

IN THE
SEVENTH JUDICIAL CIRCUIT COURT
FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

PAUL MILLER,

Defendant.

Case No. 2012-CF-171

MOTION FOR POSTCONVICTION RELIEF

The Defendant, by and through undersigned counsel, and pursuant to Florida Rule of Criminal Procedure 3.850, moves the Court to vacate his conviction and sentence, and in support of said motion alleges:

1. Name and location of the court that entered the judgment of conviction under attack:
Seventh Judicial Circuit Court, Flagler County, Florida

2. Date of judgment of conviction: June 18, 2013

3. Length of sentence: life imprisonment

4. Nature of offense involved: second-degree murder

5. What was your plea? (check only one)

(a) Not Guilty X

(b) Guilty

(c) Nolo Contendere

If you entered one plea to one count, and a different plea to another count, give details: N/A

6. Kind of trial: Jury trial

7. Did you testify at the trial or at any pre-trial hearing?

Yes X No

If yes, list each such occasion: Trial

8. Did you appeal from the judgment of conviction?

Yes X No

9. If you did appeal, answer the following:

(a) Name of court: Fifth District Court of Appeal

(b) Result: Per curiam affirmed

(c) Date of result: October 21, 2014

(d) Citation (if known): Miller v. State, 150 So. 3d 1173 (Fla. 5th DCA 2014)

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in this court?

Yes No X

11. If your answer to number 10 was "yes," give the following information (applies only to proceedings in this court):

(a) (1) Nature of the proceeding: N/A

(2) Grounds raised: N/A

(3) Did you receive an evidentiary hearing on your petition or motion, etc? N/A

(4) Result: N/A

(5) Date of result: N/A

If you did appeal, answer the following:

(1) Name of court: N/A

(2) Result: N/A

(3) Date of result: N/A

(4) Citation (if known): N/A

(b) As to any second petition, application, motion, etc., give the same information:

(1) Nature of the proceeding: N/A

(2) Grounds raised: N/A

(3) Did you receive an evidentiary hearing on your petition or motion, etc? N/A

(4) Result: N/A

(5) Date of result: N/A

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in any other court?

Yes No X

13. If your answer to number 12 was “yes,” give the following information:

(a) (1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition or motion, etc.? N/A

(5) Result: N/A

(6) Date of result: N/A

(b) As to any second petition, application, motion, etc., give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition or motion, etc.? N/A

(5) Result: N/A

(6) Date of result: N/A

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.

For your information, the following is a list of the most frequently raised grounds for postconviction relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds that you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (i).

- (a) Conviction obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by the unconstitutional failure of the prosecution to disclose to defendant evidence favorable to the defendant.
- (c) Conviction obtained by a violation of the protection against double jeopardy.
- (d) Denial of effective assistance of counsel.
- (e) Denial of right of appeal.
- (f) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).
- (g) Sentence in excess of the maximum authorized by law.
- (h) Newly discovered evidence.
- (i) Changes in the law that would be retroactive.

A. Ground 1: Defense counsel rendered ineffective assistance of counsel by failing to retain a use of force expert (and failing to present the expert as a defense witness at trial).

Supporting FACTS:

Defense counsel rendered ineffective assistance by failing to retain a use of force expert (and failing to present the expert as a defense witness at trial). As a result, Defendant Miller was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and in violation of article I, section 16 of the Florida Constitution.

The theory of defense at trial was self defense. On January 21, 2012 (i.e., prior to the night of the incident), Dana Mulhall engaged in an argument with Defendant Miller (starting with a complaint about Defendant Miller's dogs) that ended with Mr. Mulhall using profanity and threatening to harm Defendant Miller. Following the incident, Defendant Miller contacted law enforcement officials to report Mr. Mulhall's threat/behavior. As a result of this prior encounter, Defendant Miller feared Mr. Mulhall (and he specifically expressed this fear to his daughter one week prior to the incident). On the night of the incident (March 14, 2012), Mr. Mulhall again complained about Defendant Miller's dogs.¹ Another encounter ensued, and Mr. Mulhall threatened to kill Defendant Miller and his dogs, and Mr. Mulhall told Defendant Miller that he had a gun. Mr. Mulhall then reached behind his back in what Defendant Miller believed was an attempt to grab the gun and shoot him. Defendant Miller shot Mr. Mulhall in response to this threat. Thereafter, Defendant Miller called 911 to report the incident. Subsequent tests revealed that Mr. Mulhall's blood alcohol level was .188 milliliters of blood.

Thus, the key issue at trial was whether Defendant Miller was justified in using force to defend himself against Mr. Mulhall. However, defense counsel failed to present a use of force expert

¹ At the time of the incident, Defendant Miller was sixty-five years old.

who could have opined that Defendant Miller had an objective fear for his safety in light of the events of the evening (and the previous encounter with Mr. Mulhall) and that the use of force and amount of force used by Defendant Miller were justifiable. Had a use of force expert been presented at trial, the expert would have refuted the State's argument that Defendant Miller was not justified in his use of force/self defense. Defendant Miller submits that had counsel attempted to retain a use of force expert, such an expert would have been willing and available to testify at trial.²

The Sixth Amendment right to counsel implicitly includes the right to the effective assistance of counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Chatom v. White*, 858 F.2d 1479, 1484 (11th Cir. 1988). "The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show both that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency." *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Defense counsel was ineffective for failing to retain a use of force expert (and failing to present the expert as a defense witness at trial). *See Leonard v. State*, 930 So. 2d 749 (Fla. 2d DCA 2006) (holding that the failure to retain a defense expert is a facially sufficient postconviction claim and recognizing that such a claim generally cannot be resolved absent an evidentiary hearing). Counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining

² Unlike lay witnesses, a defendant is not required to list the name of a specific expert witness when claiming that defense counsel was ineffective for failing to present an expert witness at trial. *See Terrell v. State*, 9 So. 3d 1284, 1289 (Fla. 4th DCA 2009); *Lucas v. State*, 147 So. 3d 611, 612 (Fla. 4th DCA 2014). *Lucas* is currently pending review in the Florida Supreme Court. *See State v. Lucas*, case number SC14-1925.

any confidence in the outcome (i.e., had a use of force expert been presented at trial, there is a reasonable probability that the jury would have returned a not guilty verdict). *See Johnson v. State*, 921 So. 2d 490, 511-12 (Fla. 2005) (Pariente, C.J., specially concurring).

15. If the ground listed in 14 was not previously presented on your direct appeal, give your reason it was not so presented: A claim of ineffective assistance of counsel is generally not cognizable on direct appeal and is properly raised for the first time in a motion for postconviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. See Kelly v. State, 486 So. 2d 578, 585 (Fla. 1986).

16. Do you have any petition, application, appeal, motion, etc., now pending in any court, either state or federal, as to the judgment under attack?

Yes ____ No X

17. If your answer to number 16 was "yes," give the following information:

(a) Name of Court: N/A

(b) Nature of the proceeding: N/A

(c) Grounds raised: N/A

(d) Status of the proceedings: N/A

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.

(a) At suppression hearing: N/A

(b) At plea hearing: N/A

(c) At trial: Douglas S. Williams, 1414 West Granada Boulevard, Suite 4, Ormond Beach, Florida 32174-8104; and Carine L. Emplit, PL-01 The Capitol, Tallahassee, Florida 32399-1050

(d) At sentencing: Mr. Williams and Ms. Emplit

(e) On appeal: Kevin R. Holtz, 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118

(f) In any postconviction proceeding: Undersigned counsel

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

WHEREFORE, Movant requests that the Court grant all relief to which the movant may be entitled in this proceeding, including but not limited to (here list the nature of the relief sought):

1. An evidentiary hearing to determine the merits of this motion for postconviction relief.
2. Such other and further relief as the Court deems just and proper.

OATH

Under penalties of perjury and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing motion, that the facts contained in the motion are true and correct, and that I have a reasonable belief that the motion is timely filed. I certify that this motion does not duplicate previous motions that have been disposed of by the Court. I further certify that I understand English and have read the foregoing motion.

Paul Miller
PAUL MILLER
DC # V-43515

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished
to:

Office of the State Attorney
1769 East Moody Boulevard
Building 1, 3rd Floor
Bunnell, Florida 32110

by U.S. mail³ delivery this 13th day of January, 2016.

Respectfully submitted,

/s/ Michael Ufferman

MICHAEL UFFERMAN

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Counsel for Defendant **MILLER**

xc: Paul Miller

³ Based on undersigned counsel's review of the State Attorney's website, it does not appear that the State Attorney has designated an email address for eservice. Therefore, this document is being served by U.S. mail.