproportionate to his degree of personal culpability. Recognizing that "mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act," 492 U.S. at 337, the Court nonetheless declined to conclude "on the record before us today" that all mentally retarded people lack the capacity to act with the level of culpability associated with the death penalty, and concluded that the determination of whether death is the appropriate punishment properly could be made on a case-by-case basis.

1. A Majority of Jurisdictions Now Prohibit the Execution of Mentally Retarded Persons, Reflecting a National Consensus Against Such Executions.

When the Court considered the constitutionality of executing the mentally retarded in Penry, it concluded that, at that time, there was "insufficient evidence" of a national consensus against the execution of persons with mental retardation to justify a constitutional prohibition. Justice O'Connor recognized, however, that "a national consensus against the execution of the mentally retarded may someday emerge." That day has arrived.

The great weight of the evidence now suggests the American people overwhelmingly oppose the execution of persons with mental retardation.¹⁵ The emerging national consensus is

¹⁵This national consensus is shared by nearly every other society in the world. The United States Supreme Court has recognized that the practices of other nations are relevant in determining the "evolving standards of decency" that define the contours of the Eighth Amendment. Thompson, 487 U.S. at 830 (looking to "views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community"). At least 108 countries prohibit the death penalty by law or in practice. See Amnesty International, Facts and Figures on the Death Penalty, available at www.amnesty.org (updated April 26, 2001). Of those countries that still retain and employ the death penalty, almost none executes people with mental retardation. The United States is one of only two countries in the world in which executions of people with mental retardation are known to occur regularly; the other is Kyrgyzstan. See Un. N. Commission on Human Rights, Extrajudicial, summary or arbitrary executions: Report by the

most evident in the actions of state legislatures, which, the Court has said, provide "[t]he clearest and most reliable objective evidence of contemporary values." Penry. When Penry was decided, only 2 states--Georgia and Maryland--and the federal government had enacted legislation banning the imposition of the death penalty on persons with mental retardation. In the 12 years since then, that number has grown to 18.¹⁶

Special Rapporteur, E/CN.4/1997/60, s. 90 (1996); U.N. Commission on Crime Prevention and Criminal Justice, Capital Punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty: Report of the Secretary-General, E/CN.15/1996/19, s. 74 (1996).

¹⁶ In 1990, Tennessee and Kentucky implemented legislation banning the execution of persons with mental retardation. Tenn. Code Ann. s. 39-13-203; Ky. Rev. Stat. s. 532.130-140. New Mexico followed suit in 1991. N.M. Stat. Ann. s. 31-20A-2.1. In 1993, three more states -- Arkansas, Colorado, and Washington -- prohibited the practice. Ark. Code Ann. s. 5-4-618; Colo. Rev. Stat. s. 16-9-401-03; Wash. Rev. Code Ann. s. 10.95.030. Indiana became the ninth state to outlaw the imposition of the death penalty on mentally retarded persons in 1994. Ind. Code s. 35-36-9-1. In 1994 and 1995, Kansas and New York reinstated the death penalty but specifically exempted persons with mental retardation. Kan. Stat. Ann. s. 21-4623; N.Y. Crim. Proc. s. 400.27(12). In 2000, Nebraska and South Dakota banned the execution of mentally retarded persons. Neb. Rev. Stat. s. 28-105.1; S.D. Codified Laws s. 23A-27A-26.1 And, this year, five more states -- Arizona, Florida, Missouri, Connecticut, and North Carolina -- enacted legislation prohibiting the execution of the mentally retarded. Ariz. Rev. Stat. s. 13-3982 (2001); Ch. 2000-201, Laws of Florida; R.S. Mo. 565.030; Public Act No. 01-051.

Although there are minor variations among these statutes,

This tally of states represents a clear consensus. These 18 state jurisdictions and the federal government, when added -- as the Court did in Thompson, 487 U.S. 826 (plurality), 849 (O'Connor, J., concurring) -- to the 12 states (and the District of Columbia) that have rejected the death penalty entirely, form a majority of jurisdictions that now prohibit the execution of mentally retarded persons.¹⁷ Indeed, the consensus is actually broader than this because in three states -- Illinois¹⁸, Oregon, and Texas -- both houses of the legislatures passed legislation to ban the execution of persons with mental retardation, only to have the legislation vetoed by the governor. Thus, 21 state legislatures have

all jurisdictions have a similar definition of mental retardation. All recognize two key components--that an individual have significant subaverage intellectual functioning (in many states measured by an IQ score) and suffer a substantial impairment in adaptive behavior. See Appendix E.

¹⁷ Legislative judgments need not be "wholly unanimous" to show a consensus. Edmund. It is sufficient, rather, if, as here, legislative judgment "weighs on the side of rejecting capital punishment" for the category of defendants at issue. Enmund; Coker v. Georgia, 433 U.S. 584 (1977).

¹⁸ Illinois has since imposed a moratorium on the death penalty, and a renewed effort to pass legislation that would ban the execution of persons with mental retardation has been postponed pending a report from the Governor's Study Commission on the Death Penalty. See Steve Mills & Kevin Armstrong, "Governor to Halt Executions," Chi. Trib. Jan. 20, 2001 at 1. See Appendix E.

passed bills that explicitly bar the execution of persons with mental retardation.

Moreover, since Penry, no state has affirmatively legislated that the death penalty is appropriately imposed on mentally retarded persons. In Thompson, Justice O'Conner observed that where "such a large majority of the state legislatures has unambiguously outlawed capital punishment for 15-year-olds and where no legislature in this country has affirmatively and unequivocally endorsed this practice, strong counterevidence would be required to persuade me that a national consensus against this practice does not exist." 489 U.S. at 849 (O'Conner, J., concurring). Here, as in Thompson, every single state legislature that has passed a bill addressing the death penalty for mentally retarded persons has acted to ban the imposition of the death penalty on this group of defendants. And here, as in Thompson, a majority of state legislatures has banned the execution of persons with mental retardation.

Furthermore, that some states have not explicitly banned the execution of mentally retarded persons does not mean those states endorse the practice. There are other possible reasons for why legislatures in some states have not acted to ban such executions. In some states, the death penalty is lawful but

is rarely or never imposed.¹⁹ In other states, jurors impose the death penalty more often, yet the state implements it rarely or never.²⁰ Thus, while executing the mentally retarded is not expressly prohibited in 20 jurisdictions, there are far fewer in which the death penalty is used enough such that people might reasonably be expected to consider the issue closely.

In fact, legislative prohibitions on executing the mentally retarded have typically been prompted by the imminent or actual execution of a person with mental retardation. Since Gregg, mentally retarded persons reportedly have been executed in 12 states. See Denis Keyes, William Edwards & Robert Perske, People with Mental Retardation are Dying, Legally, 35 Mental Retardation 59 (1997); Human Rights Watch Report, Beyond Reason: The Death Penalty and Offender with

¹⁹ In New Hampshire, for example, there is no one on death row, and the state has not executed anyone since the Supreme Court's decision in Gregg. Wyoming has only two people on death row and has had only one execution since 1976. Montana has only six on death row and has executed only two. See NAACP Legal Defense and Education Fund, Death Row U.S.A. available at www.deathpenaltyinfo.org.

²⁰ For example, New Jersey has not put anyone to death since 1976; Idaho and Ohio have put only one person to death since then; Oregon has done so only twice; and Pennsylvania has executed only three since Gregg. See NAACP Legal Defense and Education Fund, Death Row U.S.A. available at www.deathpenaltyinfo.org. See Appendix F.

Mental Retardation 2 (March 2000). The legislatures in six of those states -- Arkansas, Arizona, Florida, Georgia, Missouri, and Texas -- passed legislation banning further execution of mentally retarded persons, and Illinois has since implemented a moratorium on the death penalty. Thus, executions that would have focused the minds of the people on the problems of executing persons with mental retardation have reportedly occurred in only five states -- Alabama, California, Louisiana, South Carolina, and Virginia -- where public reaction has not quickly resulted in legislation to end the practice. When compared with the 32 of 52 American jurisdictions that bar the execution of persons suffering from mental retardation, the practices of these five fall woefully short of counterevidence that would disprove the emergent national consensus against such executions.

Evidence of jury attitudes confirms that a societal consensus exists against executing persons with mental retardation. In Penry, the absence of evidence about jury behavior weighed against a categorical ban. The evidence now available demonstrates that it is extremely rare for a death sentence to be imposed on a mentally retarded defendant where mental retardation is presented in a coherent manner and the sentencer understands what it means to be mentally retarded.

John Blume & David Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark. L. Rev. 725, 729 (1988). The infrequency of the punishment is strong evidence of its "unusual" nature and arbitrariness in its imposition. Furman v. Georgia, 408 U.S. 238, 309 (1972)(Stewart, J., concurring).

To be sure, jury treatment of mentally retarded defendants is difficult to measure empirically because evidence of mental retardation often goes unrecognized (even by defense counsel) and is thus not presented at trial or sentencing. Data are available in judicial opinions, however, and these data show that juries reflect the societal opposition to executing the mentally retarded. In State v. McCollum, 433 S.E.2d 144, 168 (N.C. 1993)(dissenting opinion), the Chief Justice of the Supreme Court of North Carolina noted there had been numerous capital convictions and sentences affirmed by that court where the defendant had presented evidence of his mental retardation, and in all but one case, the defendant was given a life sentence. And in the one case where the jury imposed death, State v. Spruill, 360 S.E.2d 667 (1987), the jury specifically found that the defendant was not mentally retarded. See McCollum, 433 S.E.2d at 167. A judge of the Tennessee Supreme Court reported similar data after

reviewing Tennessee capital cases:

Slightly over 200 of the Rule 12 reports filed with the Court at this time contain information regarding the defendant's IQ. Of these defendants, only 20 are described as possessing a "low" IQ, i.e., an IQ below 70. Of these 20 only two are among the approximately 90 persons sentenced to death for whom Rule 12 reports are currently on file. This is a significant disparity; it suggests the capriciousness and arbitrariness prohibited by the constitution.

State v. Smith, 893 S.W.2d 908, 932 (Tenn. 1994)(dissenting opinion).

The few academic studies that have reviewed data on the sentencing of mentally retarded defendants are consistent with these opinions. A recent study of South Carolina juries, for example, confirms that, when properly presented with evidence of mental retardation, juries generally "attach significant mitigating potential to facts and circumstances that show . . . mental retardation." Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1539 (1998).

2. Imposing the Death Penalty on the Mentally Retarded is Unconstitutional Because It is Disproportionate to Their Personal Culpability; Juries Cannot Adequately Perform the Narrowing Role on a Case-by-Case Basis; and It Serves No Legitimate Penological Goal.

In deciding whether a category-based exclusion is required by the Eighth Amendment, the United States Supreme Court has asked whether a death sentence is disproportionate in light of the defendant's personal culpability, whether it comports with acceptable goals of punishment, and whether juries can adequately perform the narrowing role. Thompson; Penry. Because executing the mentally retarded fails these criteria, it is excessive and unconstitutional.

If the sanction of death is not "directly related to the [defendant's] personal culpability," Tison, 481 U.S. at 149; California v. Brown, 479 U.S. 538, 545 (1987)(O'Connor, J., concurring)(same), it is excessive and unconstitutional. Thus, the death penalty is appropriate for those who fully "deliberate" or act with "cold calculus," Enmund, 458 U.S. at 799, but is disproportionate for those with "an immature, undeveloped ability to reason." Thompson, 487 U.S. at 835 n.43. Second, the death penalty is appropriate for one who has the capacity to "evaluate the consequences of his conduct," Penry, 492 U.S. at 322, but unconstitutional for those who "wholly lack[] the capacity to appreciate

wrongfulness of their actions." Id. at 333. Third, the punishment of death is sufficiently related to an individual's personal culpability only when he can fairly be expected to conform his behavior to that of a responsible, mature citizen. Our law recognizes, for example, that children are not fully culpable for murder, as they are "less mature and responsible" and often have "less capacity to control their conduct." Eddings, 455 U.S. at 825. For this reason, "their irresponsible conduct is not as morally reprehensible." Thompson, 487 U.S. at 835. Accordingly, the death penalty is proportionate only when a defendant's individual culpability and personal responsibility warrant the sanction of death. Tison; Enmund.

Execution of persons with mental retardation, like Willie Miller, is unconstitutional under these principles of Eighth Amendment analysis.

First, individuals with mental retardation do not have the same capacity as others to make reasoned choices. The sine qua non of mental retardation is impaired intellectual capacity. This impairment affects the most basic skills, such as fact retention, problem solving, and concentration. It also impedes more abstract thought processes, such as the ability to reason and make logical connections. AAMR, Mental

Retardation at 9, 15, 40; see also Jenkinson, 104 Am. J. on Mental Retardation at 12. A course of action involves many steps: sustaining a certain level of attention; focusing on the relevant and avoiding distraction by the irrelevant; correctly assessing the situation; generating a set of alternative possible response; choosing among them; and then exercising control to act consistently with that choice. These skills normally are not acquired fully until the end of normal childhood; they remain fragmentary at best in a mentally retarded person. Jenkinson, 104 Am. J. on Mental Retardation at 321. Mentally retarded persons also may be further limited in their range of choices by the deficits in language and communication that accompany mental retardation. See AAMR, Mental Retardation at 15; Jenkinson, 104 Am. J. on Mental Retardation at 321. The death penalty is inappropriate for those who "have [a] reduced capacity for considered choice." Skipper v. South Carolina, 476 U.S. 1, 13 (1986) (Powell, J., concurring).

Persons with mental retardation also are less able to appreciate the consequences of their actions. A mentally retarded person's decreased ability to reason and understand cause and effect impairs his ability to comprehend the ultimate connection between a harmful act and any resulting

punishment. "[L]ess intelligence" means that an individual "is less able to evaluate the consequences of his or her conduct." Thompson, 487 U.S. at 835.

Also, like young children, persons with mental retardation do not possess the requisite levels of maturity and responsibility to make death an appropriate punishment. As the Court recognized, "it is undeniable . . . that those who are mentally retarded have a reduced ability to cope with . . . the everyday world." City of Cleburne, 473 U.S. at 442. Because of their impairment in intellectual functioning and coping skills, persons with mental retardation do not have the same capacity to navigate life's stresses. They are often unable to control their impulses, and like juveniles, "much more apt to be motivated by mere emotion." See Thompson, 487 U.S. at 835.

As with children, the moral reasoning of mentally retarded persons is only partially developed. The significantly subaverage intellectual functioning that is a defining characteristic of mental retardation translates into serious impairments in moral understanding. See AAMR, Mental Retardation at 9, 40. The development of abstract reasoning and moral reasoning occurs in adolescence. See, e.g., Jean Piaget, The Moral Judgment of the Child 27-29, 96-98 (Free

Press ed. 1997). Only when moral reasoning has developed can a person recognize that there are rules, and also principles underlying those rules, embodying values against which rules might be measured. See id. at 27-29, 95. Only at this stage of moral development does an individual function as an independent moral being, responding to his own developed system of morals, and not merely submitting to the authority of another. See generally id. But this stage is beyond what those with mental retardation can achieve. See AAMR, Mental Retardation at 9, 40; see also Jenkinson, 104 Am. J. on Mental Retardation at 321.

Last, persons with mental retardation do not have the individual culpability to warrant death. Due to their impairments, mentally retarded individuals are "susceptible to influence." Eddings, 455 U.S. at 115. Furthermore, the intellectual impairment of adults with mental retardation is permanent, immutable, and beyond the individual's control. See City of Cleburne, 473 U.S. at 442. Thus, while the adaptive behavior of mentally retarded persons can improve, Penry, 492 U.S. at 338, the possibility for improvement is largely, if not entirely, outside their control. It depends on educational and support services, which their family, social, and economic circumstances may or may not make

possible and actually deliver. Accordingly, persons with mental retardation cannot be said to have the individual culpability required under the Eighth Amendment for the ultimate sanction of death.

In Penry, the Court noted the Eighth Amendment likely forbids executing "profoundly or severely retarded" persons, 492 U.S. at 333, but that all other mentally retarded persons would be sentenced under the same procedures as non-retarded defendants. Since Penry, however, no state legislature considering the appropriateness of the death penalty for persons with mental retardation has adopted a line that would treat "profoundly" or "severely" retarded individuals different from others with mental retardation. Indeed, the AAMR has since changed the definition of mental retardation to eliminate such categorization. AAMR, Mental Retardation at 34. Thus, new objective evidence demonstrates that individuals with mental retardation should be treated the same for Eighth Amendment purposes. And, all persons with mental retardation under the well-established, objective definition set out in standard references should be exempted as a class from execution.

Not only is the death penalty always disproportionate when imposed on persons with mental retardation, but death for

such persons does not comport with the "two principal social purposes of punishment: retribution and deterrence of capital crimes by prospective offenders." See Thompson, 487 U.S. at 836. The death penalty cannot serve the goal of deterrence if a person cannot appreciate the consequences of his actions or understand the link between his actions and the punishment. Id. at 837. The intellectual impairments suffered by mentally retarded persons dramatically reduce their ability to engage in the sort of reasoning process that is a necessary precondition of being deterred from engaging in criminal acts. Similarly, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Tison, 481 U.S. at 149; see also Ford v. Wainwright, 477 U.S. 399, 409 (1986). Given their diminished level of personal culpability, executing defendants with mental retardation cannot fulfill this goal of retribution. As such, it "is nothing more than the purposeless and needless imposition of pain and suffering," Penry, 492 U.S. at 335 (O' Conner, J), and therefore violates the Eighth Amendment.

Finally, while most juries presented with sufficient evidence to appreciate a defendant's mental retardation appropriately sentence the defendant to prison rather than death, there is nevertheless an

unacceptably high risk that some juries will fail to grasp the mitigating force of the defendant's mental retardation -- or even will misconstrue his mental retardation as an aggravating factor. Misplaced juror passion has led to the execution of individuals with mental retardation who, like juvenile offenders, lacked the maturity and judgment to abide by societal norms, and who, like many with mental illnesses, did not understand why they were being put to death. Such unconstitutional results can be avoided only by a categorical prohibition against the execution of persons with mental retardation.

Several factors combine to make the case-by-case approach unworkable. Defendants with mental retardation are hampered at every phase of the criminal process as a result of their cognitive and behavioral impairments. Individuals with mental retardation are unusually likely to confess -- sometimes falsely -- because of their susceptibility both to coercion and to friendly suggestion. See Ruth A. Luckasson, The Death Penalty and the Mentally Retarded, 22 Am. J. Crim. L. 276, 278 (1994); James W. Ellis & Ruth A. Luckasson, Mentally Retarded Defendants, 53 Geor. Wash. L. Rev. 414, 448 (1985). Defendants with mental retardation seldom can assist in their defense, and their memory deficits and poor communication skills make it risky for them to testify. Robert Hayman, Beyond Penry: The Remedial Use of the Mentally Retarded Label in Death Penalty

Sentencing, 59 U.M.K.C.L. Rev. 46. Yet without putting the defendant on the stand, defense counsel are hard-pressed to demonstrate to the jury that the defendant suffers from mental retardation and that this condition militates against imposition of the death penalty.

Moreover, their inability to understand much of what transpires at trial and sentencing often leads defendants with mental retardation to behave in a contextually inappropriate manner -- they may smile incessantly, fall asleep, or stare at jurors; and prosecutors frequently argue, without basis but often with success, that such conduct demonstrates the defendant's lack of remorse. Beyond Reason at 30; see also Denis W. Keyes & William J. Edwards, Mental Retardation and the Death Penalty: Current Status of Exemption Legislation, 21 Mental & Physical Disability L. Rep. 687, 687 (1997).

Making matters worse, juries lack experience with mental retardation and have trouble empathizing with individuals suffering from it. Unlike juvenile defendants, whose physical immaturity and youthful appearances telegraph their likely emotional immaturity and diminished culpability, the impairments suffered by persons with mental retardation are hidden behind the facade of an adult physique. As a result, juries sometimes misconstrue the conduct and demeanor associated with mental retardation as an aggravating factor, when in fact the defendant's intellectual and adaptive deficits make him less personally culpable. The execution of persons with mental

retardation thus fails to constitute a "reasoned moral response to the defendant's background, character, and crime." Franklin v. Lynaugh, 487 U.S. 164, 184 (1988)(O'Connor, J., concurring) (internal quotations and citation omitted).

The absence of category-wide protection for defendants with mental retardation results in an impermissible degree of arbitrariness. While most juries appropriately recognize that a defendant's mental retardation makes a sentence of death inappropriate, others inevitably will not. See Keyes & Edwards, 21 Mental & Physical Disability L. Rep. at 688 (documenting executions of mentally retarded defendants since Penry was decided). And 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.

Where the death penalty is being imposed on a category of defendants based on such constitutionally inappropriate factors, the exclusion of that category from the pool of

death-eligible defendants serves a critical "narrowing" function. See Lowenfeld v. Phelps, 484 U.S. 231 (1988)(discussing need to narrow class of death-eligible defendants).

Moreover, categorical protection of defendants with mental retardation is necessary because the execution of such persons occurs both randomly and infrequently. The "infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying [the Court's] judgment in Furman . . . that the death penalty [when] administered in unguided fashion, was unconstitutional." Thompson, 487 U.S. at 831 (citations omitted). Only a category-based rule will ensure that death will not be meted out arbitrarily to persons with mental retardation.

C. Execution of Mentally Retarded Persons Violates Article I, Section 17, of the Florida Constitution, Because a Statewide Consensus Exists Against Such Executions; Because the Death Penalty is Disproportionate Given their Lessened Culpability; and Because the Death Penalty is so Rarely Imposed on Retarded Persons that It is "Unusual" Punishment.

Even if there were no national consensus against executing retarded persons, the recent passage in Florida of a law prohibiting the imposition of the death penalty on mentally retarded persons reflects a decision by the people of Florida that such executions are disproportionate and make no measurable contribution to acceptable goals of punishment. Executing a mentally retarded person in Florida also would constitute "unusual" punishment because no mentally retarded defendants have been executed in the last quarter of a century. The execution of mentally retarded persons also is unconstitutional because the death penalty is disproportionate to their personal culpability.

In discerning whether Florida's evolving standards of decency prohibit the execution of category-based defendants under our Constitution, this Court, like the United States Supreme Court, has looked to objective evidence, including laws enacted by the state legislature and the actions of sentencing juries.

In LeCroy v. State, 533 So. 2d 750, 757 (Fla. 1988), the

Court concluded there was no constitutional impediment to executing a 17-year-old, finding relevant that "legislative action through approximately the last thirty-five years has consistently evolved toward treating juveniles charged with serious offenses as if they were adult criminal defendants," and that "the legislature has repeatedly reiterated the historical rule that juveniles charged with capital crimes will be handled in every respect as adults."²¹

Subsequently, in Allen v. State, 636 So. 2d 494, 497 (Fla. 1994), the Court held executing 15-year-old Allen would violate Article 1, Section 17, of the Florida Constitution, because "death almost never is imposed on defendants of Allen's age."

Five years later, in Brennan v. State, 754 So. 2d 1 (Fl. 1999), the Court extended that ban to include 16-year-old

²¹ Justice Barkett, dissenting, took a broader approach. She found relevant that our legislative history was replete with laws recognizing that persons under 18 are less mature and less capable of exercising discretion and judgment, including laws prohibiting them from voting, serving on a jury, drinking alcohol, entering into a contract, suing or being sued, and so on. She concluded that because the death penalty can be imposed only where there is heightened culpability, persons whose maturity is deemed legally insufficient in other respects should not be considered mature enough to be executed. Id. at 760. In her view, the line "should be drawn where the law otherwise distinguishes 'minors' from adults." Id. at 759.

defendants, relying, as in Allen, on the rarity of such executions: "At least since 1972, more than a quarter of a century ago, no individual under the age of seventeen at the time of the crime has been executed in Florida." 754 So. 2d at 7. The Court also found relevant that of those sentenced to death who were 16 years old at the time of their crimes, all had their death sentences reduced by this Court. The Court concluded the execution 16-year-old defendants violated article I, section 17's prohibition against "unusual" punishments.²² The Court noted, too, that because the death penalty has so rarely been imposed on 16-year-old defendants, this Court's constitutionally required proportionality review would be difficult, if not impossible, in such cases:

. . . [P]roportionality review requires us to compare similar defendants, facts and sentences. This difficulty in conducting a proper proportionality analysis in this case, because the death penalty has not been upheld for any other defendant who was sixteen years old at the time of the crime, highlights the inherent problems in upholding the death penalty under these circumstances.

²² Unlike the federal Constitution, the Florida Constitution prohibits "cruel or unusual" punishments, Art. I, s. 17, Fla. Const. (emphasis added), meaning alternatives were intended. Allen, 636 So. 2d at 497 n.5.

Id. at 10-11 (citations omitted).²³

This Court has addressed the constitutionality of executing a mentally retarded person only once, in Thompson v. State, 648 So. 2d 692 (Fla. 1994).²⁴ In Thompson, the Court noted it had not established a minimum IQ score below which an execution would violate the Florida Constitution.²⁴ The Court then concluded it would follow the United States Supreme Court's approach in Penry and treat "low intelligence" as a

²³ Justice Anstead concurred but wrote separately to say he believed there was an alternative basis for the Court's holding. Echoing Justice Barkett's dissent in LeCroy, Justice Anstead concluded that "based upon the enormous value we place on our children, and our historically consistent treatment of children differently from adults for virtually all legal purposes, but especially for purposes of meting out punishment for criminal acts," id. at 12, the constitutional line should be drawn at age seventeen, the "line we already have purposefully drawn between childhood and adulthood." Id.

²⁴ The Court dodged the constitutional issue in several cases. In Watts v. State, 593 So. 2d 198 (Fla. 1992), the Court noted the defendant had an IQ of 71, which placed him one or two points above the statutory limit of 70 as defined by section 393.062(42), Florida Statutes (1990). And, in Taylor v. State, 630 So. 2d 1038 (Fla. 1993), even though the trial court found the defendant mentally retarded, this Court avoided the constitutional question by noting that only the defendant's mother had said he was retarded: "Neither the jury, the trial judge, nor this Court has any empirical data of Taylor's mental condition." Id. at 1041.

²⁴ Defense evidence showed Thompson was retarded with an IQ of 70. There also was evidence that on the revised intelligence scale, he scored between 56 and 63. No explanation of the discrepancy in these scores was given in the Court's opinion.

significant mitigating circumstance "with the lower [IQ] scores indicating the greater mitigating influence." Id. at 697.

Some members of the Court, however, before and since Thompson, have expressed the view that executing a mentally retarded person would violate Florida's constitutional ban on cruel or unusual punishment. In Woods v. State, 531 So. 2d 79 (Fla. 1988), Justice Shaw, joined by Justices Barkett and Kogan, concluded the execution of Woods, who had an IQ of between 60 and 69, would violate the Florida Constitution. In Hall v. State, 614 So. 2d 473 (Fla. 1993), Justice Barkett, joined by Justice Kogan, dissented from the Court's affirmance of the death sentence, providing the most extensive treatment to date of the constitutional problems in executing the mentally retarded.²⁵ Justice Barkett noted Hall had an IQ of 60; suffered from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; was functionally illiterate; and had the short-term memory of a first grader. Barkett then explained why she believed Hall's execution would violate our constitution:

Floridians' attitudes toward the
mentally retarded have evolved

²⁵ The majority opinion in Hall made no mention of Hall's mental retardation.

significantly in recent decades. Those mentally retarded people committed to state care no longer are warehoused in "training centers," and a variety of procedural safeguards have been enacted to protect the rights of those committed to state facilities. See s 393.11, Fla. Stat. (1991)(regulating involuntary admission of the mentally retarded to state residential services); see also David A. Davis, Executing the Mentally Retarded, Fla. Bar. J., February 1991, at 13, 15 (discussing generally how statutes have changed to reflect a more enlightened approach to caring for the mentally retarded).

Society has developed a greater understanding of mental retardation. It is generally recognized now that mental retardation is a permanent learning disability that manifests itself in several predictable ways, including poor communication skills, short memory, short attention span, and immature or incomplete concepts of blameworthiness and causation. Davis, Fla. Bar. J. at 13; see also James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 417 (1985); John Blume & David Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark. L. Rev. 725, 732-34 (1988). A person who is mentally retarded is not just "slower" than the average person. Mental retardation is "a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life." Blume & Bruck, 41 Ark. L. Rev. at 734.

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

This Court has not addressed whether executing the mentally retarded is cruel or unusual punishment under article I, section 17, of the Florida Constitution. I believe it is appropriate to analyze whether imposition of capital punishment in such circumstances is either "cruel" or "unusual." First, because Freddy Lee Hall has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior, imposition of the death penalty is excessive in relation to the crime committed. . . .

Second, executing a mentally retarded defendant such as Hall is "unusual" because it is disproportionate. Because mentally retarded persons are not as culpable as other criminal defendants, I would find that the death penalty is always disproportionate when the defendant is proven to be retarded.

Id. at 481. Subsequently, in Hall v. State, 742 So. 2d 225 (Fla. 1999), this Court affirmed the denial of Hall's motion for post-conviction relief. Justice Anstead, joined by Justice Pariente, specially concurred, stating he agreed with Justice Barkett's earlier dissenting opinion. 742 So. 2d at 230-33.

1. Executing Mentally Retarded Persons Violates the Florida Constitution Because Recent State Legislation Demonstrates a Societal Consensus Against Such Executions.

On June 12, 2001, Florida Governor Jeb Bush signed into law a bill prohibiting the imposition of the death penalty on a defendant who suffers from mental retardation. See Ch. 2001-202, Laws of Florida. The bill -- which unanimously

passed the Florida Senate in March and was only one vote short of passing the House unanimously -- does not specify a set IQ but uses a definition that includes intellectual functioning and adaptive behavior. Under the legislation, a defendant who has been convicted and has received an advisory recommendation of death can petition the trial court to appoint mental health experts to determine whether he or she is mentally retarded. See Appendix G.

This law -- the most significant piece of death penalty legislation passed in the last quarter century -- demonstrates that the citizens of Florida, like the majority of Americans, do not accept the execution of the mentally retarded. By its terms, the law is prospective and thus does not apply to Willie Miller.²⁶ However, because the new law indicates that a societal consensus against execution of the mentally retarded exists among Floridians, this Court should hold that executing a mentally retarded defendant would constitute cruel and unusual punishment prohibited by Article I, Section 17, of the Florida Constitution. The Georgia Supreme Court reached a similar conclusion in Fleming v. Zant, 386 S.E.2d 339 (Ga.

²⁶ Section 8 of Chapter 2001-202 provides that the law "does not apply to a defendant who was sentenced to death prior to the effective date of this act." The act became effective when signed by the Governor.

1989). Fleming, who was convicted of murder and sentenced to death in 1977, filed a habeas petition in 1988 challenging his death sentence based upon a new law prohibiting the imposition of the death penalty on the mentally retarded. In addressing Fleming's claim, the Georgia Supreme Court noted first that the new law applied only "in the trial of any case in which the death penalty is sought which commences on or after July 1, 1988," and thus on its face did not apply to Fleming, who had been tried ten years earlier. The court concluded, however, that the new law reflected a statewide consensus against executing the mentally retarded, and the execution of a mentally retarded person therefore would be cruel and unusual punishment under the Georgia Constitution:

To ascertain how society currently views a particular punishment, this court, like the U.S. Supreme Court, considers objective evidence. Such evidence may include information gathered from polls or studies, data concerning the actions of sentencing juries, etc. However, legislative enactments constitute the clearest and most objective evidence of how contemporary society views a particular punishment. Those enactments may change from time to time and as they do those changes amount to evidence of the shifting or evolution of the societal consensus.

. . . .

. . . [T]his state's elected representatives, voicing the will of the electorate, have spoken on the subject and

have declared that if a defendant is found to be mentally retarded, "the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life." OCGA s. 17-7131(j). The legislative enactment reflects a decision by the people of Georgia that the execution of mentally retarded offenders makes no measurable contribution to the acceptable goals of punishment. Thus, although there may be no "national consensus" against executing the mentally retarded, this state's consensus is clear.

386 S.E.2d at 341-42.²⁷

This Court should conclude, as did the Georgia court, that the execution of mentally retarded persons is now prohibited under our state Constitution.

²⁷ A different standard of proof applies when a claim is made solely under the Georgia constitution. See Turpin v. Hill, 498 S.E.2d 52 (Ga. 1998)(statute requires defendant to prove mental retardation beyond a reasonable doubt whereas holding in Fleming requires defendant to prove retardation by preponderance of evidence).

2. Executing the Mentally Retarded Violates the Florida Constitution Because the Death Penalty is Disproportionate Punishment and is so Rarely Applied to Mentally Retarded Persons that It is "Unusual."

In addition to the clear evidence of a societal consensus against such executions demonstrated by the recent enactment of Ch. 2001-202, all of the reasons outlined by Justice Barkett in Hall apply today with equal or greater force.

Clearly, Floridians have become more sensitive to and compassionate towards the mentally retarded. Florida has recognized that mentally retarded persons deserve special protections because of their intellectual deficiencies. For example, several statutes initially designed to protect children called to testify were expanded in 1994 to include mentally retarded persons. See ss. 92.53 (videotaping testimony of victim or witness), 92.54 (use of closed circuit television), 92.55 (judicial proceedings involving victim or witness), 914.16 (limits on interviews of victims of physical or sexual abuse), 914.17 (appointment of advocate for victims or witnesses), 918.16 (clearing of courtroom during testimony of victims of sex crimes), Fla. Stat. (2000 Supp.); see also Clements v. State, 742 So. 2d 338 (Fla. 5th DCA 1999)(state has compelling interest in protecting young children and mentally retarded persons while testifying concerning sexual offense). Mentally retarded adults are, in fact, considered

as "disabled persons" deserving of "adult protective services" to protect them from abuse, neglect, and exploitation. ss. 415.101-.102, Fla. Stat. (2000 Supp.).

Mentally retarded persons also are given special treatment by the law when charged with a crime. Before 1988, the law recognized no distinction between the mentally ill and the mentally retarded for competency purposes, and mentally retarded persons frequently were overlooked or misdiagnosed. In 1988, the legislature rewrote Chapter 916, creating a separate and distinct mechanism for evaluating the mentally retarded for purposes of competency. See ss. 916.301-.303, Fla. Stat. (2000 Supp.). Furthermore, once in the custody of the Department of Corrections, mentally retarded defendants are to be identified and housed away from repeat or dangerous offenders. s. 945.025, Fla. Stat. (2000 Supp.). Upon release, the Department must notify the Department of Children and Family Services, so it can offer its services to the defendant. s. 947.175, Fla. Stat. (2000 Supp.).

Last, mentally retarded persons have seldom, if ever, been executed in Florida. During the last quarter century, since Florida reenacted its death penalty, none of the 51 defendants this state has put to death has been mentally

retarded.²⁸ That the State of Florida has not executed any mentally retarded persons during this period indicates that to do so would be "unusual" in the constitutional sense. See Brennan (execution of persons 16 or younger at time of offense is so rare, such executions must be deemed "unusual" under provision prohibiting cruel or unusual punishment); Allen (same regarding persons 15 years old or younger).

For all of these reasons, this Court should hold that executing the mentally retarded constitutes cruel and unusual punishment under Article I, section 17, of the Florida Constitution.

D. Conclusion

This Court should hold executing the mentally retarded violates both the state and federal prohibitions against cruel and unusual punishment. Executing retarded persons is cruel because their intellectual handicap makes them among the least deserving of being put to death. Executing the mentally retarded also is unusual due to the rarity of such executions.

²⁸ The Death Penalty Information Center's web site claims Florida has executed four mentally retarded defendants: Arthur Goode, James Dupree Henry, Nollie Martin, and John Earl Bush, available at www.deathpenaltyinfo.org/dpicmr.html. See Appendix H. Henry had an IQ of 70 and was not retarded under Florida's definition. See Watts. As for the other three, there is no indication in any of this Court's decisions in their cases that they were mentally retarded or even had low IQs.

And, executing the mentally retarded is contrary to our state and national standards of decency, as demonstrated by legislation in Florida and other states banning such executions.

ISSUE II

THE DEATH PENALTY IS DISPROPORTIONATE FOR THIS FELONY MURDER WHERE THE AGGRAVATING CIRCUMSTANCES ARE FEW AND RELATIVELY WEAK AND THE MITIGATION IS SUBSTANTIAL, INCLUDING THAT MILLER IS MENTALLY RETARDED AND HAS DIFFUSE BRAIN DAMAGE.

This case involves a robbery-murder committed by a person who has serious, longstanding mental disorders. The robbery itself was planned by Miller's older brother, who also provided the gun that was used. The aggravating circumstances are few and the mitigation is substantial. Under the doctrine of proportionality, the penalty of death is not warranted.

As this Court has stated time and again, the death penalty must be limited to the most aggravated of first-degree murders committed by the most culpable of offenders. See, e.g., Larkins v. State, 739 So. 2d 90 (Fla. 1999); Cooper v. State, 739 So. 2d 82 (Fla. 1999); Johnson v. State, 720 So. 2d 232 (Fla. 1998); Terry v. State, 668 So. 2d 954 (Fla. 1996); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Proportionality review is not merely a comparison between the number of aggravating and mitigating circumstances. Proportionality review "requires a discrete analysis of the facts, entailing a qualitative review by this Court of the

underlying basis for each aggravator and mitigator rather than a quantitative analysis." Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998)(quotations and citation omitted; emphasis in original). Proportionality analysis requires the Court to "consider the totality of circumstances in a case," in comparison to other capital cases. See Porter v. State, 564 So. 2d 1060 (Fla. 1999), cert. denied, 498 U.S. 1110 (1991). The Court must compare "similar defendants, facts, and sentences." Brennan v. State, 754 So. 2d 1, 10 (Fla. 1999). The standard of review is de novo. See, e.g., Larkins; Cooper; Urbin.

Application of these principles mandates a reduction of Willie Miller's death sentence to life imprisonment. First, the facts of the crime itself do not call for the most severe punishment available. The circumstances of this crime do not set it apart from other felony murders that this Court has determined did not warrant the death penalty. See, e.g., Urbin (bar patron shot and robbed in bar parking lot); Curtis v. State, 685 So. 2d 1234 (Fla. 1996)(store clerk shot during robbery); Terry (store clerk robbed and shot); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995)(cab driver robbed and shot); Thompson v. State, 647 So. 2d 824 (Fla. 1994)(subway shop attendant shot in head during robbery); Jackson v. State,

575 So. 2d 181 (Fla. 1993)(store clerk shot during robbery); Livingston v. State, 565 So. 2d 1288 (Fla. 1988)(defendant shot store clerk during robbery, then shot another person).

Second, the aggravating circumstances are not especially compelling. The trial court found two aggravating factors, pecuniary gain and prior violent felony. Neither the heinous, atrocious, or cruel, nor the cold, calculated, and premeditated aggravator was found. As this Court has said, these "are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is also not without some relevance to a proportionality analysis." Larkins, 739 So. 2d at 95.

The pecuniary gain aggravator, based upon the underlying robbery and already used to convict Miller, is equivalent to the felony murder aggravator, which this Court has treated as a relatively weak aggravator. See Rembert v. State, 445 So. 2d 337 (Fla. 1984)(reducing death sentence to life where underlying felony was only aggravator, even though there was no mitigation and jury recommended death).

The more serious aggravator, the prior violent felony aggravator, must be viewed in light of the particular circumstances of this case. As this Court stated in Terry:
"The Florida sentencing scheme is not founded on "mere

tabulation" of the aggravating and mitigating factors, but relies instead on the weight of the underlying facts.'" 668 So. 2d at 965 (quoting Francis v. Dugger, 908 F.2d 696, 705 (11th Cir. 1990), cert. denied, 500 U.S. 910 (1991)). Here, the prior violent felony aggravator was based upon a convenience store robbery committed in 1984. Miller entered the store, armed with a pistol, and robbed the store of petty cash. This obviously was a serious offense, but no shots were fired (we don't even know if the pistol was loaded), and the two clerks in the store were not touched or harmed. Thus, although the two aggravators make Miller eligible for the death penalty, they are relatively weak.

The mitigating evidence, on the other hand, was extensive and compelling.²⁹ Miller never knew his father, and his mother was so abusive that many of her 12 children were removed from her custody by protective services. Unfortunately, the aunt who kept Willie and some of his siblings allowed their mother to continue the abuse, and when the aunt died, the children were returned to their mother. The children were tied up, gagged, and beaten with extension cords dipped in boiling

²⁹ As defense counsel stated to the trial judge at the final sentencing proceeding, "Judge, this case has troubled me since the verdict 12-0 came down. If you ever had a case with mitigation this would be the case." VII 815.

water. When they passed out, they were revived with cold water, then beaten some more. All of the children were traumatized by the abuse, but Willie and his twin brother, Mike, were the most affected. When Mike was 12, his mother beat him to death -- for staying out after dark. Willie, who witnessed this horror, never recovered from the trauma. Mike, the "faster thinker" of the two undoubtedly had offered some protection against a world Willie had never quite grasped. When Mike was killed, Willie went into a shell from which he never emerged. He began to run away with increasing frequency, often spending weeks in the woods hiding from his mother. Not surprisingly, he began to drink alcohol as a way to cope with the abuse. The evidence shows the brutal abuse and trauma Willie experienced as a child caused profound and long-lasting damage.

The damage caused by the abuse was exacerbated by Willie's mental deficiencies. The defense expert testified that Willie suffers from three different mental disorders: mental retardation, organic brain damage (or cognitive disorder), and antisocial personality disorder. All of these disorders significantly impaired Miller's ability to function in the world. According to the defense expert, diffuse brain damage results in poor impulse control, a trigger temper, poor

coping skills, and poor judgment. Persons with mental retardation have similar deficits. Miller's problems in life thus resulted from a trio of mental disorders, each of which standing alone would result in serious adaptive and/or behavioral problems.

Despite his mental impairments and horrific childhood, Willie Miller has redeeming qualities. He was able to maintain a job during several periods of his life when he lived with one or another of his sisters. He cared for one sister's children while she worked and was really good to them. During those times, his sisters apparently took care of many of his basic needs.

The trial court found and gave weight to the statutory mitigating factor of age, based upon Miller's mental age of 14 or 15. The trial court also found and gave weight to eight nonstatutory mitigating circumstances: (1) Miller is mentally retarded and has an IQ of 64; (2) Miller suffers from cognitive brain disorder; (3) Miller's father was absent during his childhood; (4) Miller's family was severely dysfunctional; (5) Miller was very close to his twin brother, whom his mother murdered, and was emotionally distraught upon his death; (6) Miller completed seventh grade; (7) Miller is loved by his family (8) Miller's co-defendant, Samuel Fagin,

received a life sentence. 194D-H, Appendix A.

Although the trial court did not find the defense proved Miller is capable of adapting well to long-term incarceration, this Court should consider this mitigating factor as well. The trial court acknowledged "there was no evidence of any type of disciplinary problems" during Miller's two incarcerations. Dr. Krop testified Miller likely would do better in a structured situation, such as prison. The testimony of his sisters that he did well when under their care and guidance bears this out. This mitigator was proved by a preponderance of the evidence.

The presence of such significant mitigation removes this case from the category of being the most aggravated and least mitigated of capital murders. When this case is compared to similar robbery-murder cases or to cases involving similar mitigation, the death penalty is unwarranted. See, e.g., Cooper (vacating death sentence where three aggravators -- prior violent felony, CCP, and pecuniary gain -- were weighed against substantial mitigation including age of 18, brain damage, low intelligence, and abusive childhood); Larkins (vacating death sentence where two aggravators -- prior violent felony and pecuniary gain -- were weighed against two statutory mental mitigators and nonstatutory mitigation

including organic brain damage, low intelligence, and history of drug and alcohol abuse); Johnson v. State, 720 So. 2d 232 (Fla. 1998)(vacating death sentence where two aggravators-- prior violent felony and pecuniary gain--were weighed against nonstatutory mitigation including age of 22, defendant surrendered to police, troubled childhood, good son and neighbor, had son, got GED, was high school athlete); Hawk v. State, 718 So. 2d 159 (Fla. 1998) (vacating death penalty in brutal beating of two elderly persons where two aggravators were weighed against statutory mitigator of age (19) and nonstatutory mitigation including substantial impairment, emotional disturbance, brain damage, abusive childhood, lack of education and training); Terry (death sentence vacated where prior violent felony and felony murder aggravator were weighed against "not a great deal of mitigation"); Sinclair (vacating death sentence where felony murder aggravator was weighed against nonstatutory mitigation including good parent and provider, honorable discharge from Navy, regular employment, good prisoner); Thompson (vacating death sentence where pecuniary gain aggravator was weighed against "minimal nonstatutory mitigation").

Additionally, Miller's mental retardation should be given great weight, at least as much weight as the chronological age

of a minor. Mental retardation is a severe and pervasive disability. Because of their impairment in intellectual functioning and coping skills, persons with mental retardation do not have the same capacity as adults to navigate life's stresses. Like children and adolescents, mentally retarded persons have poor judgment and are prone to impulsive behaviors. Unlike children, however, mentally retarded persons never outgrow their disability. Willie Miller is no exception to these basic truths about mental retardation. Witnesses testified that Willie "acts like a teenage boy, someone that might be in middle school," V 586, that he is "like a little boy in a grown person body," VI 626, and that he "[does not] have the capabilities of thinking like an adult." VI 635. The evidence also showed that he is a follower, taking direction and instruction from others. Indeed, he walked into the Jung Lee grocery store at the direction of his older brother, who planned the robbery and provided him with a gun. For the same reasons that less culpability attaches to crimes committed by juveniles, less culpability should attach to crimes committed by persons with mental retardation. See Issue I, supra pp. 40-49.

Finally, Florida has seldom, if ever, executed a person with mental retardation, see Issue I, supra p. 60 & note 28,

and the death penalty has been imposed and affirmed in only a few extreme cases. See Thompson v. State, 648 So. 2d 692 (Fla. 1994)(double murder involving six aggravating factors, including CCP and HAC), cert. denied, 515 So. 2d 1125 (1995); but see Kight v. State, 512 So. 2d 922 (Fla. 1987)(affirming death penalty where two aggravators were found, robbery and HAC, and finding no error in trial court's failure to consider Kight's mental retardation and deprived childhood as mitigating), cert. denied, 485 U.S. 929 (1988).

The present case does not warrant the death penalty. The aggravating factors are few and relatively weak, and the mitigating factors are numerous and compelling. This is not one of the most aggravated and least mitigated of first-degree murders. See Dixon. Furthermore, the 12-0 death recommendation and sentence are flawed and unreliable because the jury's recommendation was tainted by the prosecutor's improper closing argument. See Issue IV, infra p. 71. This Court should reverse Willie Miller's death sentence and remand for imposition of life imprisonment with no possibility of parole.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING DETECTIVE HALLAM TO TESTIFY TO THE HEARSAY STATEMENTS OF MELVIN GREEN WHERE MILLER HAD NO OPPORTUNITY TO CROSS-EXAMINE GREEN

REGARDING THE STATEMENT.

Over Miller's hearsay objection, the state was permitted to allow Detective Hallam to read to the jury a statement given to him by Melvin Green, a jail inmate. In the statement, Green said Miller went to the Chinese grocery store on Acorn Street to rob it and ended up shooting the security guard "for no reason." IV 396-397.³⁰ The trial court admitted Green's statement because it was admitted during the guilt phase of the trial. The admission of Green's statement was error, however, because Miller did not have a fair opportunity to rebut the hearsay. Accordingly, the admission of the statement violated Miller's right under state and federal constitutions to confront the witnesses against him.

The appropriate standard of review is de novo since the trial court's ruling was based upon a misapplication of a strict rule of law. See Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980)("Where a trial judge fails to apply the correct legal rule, . . . the action is erroneous as a matter of law. This is not an abuse of discretion."); Florida Game and Freshwater Fish Commission v. Dockery, 671 So. 2d 471, 474 (Fla. 1st DCA 1996) (where trial court's decision involves

³⁰ The statement, which was written by Detective Hallam, then signed by Melvin Green, was admitted as State's Exhibit 17.

pure question of law, appellate court is not bound by trial court's legal conclusions where those conclusions conflict with established principles of law); see also Rodriguez v. State, 753 So. 2d 29 (Fla. 2000)(no deference given to trial court's ruling in finding admission of hearsay during penalty phase erroneous).

It is uncontroverted that the Sixth Amendment right of confrontation, which includes the right of cross-examination, applies to the sentencing phase of a capital trial. Rodriguez, 753 So. 2d at 43. Furthermore, even though the rules of evidence are relaxed somewhat during the penalty phase, evidence may not be admitted unless "the defendant is accorded a fair opportunity to rebut any hearsay astatements." s. 921.141, Fla. Stat. (1997); see also Rodriguez, 753 So. 2d at 44 ("linchpin of admissibility" is whether defendant has a fair opportunity to rebut hearsay statements).

In Rodriguez, a detective was allowed to testify to hearsay statements made to him by an inmate named Lago, who had shared a cell with Rodriguez. The Court concluded the admission of the testimony was erroneous because the state did not call Lago to testify as to the statements Rodriguez allegedly made to him. 753 So. 2d at 44. The Court noted that allowing the testimony of a jailhouse informant to be

heard through the testimony of another witness not only deprived Rodriguez of the opportunity to cross-examine Lago, but also "improperly bolstered Lago's statement by having a potentially more credible police officer repeat the statements of a potentially less credible jailhouse informant." Id.

The present case is similar to Rodriguez. Because the state did not call Melvin Green to testify, Miller had no opportunity to cross-examine Green as to the statement he gave Detective Hallam. Although Green testified during the guilt phase, Miller had no opportunity to cross-examine Green about the hearsay statement at that proceeding because the hearsay statement was only admitted after Green was cross-examined, to rebut an inference of recent fabrication. IV 388. Thus, Miller never had an opportunity to cross-examine Green as to the specific statements contained in the statement he gave Hallam.

The admission of Green's statement cannot be deemed harmless. No other witness testified that Miller said he shot the guard for no reason. This error requires reversal for a new sentencing proceeding.

ISSUE IV

THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT DEPRIVED MILLER OF A FAIR SENTENCING PROCEEDING.

During closing argument, the prosecutor improperly used inflammatory language deliberately calculated to incite a retaliatory sentencing decision; mischaracterized the expert testimony; called Miller a liar; and made derogatory remarks about Miller not based on any evidence in the case. Some of the misconduct was identical to conduct this Court previously--and repeatedly--has condemned as improper and unethical. The improper argument tainted the jury's recommendation and deprived Miller of a fair trial.

Because Miller's counsel made no objection to the prosecutor's closing argument, the standard of review is whether "the error committed was so prejudicial as to vitiate the entire trial." See Murray v. State, 443 So. 2d 955, 956 (Fla. 1984); see also Urbin v. State, 714 So. 2d 411, 418 n.8 (Fla. 1998) (quoting Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996) (unpreserved claims of prosecutorial misconduct cognizable on direct appeal where misconduct constitutes fundamental error, defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance

of the alleged error"), cert. denied, 522 U.S. 832 (1997)).

In a slew of recent capital cases, this Court has warned prosecutors against exceeding the bounds of zealous advocacy, and has not hesitated to reverse convictions and death sentences based upon egregious prosecutorial misconduct. See, e.g., Brooks v. State, 762 So. 2d 879 (Fla. 2000); Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Gore v. State, 719 So. 2d 1197 (Fla. 1998); Urbin v. State, 714 So. 2d 411 (Fla. 1998).

As the Court reiterated in Gore, a criminal trial "is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament." 719 So. 2d at 1202 (quoting Steward v. State, 51 So. 2d 494, 495 (1951)). A criminal trial, rather, "is a neutral arena wherein both sides place evidence for the jury's consideration; [and] the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence." Ruiz, 743 So. 2d at 4. Moreover, as representatives of the state, prosecutors have an even greater duty "to refrain from inflammatory and abusive argument, maintain their objectivity, and behave in a professional manner." Gore, 719 So. 2d at 1202. That duty is

further heightened in death penalty cases, "where both the prosecutor and the courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects." Id.; see also Lasko v. Lehman, 925 F.2d 1527, 1541 (3d Cir.) ("Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices"), cert. denied, 502 U.S. 898 (1991).

In the present case, the prosecutor made several improper arguments. First, the prosecutor repeatedly used the word "executed" to describe the shooting:

"This defendant effectively executed James Wallace"
(VII 710)

"I say this defendant effectively executed James Wallace on July 15th" (VII 710)

"[T]his defendant executed James Wallace" (VII 721)

"He executed James Wallace" (VII 722)

"He executed James Wallace" (VII 724)

The only conceivable purpose of using the word "execute" was to prejudice the jury. The evidence did not justify the word "execute." There was no evidence the shooting was premeditated or even intended. The gun may have gone off accidentally, as Miller told Dr. Krop, or the shooting may

have been a reflexive or impulsive act. This was not an execution-style killing, and the prosecutor did not even request a jury instruction on the cold, calculated, and premeditated aggravator, which specifically applies to execution-style killings.

This Court repeatedly has condemned argument designed to invoke an emotional or retaliatory response. Brooks; Urbin; King v. State, 623 So. 2d 486 (Fla. 1993); Garron v. State, 528 So. 2d 353 (1988); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); see also Vierick v. United States, 318 U.S. 236, 247 (1943)(It is axiomatic that a prosecutor may not make statements calculated only to arouse passions and prejudice). Indeed, this Court found improper the prosecutor's use of the word "execute" in two capital cases decided several years before the present resentencing. See Brooks (prosecutor improperly used word "executed" or "executing" six times during penalty phase closing argument); Urbin (prosecutor improperly used same terms nine times). It cannot be doubted that this inflammatory rhetoric prejudiced Miller. The observations of the Fifth Circuit Court of Appeals are applicable here:

This type of shorthand characterization . . . , not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of

the usual welter of grey facts it starkly rises--succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.

Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969).

The second impropriety was in misleading the jury with respect to Dr. Krop's testimony. In his closing argument, the prosecutor summarized Dr. Krop's testimony with regard to the letter Miller allegedly wrote to the codefendant, Samuel Fagin, as follows:

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.

. . . .

He was not being honest with Dr. Krop.

VII 729 (emphasis added.)

This argument was improper because it misrepresented Dr. Krop's testimony; misrepresented the evidence; and improperly suggested Miller had lied. Although Dr. Krop said the letter

"seemed to be a somewhat higher level than I would expect for a person who claims he can't read or write," he made clear he was referring to the "level of writing and spelling," not to Miller's functioning or intellectual ability.

Telling the jury Dr. Krop said the letter showed a higher level of functioning was inaccurate and misleading. Furthermore, by insinuating Miller had lied to Dr. Krop about his reading and writing ability, the prosecutor improperly cast the entire case for mitigation in a false light. The state's argument suggested, in effect, that because Miller lied to Dr. Krop about his reading and writing abilities, Dr. Krop's conclusions were unreliable. Telling the jury Dr. Krop said the letter showed Miller had a higher level of functioning was improper and unethical, particularly as the state's own evidence indicated Melvin Green helped Miller write the letter.³¹

³¹ Detective Hallam testified at this proceeding that a handwriting expert had determined that the handwriting in the letter to Samuel Fagin was Willie Miller's. Miller objected to the admission of the testimony regarding the expert's conclusions, as well as the letter itself, on hearsay grounds but did not attempt to rebut the expert's conclusion in this proceeding. The handwriting exemplars admitted in the guilt phase, and the original letter, admitted in both this and the prior proceeding, were forwarded to this Court. See State's Exhibit 25. Interestingly, some of the characters in the Fagin letter are dissimilar to Miller's handwriting exemplar and similar to Melvin Green's. For example, the letter "f" in the Fagin letter, is identical to the "f" in Melvin Green's

The prosecutor also improperly told the jury Miller was dangerous, had no mental disorder, and that he committed crimes out of meanness:

This defendant is dangerous. Human life means nothing to him. . . 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.

VII 735. The prosecutor's statement that Miller did not have any mental disorder is, of course, contrary to the evidence. Dr. Krop testified that although Miller is not mentally ill and knows right from wrong, he suffers from three distinct mental disorders: mental retardation, organic brain damage, and antisocial personality disorder. Furthermore, there was no evidence Miller committed the crime out of "pure meanness," that he is "dangerous" or that human life means nothing to him. This type of inflammatory rhetoric, not based on any evidence in the case, has no place in a capital sentencing proceeding. These arguments, like the use of the word "execute" were designed to invoke emotion and fear, not reason.

The improper comments were egregious and deprived Miller

handwriting exemplars. Also, the Fagin letter contains the upper case "A" and the lower case "a" whereas Miller's handwriting exemplar does not contain a single lower case "a," even when he copied words that had only the lower case "a."

of a fair penalty phase proceeding. The evidence in favor of death was not compelling. The aggravation was minimal and the mitigation extensive. The jury, however, heard a misleading, inflammatory characterization of the evidence from the state's representative. The improper argument rendered the proceeding fundamentally unfair and denied Miller due process of law. Miller is entitled to a new sentencing before a new jury.

CONCLUSION

Appellant respectfully asks this Honorable Court to grant the following relief: Issues I and II, vacate appellant's death sentence and remand for imposition of a sentence of life in prison with no possibility of parole; Issues III and IV, reverse and remand for a new sentencing proceeding before a newly empaneled jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis M. French, Assistant Attorney General, by delivery to The Capitol, PLO1, Tallahassee, FL 32399-1050, on this date, September _____, 2001.

Nada M. Carey

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Florida Rule of Appellate

Procedure, this brief was typed in Courier New 12 point.

Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

WILLIE MILLER,

Appellant,

v.

Case No. SC01-837

STATE OF FLORIDA,

Appellee.

_____ /

APPENDIX TO
INITIAL BRIEF OF APPELLANT

APPENDIX

DOCUMENT

A	<u>Miller v. State</u> , 733 So. 2d 955 (Fla. 1998)
B	Fagin letter
C	Incident Report on Death of Mike Miller
D	Amended Sentencing Order
E Penalty	State Statutes Prohibiting the Death For People With Mental Retardation
F	Number of Executions by State Since 1976
G	Senate Bill 283: Relating to Death Penalty/Mental Retardation
H Penalty	Defendants With Mental Retardation Executed In The United States Since the Death Penalty Was Reinstated in 1976