

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3487
Conference Calendar

ROBERT E. MILLER,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary and
RICHARD P. IEYOUB, Attorney General,
State of Louisiana,

Respondents-Appellees.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CA 93-951 E
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(March 23, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Robert E. Miller argues that the state trial court erred when it permitted the prosecutor to testify and continue to prosecute Miller's case. A federal habeas petitioner's allegation that a state court conviction is invalid because of the violation of the advocate-witness rule is reviewed for a violation of due process in which the entire trial was rendered

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

unfair. Walker v. Davis, 840 F.2d 834, 838 (11th Cir. 1988); See also Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (involving the habeas corpus review of a state prosecutor's closing argument); Darden v. Wainwright, 477 U.S. 168, 182-83, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (appropriate standard of review for prosecutorial misconduct claim on federal habeas corpus review is due process).

Miller fails to demonstrate that the prosecutor's testimony rendered his trial fundamentally unfair. Andrews's identification of Miller would have been cumulative of the testimony of McDonald and Dunn. McDonald, the victim's roommate, testified that he had known Miller for seven years and positively identified Miller as one of the assailants. Dunn testified that she had occasionally seen Miller around the project and was positive in her identification of him as the perpetrator. Cf. Walker, 840 F.2d at 838 (absent prosecutor's testimony, insufficient evidence existed to convict defendant). Therefore, this issue lacks merit.

Miller also argues that he is entitled to relief because the trial court charged the jury with an instruction on reasonable doubt that was unconstitutional under Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). Miller's conviction and sentence, however, became final in December of 1980. See Miller, 391 So. 2d at 1159. This Court has proclaimed that Cage is not retroactively applied to decisions which became final before Cage was decided. Skelton v. Whitley, 950 F.2d 1037, 1041-46 (5th Cir.), cert. denied, 113 S.Ct. 102 (1992). Therefore, this issue also lacks merit.

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The judgment is AFFIRMED.