

IN THE SUPREME COURT OF FLORIDA

DAVID MILLER,

Petitioner,

vs.

CASE NO. SC05-472

JAMES V. CROSBY, Jr., Secretary,
Florida Department of Corrections,

Respondent.

_____ /

RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW JAMES V. CROSBY, Secretary, Florida Department of Corrections (hereafter, the State), by and through undersigned counsel, and hereby responds as follows to Miller's Amended Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

Miller's appeal from the denial of postconviction relief is pending in this Court (Case No. SC04-892). The State's brief in that case sets out a detailed Statement of the Case and Facts, which will not be repeated herein. In his habeas petition, Miller raises one claim, in which he argues that his appellate counsel on direct appeal was ineffective for failing to argue that the prosecutor's closing argument was fundamental error.

Miller's habeas issue is simply a variant of a claim before this Court in his postconviction appeal that trial counsel was ineffective for failing to object to the very same prosecutorial arguments at issue here. See Issue III, Initial Brief on Appeal, Case No. SC04-892. If trial counsel acted in a constitutionally deficient manner in failing to object and that substandard performance was prejudicial, then Miller would be entitled to relief on his postconviction claim that trial counsel was ineffective and his habeas claim would be moot. If, on the other hand, trial counsel had a reasonable strategic decision for not objecting, or the failure to object, although unreasonable, was not prejudicial, then fundamental error cannot have occurred, and appellate counsel cannot have been ineffective for failing to object to these unpreserved arguments. By complaining about prosecutorial closing argument both here and in his postconviction appeal, Miller has unnecessarily burdened this Court with redundant material.¹ Blanco v. Wainwright, 507 So. 2d 1377, 1384

¹ Fundamental error is defined as one reaching "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." State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991). If the prosecutor's argument was both improper and "fundamentally" erroneous, trial counsel's decision not to object could not have been reasonable. Moreover, "fundamental" error by definition

(Fla. 1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").

The State fully argued the issue of prosecutorial closing argument in its Answer Brief in Case No. SC04-892. For reasons discussed at length therein (pp. 47-54), the arguments were not improper. Miller's appellate counsel cannot be deemed ineffective for "failing to raise a claim that would have been rejected on appeal." Downs v. State, 740 So.2d 506, 517 n. 18 (Fla. 1999).

Furthermore, as the State discussed in its Answer Brief, Miller has failed to demonstrate prejudice. In short, there was no fundamental error. Absent fundamental error, appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved for appeal by trial counsel. Rodriguez v. State, 30 Fla.L.Weekly S385 (Fla. May 26, 2005).

would have been more prejudicial than the "prejudice" component of an effective assistance of counsel claim. Thus, if, as the State argue in its brief on Miller's postconviction appeal (and as the trial court found), Miller's *trial* counsel was not ineffective, the error could not have been fundamental, and *appellate* counsel could not have been ineffective for failing to argue fundamental error on appeal.

CONCLUSION

For the foregoing reasons, Miller's habeas petition should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CURTIS M. FRENCH
Senior Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Robert A. Norgard, Attorney at Law, P.O. Box 811, Bartow, Florida 33831, this 20th day of June, 2005.

CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

This habeas response was produced in Microsoft Word, using Courier New 12 point, a font which is not proportionately spaced.

CURTIS M. FRENCH
Senior Assistant Attorney General