IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

CASE NO: 12-00171-CFFA

STATE OF FLORIDA

VS.

PAUL MILLER,
DEFENDANT.
_____/

STATE'S RESPONSE TO DEFENDANT'S AMENDED MOTION FOR POSTCONVICTION RELIEF WITH OATH

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and files this Response to Defendant's Amended Motion for Post-Conviction Relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure With Oath. The State requests that this Honorable Court summarily deny the motion and the singular ground alleged therein. In support thereof, the State sets forth the following:

INTRODUCTION

On March 23, 2012, the defendant was charged by Information with one count of Second Degree Murder With a Firearm. He was tried on that charge before a Flagler County petit jury from May 20 to May 24, 2013. At trial, the defendant asserted the justification of self-defense. At the conclusion of the trial, the jury rejected his defense and found the defendant guilty as charged. They also made the factual finding that the defendant had discharged a firearm and thereby caused the death of the victim, Dana

Mulhall. The latter finding qualified the defendant for a mandatory minimum prison sentence of 25 years to life. On June 18, 2013, the trial court adjudicated the defendant guilty and sentenced him to a term of natural life. Throughout the discovery, trial and sentencing phases, the defendant was represented primarily by Attorney Douglas S. Williams.

On July 10, 2013, the defendant filed a direct appeal with the Fifth District Court of Appeals. On October 21, 2014, the 5th DCA affirmed the judgment and sentence of the trial court in a *per curiam* opinion. *See Miller v. State*, 150 So.3d 1173 (Fla. 5th DCA 2014) (unpublished disposition). A Mandate was issued by that court on November 14, 2014.

On November 29, 2016, the defendant, with assistance of counsel, filed the motion for post-conviction relief at issue in this response. That motion appears to be timely filed and adequately verified with an unnotarized oath and certification by the defendant as required by Rule 3.850, Florida Rules of Criminal Procedure.

In his motion, the defendant alleges only one ground of ineffective assistance of counsel. He argues that his trial counsel was deficient in failing to retain and present at trial a "use of force" expert who could have refuted the State's argument that the defendant was not justified in using deadly force. The defendant also claims to have retained such an expert in preparation for the motion and proffers that the expert has

concluded and could testify that "Defendant Miller reacted appropriately as prescribed by law when he used deadly force to protect himself."

EVIDENTIARY STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Claims of ineffective assistance of counsel are evaluated using the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). For such a claim to be meritorious, a claimant must (1) identify particular acts or omissions of the trial lawyer that fall below the wide range of reasonably competent performance under prevailing professional standards and (2) show that there is a reasonable probability that, but for the clear and substantial deficiency in counsel's performance, the result of the proceeding would have been different.

Under *Strickland*, the defendant, as the moving party, bears the burden of overcoming a strong presumption of counsel's reasonable and effective performance. *State v. Patterson*, 966 So.2d 471, 477 (Fla. 2d DCA 2007) (citing *Cabrera v. State*, 766 So.2d 1131, 1133 (Fla. 2d DCA 2000)). In addition to this presumption, an examination of trial counsel's performance much be considered from trial counsel's perspective under the circumstances at the time of trial, *Patterson*, 966 So.2d at 471, and strategic or tactical decisions by counsel after a thorough investigation are virtually unchallengeable, *Cabrera*, 766 So.2d at 1133.

A defendant asserting a claim of ineffective assistance of counsel in not entitled to a hearing if (1) the motion, files and record in the case conclusively show that the defendant is not entitled to relief, or (2) the motion or particular claim is legally insufficient. *Williamson v. State*, 994 So.2d 1000, 1006 (Fla. 2008) (quoting *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000)). A defendant's post-conviction motion is legally insufficient if the allegations contained therein are conclusory. His motion must allege specific facts that, when considered in the totality of the circumstances, demonstrate a deficiency on the part of counsel that is detrimental to the defendant. *State v. Coney*, 845 So.2d 120, 135 (Fla. 2003). Even when the allegations are sufficiently specific, a court may summarily deny a claim for relief when it is clear that the prejudice component is not satisfied. *Kennedy v. State*, 547 So.2d 912, 914 (Fla. 1989) (citing *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986)).

ARGUMENT

Ground 1: Defense Counsel Failed to Retain a "Use of Force" Expert

The defendant's sole claim in his motion for post-conviction relief is that his trial attorney failed to retain and call at trial a "use of force" expert who could have testified that "Defendant Miller reacted appropriately as prescribed by law when he used deadly force to protect himself." Such testimony would have been legally inadmissible at trial if offered by the defense at the time. Therefore, the defendant's claim that his attorney was ineffective for failing to do so must fail.

The Florida Supreme Court has held that it is generally improper to permit an expert to express an opinion which applies a legal standard to a set of facts. *See Gurganus v. State*, 451 So.2d 817, 821 (Fla. 1984); *Shaw v. State*, 557 So.2d 77 (Fla. 1st DCA 1990). *See also* Ehrhardt, *Florida Evidence* § 703.1 at 885 (2016 Edition). This principle has been applied to several cases in which experts were offered to provide opinions on ultimate self-defense issues.

In *Christian v. State*, 693 So.2d 990 (Fla. 1st DCA 1996) (overturned on other grounds, *State v. Christian*, 692 So.2d 889 (Fla. 1997)), the defendant appealed his conviction of second-degree murder, along with other crimes. At trial, he claimed that he was acting in defense of his brother when he shot one victim three times in the back and in self-defense when he shot another man twice. Both men were unarmed. The trial court refused to allow the defense to elicit testimony from an expert that the defendant "was in a state of fear which caused him to believe that shooting [the victim] was the only means available to him to prevent [the victim] from killing or seriously injuring his brother." *See id.* at 993. The First District Court of Appeals upheld that the trial court's decision was proper.

The same rule applies regardless of whether the party that seeks to offer such evidence is a criminal defendant or the prosecution. In *State v. Andrews*, 820 So.2d 1016 (Fla. 4th DCA 2002), the defendant was charged with attempted second-degree murder of a police officer when he allegedly attempted to run over the officer with his

car. During the event, the officer fired his service firearm several times at the defendant. *See id.* at 1019. During opening statement, defense counsel argued that the officer was not in any danger of being run over and was, thus, not justified in shooting at the defendant. He continued that the officer, rather than the defendant, should have been on trial for attempted murder. *See id.* at 1024.

During the trial, the State responded to the argument by calling the elected State Attorney to testify as an expert in justifiable use of force. Over the defense's objection that this was an issue to be decided by the jury, the trial court permitted the State Attorney to testify that the officer's actions were appropriate and his use of force was legally justified. *See id.* The defendant was convicted as charged. On appeal, the Fourth District overturned the attempted murder conviction, holding that the appropriateness of the officer's actions were a jury question and that the trial judge abused his discretion in permitting the "use of force" expert testimony. *See id.* at 1025.

The sole description of the testimony that the defendant claims his trial counsel was deficient for failing to offer at trial is the following statement: "After reviewing the evidence/testimony in this case, [the defense's "use of force" expert] has concluded that Defendant Miller reacted appropriately as prescribed by law when he used deadly force to protect himself." This is indistinguishable from the expert testimony elicited in *Christian* and *Andrews*. Such opinion testimony invades the province of the jury by essentially telling the jury how to decide the case. As Professor Ehrhardt has observed,

when such testimony is allowed it creates a danger that "the witness will apply a [legal] standard or definition which is different from that defined by the applicable law. The application of an erroneous legal standard results in the opinion testimony being misleading and not helpful to the jury." *See* Ehrhardt, *Florida Evidence* § 703.1 at 885-86. This threat is increased exponentially when considering the likelihood that an "expert's" credentials and demeanor would be used to impress a jury to accept the legally misleading testimony. *See id.* at 884.

Therefore, the testimony described in the defendant's motion would have been inadmissible at trial. The defendant's trial counsel cannot be held at fault for failing to offer improper opinion evidence. As such, the defendant's motion for post-conviction relief is legally insufficient and should be summarily denied.

R.J. LARIZZA
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. Mail, electronic mail, and/or e-service delivery to MICHAEL UFFERMAN, 2022-1 RAYMOND DIEHL ROAD, TALLAHASSEE, FL 32308 and DOUGLAS S WILLIAMS, 1414 WEST GRANADA BLVD, SUITE 4, ORMOND BEACH, FL 32174, on December 15, 2016.

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