IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-472

DAVID MILLER, JR.,

Petitioner,

V

JAMES V. CROSBY, JR., Secretary, Department of Corrections, State of Florida, and TOM BARTON, Superintendent, Florida State Prison at Starke, Florida

Respondents.

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

PETITION FOR WRIT OF HABEAS CORPUS

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Petitioner, DAVID MILLER, who has appealed from a denial of a motion for post-conviction relief in the Judicial Circuit, moves as an alternate ground for relief that this Court issue a writ of habeas corpus on the ground that he was denied effective assistance of counsel on his direct appeal of his conviction and death sentence. Appellate counsel rendered ineffective assistance by failing to present to this Court several clear violations of the petitioner's rights under the Constitutions of the United States and of the State of Florida. Had those violations been brought to this Court's attention, Mr. Miller's; conviction and/or sentence would have been reversed by this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Miller has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has liberally granted oral argument in other capital cases in a similar procedural posture. A full opportunity to present the issues through oral argument would be appropriate in this case given the seriousness of the issues before this Court. Undersigned counsel respectfully

requests that oral argument be granted in this case.

JURISDICTION

Petitioner seek a writ of habeas corpus pursuant to Article V, §3(b)(1), and (7) and (9) of the Constitution of the State of Florida and Rule 9.030 (a)(3) of the Florida Rules of Appellate Procedure. Petitioner seeks relief in this Court because the issues raised herein involve this Court's appellate review of the trial proceedings. See, Knight v. State, 394 So. 2d 997 (Fla. 1981).

PROCEDURAL HISTORY

References to the record on appeal are made to the original direct appellate record and denoted by the volume number, the designation "R" and the appropriate page number.

Petitioner was convicted by a jury of first degree murder on June 26, 1998, in the Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County, Florida.(X,R797) After a sentencing hearing, the jury returned a 7-5 recommendation for death on July 7, 1998.(IX,R996) The trial court sentenced Mr. Miller to death on July 24, 1998.

This Court affirmed the conviction and sentence on direct appeal. Miller v. State, 770 So. 2d 1144 (Fla. 2000) rehearing denied, (October 24, 2000).

Mr. Miller filed a motion for post-conviction relief in the trial court on September 27, 2001 and an Amended Motion on March 11, 2002. An evidentiary hearing was conducted on the motion on November 4-5, 2003. The trial court denied relief on all grounds on April 23, 2004. Mr. Miller filed a timely Notice of Appeal and his brief is filed contemporaneously with this writ.

STATEMENT OF THE FACTS

On March 5, 1997, Albert Floyd and his girlfriend Linda Fullwood were living on the streets of Jacksonville. (VII,R268-271) After drinking several beers and using rock cocaine, Floyd and Fullwood went to sleep under a covered doorway behind the Episcopal Church Bookstore building. (VII,R270-272;293) Sometime in the night Fullwood awoke to find a man beating Floyd with a pipe or stick. (VII,T274) Fullwood screamed and verbally confronted the man, asking why he was hitting Floyd. (VII,T297) The man turned and began striking Fullwood in the head, arm, and side. (VII,R275-276)

Jimmy Hall, who was walking down the street about 3:00

a.m. heard yelling and ran behind a church building. (VII,T305-306) He saw a man beating two people with a pipe. (VII,T306-307) Hall yelled at the man to stop. (VII,T308) The man turned and started walking toward Hall, but then ran away around the building. (VII,T309)

Floyd died as result of the incident. (VII,T339-350) Fullwood suffered a concussion, a broken arm, two broken fingers, and several fractured ribs. (VII,T278-279)

Two and one half months after the homicide, Mr. Miller approached a police officer in Baton Rouge, Louisiana, and told him that he had killed a man in Jacksonville and wanted to confess. (VIII,T417-418) Mr. Miller was taken to the police station, advised of his Miranda rights, and then gave a statement that he had beaten a black man to death and had also beaten a woman while trying to rob the man. (VIII,T420-421) A man came up and Miller fled. (VIII,R420-421;517)

On the night of the homicide Mr. Miller had teen drinking smoking crack cocaine. (VIII,T450-451) Mr. Miller was looking for money to buy more cocaine and alcohol. (VIII,T441-445)

During the penalty phase, Mr. Miller's mother, sister, and brother testified that they were a close family and

that they loved and cared for Mr. Miller. (XI)

During closing argument in both the guilt and penalty phases of trial the prosecutor repeatedly overstepped the bounds of acceptable and ethical argument:

Guilt Phase:

The prosecutor repeatedly argued to the jury that Mr. Miller intended to kill Fullwood would have done so if Mr. Hall had not appeared. (X,R698;701-702;703-704;717) The prosecutor vouched for the credibility of his witness Hall, telling the jury that even though Hall was a convicted felon and not someone that you would want your daughter to date, he was telling the truth in his testimony. (X,T716)

Penalty Phase:

The prosecutor urged the jury to reject as a mitigating factor the positive family relationships that Mr. Miller had. In doing so the prosecutor argued that "The defendant didn't care that Albert Floyd had a wife, he didn't care that Albert Floyd had children, he didn't care that Albert Floyd had any grandchildren, he didn't care that he had a family and friends who loved and cared for him. He didn't care. Now he wants you to care for him, he wants you to recommend a life sentence for him." The prosecutor continued by arguing "…The Defendant wants you

to only hear that there are people who love and care for the defendant. He wants you to hear and focus on his life, his family, his problems. Doesn't really want you to hear about Albert Floyd, that he had a wife, children, grandchildren, wants you to forget that. He was a hard-working man who worked to support his family, doesn't want you to think about the people who loved and cared for Albert Floyd."

RELIEF REQUESTED

Petitioner David Miller asks this Court to grant him a new appeal, or alternatively, to vacate his prior conviction and/or sentence of death because of the fundamental error described herein.

REASONS THAT THE WRIT SHOULD ISSUE

This Court should issue a writ of habeas corpus because of the fundamental error which occurred at Mr. Miller's trial and which was not raised by appellate counsel or by this Court in its review of the case. This error is so substantial, so persuasive, that it invaded the truth finding function of the jury. The conviction and sentence must be set aside.

I. DAVID MILLER WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS PREVIOUS APPEAL TO THIS COURT.

STANDARD OF REVIEW

The standard of review in a case alleging ineffective assistance of appellate counsel is as follows:

> A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction … on the ground of ineffectiveness of counsel on appeal must show , first, that there were specific errors or ommiss-ions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome.

Jackson v. Wainwright, 463 So. 2d 207, 209 (Fla.1985); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); Smith v. State, 457 So. 2d 1380 (Fla. 1984). Habeas corpus relief is appropriate where appellate counsel failed to raise fundamental error appearing on the record. Lowman v. Moore, 744 So. 2d 1210 (Fla. 2nd DCA 1999), citing Ferrer v. Manning, 682 So. 2d 659 (Fla. 3rd DCA 1996).

> Appellate counsel may be deemed to have Rendered ineffective assistance in failing to Raise a meritorious issue on appeal even if Trial counsel did not preserve it for appeal If the error or impropriety rises to the level Of a due process violation, constitutional Violation, or another matter of fundamental Error. Those, of course, cannot be waived by Failure to object. See Hargrave v. State, 427 So. 2d 713 (Fla. 1983).

Mayer v. Singletary, 610 So. 2d 1329 (Fla. 4th DCA 1992).

The Eleventh Circuit has applied the two-prong test of Strickland v. Washington, which requires a showing that the performance of counsel was deficient and a showing of prejudice to the defendant to appellate counsel. Health v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Petitioner David Miller submits that previous appellate counsel was ineffective in failing to raise on the previous appeal to this court the issue of prosecutorial misconduct in guilt and penalty phase closing arguments. The decision, if indeed there was one, not to raise the issue of prosecutorial misconduct on direct appeal "cannot be excused as mere strategy or allocation of appellate resources." Wilson v. Wainwright, 474 So. 2d 1192 (Fla. 1985). This issue was not so obscure that is can be likened to a search for the "needle in the haystack". The misconduct of the prosecutor could not be missed even upon a cursory review of the appellate record. A claim based upon prosecutorial misconduct is hardly new or novel, the law is well settled in this area, with the courts having become increasingly vigilant over such prosecutorial abuse.

This Court has expressed increasing concern over the

frequency with which prosecutors overstep the bounds of acceptable argument in both the guilt and penalty phases of capital trials. This concern has led to the reversal of death cases based upon such improper argument. Ruiz v. State, 743 So. 2d 1 (Fla. 1999). This court has stated that the proper role of closing argument in a criminal case is to serve as a review of the evidence and inferences which may be reasonably drawn from them. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). This Court, in cases such as Ruiz, has found the error to be fundamental, thus reversible if raised by appellate counsel.

In this case the arguments of the prosecutor were clearly improper. Exhorting the jury to convict Mr. Miller because he would have killed a second person if not stopped is impermissible as nonstatutory aggravation. Drake v. State, 441 So. 2d 1079 (Fla. 1983); Miller v. State, 373 So. 2d 882 (Fla. 1979). Likewise, a prosecutor may not vouch for the credibility of a witness by expressing an opinion as to whether or not the witness is telling the truth or otherwise imply that the witness has told the truth. Kelly v. State, 842 So. 2d 223 (Fla. 1st DCA 2003); DeLuca v. State, 736 So. 2d 1222 (Fla. 4th DCA 1999).

Prosecutors are prohibited from utilizing argument in

penalty phase that invokes sympathy for the victim or attempts to engage the sympathy of the jury. Argument which seeks to take a mitigating factor, such as the support of friends and family of the defendant, and turn it into an aggravating circumstance is patently improper argument. Urbin v. State, 714 So. 2d 411 (Fla. 1998); Hamilton v. State, 703 So. 2d 1038 (Fla. 1997); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Richardson v. State, 604 So. 2d 1107 (Fla. 1992). At the time of the direct appeal in this case, each of the objectionable and prejudicial arguments made by the prosecutor in this case had been found to be fundamental error in the above-cited cases. There is no strategy which would justify the omission of this argument in the direct appeal.

The serious omission by appellate counsel constitutes a performance which fell below that which is professionally acceptable, and undermines confidence in the appellate review of this case. This issue, if properly raised on direct appeal, constituted grounds for reversal under reported decisions of this Court. Because of this failure, this Court should grant a new trial to Mr. Miller. Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986).

CONCLUSION

For the foregoing reasons, the previous appeal in this matter failed to correct fundamental error. Because Mr. Miller was denied his Sixth Amendment right to effective assistance of counsel on appeal, this Court should grant the writ of habeas corpus, grant a new appeal, or alternatively, vacate his conviction and/or sentence of death.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Writ of Habeas Corpus has been furnished by United States Mail to all counsel of record and the defendant on this _____ day of March, 2005.

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