

IN THE SUPREME COURT OF FLORIDA

WILLIE MILLER,

Petitioner,

v.

Case No. **SC01-837**

STATE OF FLORIDA,

Respondent.

_____/

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF APPELLANT¹

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.**

In his initial brief, appellant argued his execution would offend the Florida and United States Constitutions because the legislatures in a majority of jurisdictions, including Florida, have banned the execution of mentally retarded persons; because such executions are disproportionate and serve no valid penological purpose; and because juries

¹The Supplemental Record on Appeal, Case No. 85,744, which is Willie Miller's original trial and sentencing record consisting of Volumes I-XXIV, will be referred to in this brief as "SR" followed by the volume and page number.

cannot adequately perform the narrowing role on a case-by-case basis.

The state has responded that Florida's statute prohibiting the execution of mentally retarded persons is prospective only and does not apply to Miller. Miller did not argue the statute applies to him, however, or that it should be applied retroactively. Miller argued, rather, that the statute, which passed one vote shy of unanimous by both houses of the legislature, is compelling evidence of a state policy against executing mentally retarded persons, which would make Miller's execution cruel and unusual punishment under Article 1, section 17, of our state Constitution. The state did not address Miller's state constitutional argument in its brief, nor did the state address Miller's argument that there also is now a nationwide consensus against executing mentally retarded persons, rendering Miller's execution unconstitutional under the cruel and unusual clause of the United States Constitution as well.

In fact, the state addressed only one paragraph of appellant's constitutional argument, see Answer Brief at 9, asserting Miller's case proves juries can adequately perform the narrowing role on a case-by-case basis. Appellant disagrees. Miller's case is a perfect example of why there

should be a categorical ban on executing mentally retarded persons. Although Dr. Krop testified Miller's IQ was 64, and that he is mentally retarded, neither Dr. Krop nor anyone else explained to the jury the pervasive disabling affects of mental retardation. See Initial Brief at 24-28. Moreover, the prosecutor minimized Miller's mental retardation, claiming Miller was "dishonest" about his reading and writing ability and arguing to the jury that his "low intellectual level" was of little or no weight since he "knew right from wrong." VI 730, 735. The prosecutor also argued that the robbery was planned by Miller, although the evidence at trial showed the crime was conceived, planned, and orchestrated by Miller's older brother, Ezekiel. See infra at ----. On this appeal, the state disputes that Miller is retarded, asserting he does not meet the statutory criteria of mental retardation. Answer Brief at 8-9. This argument is absurd. School and psychological records show that Miller was diagnosed as mentally retarded twice before the age of 18. His I.Q. was found to be 60 at that time. Dr. Krop's finding that Miller's I.Q. tested at 64, which was uncontroverted, shows that his I.Q. is well below two standard deviations from the mean (a standard deviation is 15 points, the mean I.Q. is 100, and the cut-off for mental retardation is 70). Miller's school

records amply support significant deficits in adaptive behavior before the age of 18. That Miller is mentally retarded was not even disputed by the state at the sentencing hearing. Nonetheless, all the jury was told about was that Miller had an I.Q. of 64. This case--where the defense supplied the jury with scant information about mental retardation and the prosecution denigrated mental retardation as a mitigator--is a good example of why juries often discount the significance of mental retardation.

The legislature's failure to provide for retroactive operation may have been based on the assumption that no prisoner then on death row was mentally retarded. In any event, when the Georgia Supreme Court and the Tennessee Supreme Court faced the identical issue--whether executing a mentally retarded defendant not covered by the statute would violate their state constitution--those courts relied on their statutes to hold that contemporary standards of decency no longer supported execution of the mentally retarded. van Tran v. State, 2001 WL 1538508 (Tenn.)(attached herein as Appendix A); Fleming v. Zant, 386 S.E.2d 339 (Ga. 1989). Appellant urges this Court to hold likewise. Appellant also urges this Court to hold, as did the Tennessee Supreme Court in van Tran, that execution of mentally retarded persons violates the

Eighth Amendment of the United States Constitution.

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.

The state argues the cases Miller relies on in his proportionality argument are distinguishable. For example, the state notes several cases appellant cited are one-aggravator cases, and that one of the two-aggravator cases cited by appellant is "to all extents and purposes" a single-aggravator case. Answer Brief at 15 n.7. This Court repeatedly has stated, however, that proportionality is not merely a comparison between the number of aggravating and mitigating circumstances but requires, rather, a qualitative analysis. See, e.g., Urbin v. State, 714 So. 2d 41, 416 (Fla. 1998). Furthermore, in addition to the one-aggravator cases Miller relied upon as being qualitatively similar to the present case, Miller also relied upon numerous multiple-aggravator cases, which the state did not distinguish from this case. See 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); Hawk v. State, 718 So. 2d 159 (Fla. 1998)(discussed in Initial Brief of Appellant at 68).

The state also asserts that Curtis v. State, 685 So. 2d 1234 (Fla. 1996), and Livingston v. State, 565 So. 2d 1288 (Fla. 1988), are distinguishable because the defendants in those cases were seventeen when the crimes were committed, whereas Miller is an adult. Miller is an adult chronologically; however, he has the mental age of a 12 or 13-year-old and he will never achieve the emotional or intellectual maturity of an adult. The chronological age distinction thus is a distinction without a difference, and Livingston and Curtis are similar cases for purposes of proportionality analysis.

The state also cited a number of two-aggravator cases, which it contends are more similar to Miller's case. Answer Brief at 15-16. The cases cited by the state are not similar because they involve either brutal, premeditated murders, scant mitigation, or both. See Miller (David) v. State, 770 So. 2d 1144 (Fla. 2000) (mitigation deemed not compelling; no history of severe childhood abuse); Sliney v. State, 699 So. 2d 662 (Fla. 1997) ("particularly brutal murder" in which victim was beaten with hammer and stabbed with scissors; no statutory mitigators); Consalvo v. State, 697 So. 2d 805 (Fla. 1996) ("weak nonstatutory mitigation"); Pope v. State, 679 So. 2d 710 (Fla. 1996) (premeditated murder for pecuniary gain in

which victim was beaten, stabbed, and kicked in head repeatedly with cowboy boots); Heath v. State, 648 So. 2d 660 (Fla. 1994)(victim shot, kicked, and stabbed with hunting knife; previous second-degree murder conviction); Melton v. State, 638 So. 2d 927 (Fla. 1994)(mitigation "not compelling"); Stewart v. State, 588 So. 2d 972 (Fla. 1991)(defendant shot two people; opinion does not discuss proportionality; only mitigation mentioned is traumatic childhood).

In contrast, the mitigation in the present case was extensive and compelling, and the murder was neither premeditated nor particularly brutal. The present case does not warrant the death penalty. This Court should vacate Miller's death sentence and remand with directions he be sentenced to life in prison 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.

The state contends the trial court properly admitted Green's hearsay statement because Green testified at trial and Miller cross-examined Green extensively about the statement at

that time.

Miller did cross-examine Green at the guilt phase of his trial. However, the issues there were entirely different from those here. Because Miller's guilt was not at issue here, Miller obviously would have taken a completely different approach in cross-examining Green, had he been given the opportunity. At trial, Miller's attorney focused on inconsistencies between Green's testimony and the written statement in order to impeach Green's credibility. SR XXI 698-703. For example, Green testified Willie said he removed the security guard's pistol from the holster whereas in the statement Hallam took, Green said Samuel Fagin removed the pistol.² Because guilt was the key issue, there was no reason to focus on aspects of the statement that would be damaging at a sentencing-only trial, such as the statement that "Willie then shot him between the eyes for no reason." Thus, Miller has not had a fair opportunity to rebut the statement.

²Neither scenario by Fagin is consistent with James Jung's trial testimony. Jung testified the two men entered the store, and Miller ("the shorter lightskinned one") "stayed by the front door," XX 540-541, while Fagin ("the shorter darker one") "proceeded straight towards Mr. Wallace coming down the passage way and is bearing down on the security guard" and the "next thing I heard was a shot" and he observed "the taller darker one leaning over the security guard." Then, Fagin "came back down" towards the counter and "paired up with his partner," and then Jung heard another shot and realized he had been hit. SR XX 516-517.

Furthermore, it would be totally unfair to require Miller to introduce here Green's direct and cross-examination during the guilt phase as Green's testimony was not relevant to Miller's sentence. The only aggravating factor Green's testimony had any bearing on was the pecuniary gain aggravator, and that aggravator already had been amply proved by the testimony of both James Jung and Samuel Fagin.

The statement was directly harmful, as the prosecutor emphasized it in closing argument:

Just like he said to Melvin Green. Once inside Willie 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 for no reason.

VI 721. This error requires reversal for a new sentencing proceeding.

Issue IV

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

The state asserts the term "executed" is an accurate description of the murder and fair comment on the evidence. Describing this unplanned and perhaps even accidental shooting as an "execution" isn't any more appropriate here than it was in Brooks v. State, 762 So. 2d 879 (Fla. 1998), or Urbin v.

State, 714 So. 2d 41 (Fla. 1998). The state also asserts Brooks and Urbin are distinguishable by the number of improper comments in those cases. The closing argument in this case was rife with improprieties. Other examples of inflammatory rhetoric include the prosecutor's repeated characterizations of the shooting as a "vicious, cold-blooded murder," VI 712, a "brutal, vicious, cold-blooded murder," VI 712, and as a "vicious murder." VI 738. Furthermore, as discussed below, the prosecutor made arguments which were contrary to the evidence the state presented during the guilt phase of Miller's trial, which was both improper and unethical.

As for the prosecutor's argument regarding Dr. Krop's testimony about the Fagin letter, the state does not really address the mischaracterization asserted by appellant. Dr. Krop did not say the letter showed a higher level of functioning but a higher level of writing and spelling than Miller's school records indicated, which showed a second-grade reading level. Dr. Krop was not surprised by the thought processes in the letter, which, he said, did not indicate a high level of intellectual ability, just street sense and awareness he was in trouble. The prosecutor, however, told the jury Miller lied when he told Dr. Krop he could not read or write. This was false, and the prosecutor knew it. The

prosecutor was well aware that Melvin Green helped Miller write the letter. In fact, during the guilt phase trial, when asked "how many times did he ask you how to spell words?," Green responded, "mostly through the whole letter." SR XXI 682. The prosecutor also knew the handwriting expert at the guilt phase trial could not testify that Miller definitely wrote the letter to Fagin, only that he "probably" wrote it. SR XXIII.

The prosecutor also knew that Fagin testified during the guilt phase trial that Ezekiel, Miller's brother, planned the robbery; Ezekiel told them to do the robbery because he needed money; Ezekiel took them to a pawn shop to buy bullets; Ezekiel test-fired the gun; Ezekiel personally went to the Jung Lee grocery store before the robbery to check it out and found out where the security guard was (Willie Miller did not even go in the store on that trip); and it was Ezekiel's plan for Fagin to go in first. SR XXII 795, 798, 801, 805, 829, 833. So, when the prosecutor told the jury in closing argument, see VI 720, that Willie Miller had learned a few things since the 10-year-old robbery he'd committed in 1984, including to "bring an accomplice" with him, to rob a little grocery store that had no security camera, and to check out

the store first, who was being dishonest?³ The prosecutor knew full well that Willie Miller did not plan this crime. Telling the jury Willie Miller was the dominant and more intelligent player and was the person who planned the crime when he knew the state's own evidence showed otherwise went beyond the bounds of vigorous advocacy. The prosecutor's closing argument was unfair and unethical in numerous respects.

And, contrary to the state's assertion in its Answer Brief, the evidence, via Dr. Krop's testimony, showed Miller had three mental disorders, brain damage, mental retardation, and antisocial personality disorder. Therefore, the prosecutor's argument to the jury otherwise was contrary to the evidence.

Finally, in its Answer Brief at page 24, the state asserts Dr. Krop "admitted that Miller's school records reflected that his difficulties in school were caused by his misbehavior and meanness." Dr. Krop did not say anything remotely like this. What Dr. Krop said was:

[Miller] said he was suspended a lot of times which is also supported by the school

³Mr. Bledsoe was the prosecutor for the conviction phase of the trial and both penalty phases so it must be presumed he was aware of Samuel Fagin's testimony during the conviction phase of the trial.

records. In retroactively he described various symptoms that he had -- I won't call them symptoms but certainly behavior patterns in school. He had trouble focusing. He had trouble sitting still and concentrating, and I indicated in my notes that he was probably a hyper-active child, what we would not call attention deficit hyper-activity disorder but he was certainly diagnosed as having emotional and academic problems to the point where he really did not progress in school and was held back several times and was viewed as a serious behavioral problem from a very early grade.

VI 517. Of course, it's not surprising that a child who is mentally retarded, brain damaged, probably had ADHD, and was severely abused and neglected by his own family would have severe emotional and behavioral problems in school. After all, human beings are not born with instincts that guide them in life. Human beings live what they learn. Willie Miller's life story was a predictable one, a story this Court has seen over and over and over again in death penalty cases.

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 II and III, 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 Barbara Yates, Assistant Attorney General, by delivery to The Capitol, PL01, Tallahassee, FL 32399-1050, on this date, May 8, 2002.

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

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**APPENDIX TO
REPLY BRIEF OF PETITIONER**

APPENDIX

DOCUMENT

A

van Tran v. Tennessee, 2001 WL 1538508