No._____

IN THE SUPREME COURT OF THE UNITED STATES

_____term, 2022

No. 21-8098

ROCKY TRAVERSE CHRISTIAN,

Petitioner,

Vs.

STATE OF FLORIDA,

Respondent

PETITION FOR REHEARING

Petitioner moves this Honorable Court for rehearing from the denial of his Certiorari petition entered in on October 3, 2022, in considering whether this Court should grant the rehearing this Court should consider the following:

GROUNDS TO BE CONSIDERED

1). Whether the decision of the court that decided petitioner's case is in conflict with decisions of another appellate court;

2). Whether the plain error in petitioner's jury instruction that Florida's Fifth District Court of Appeal overlooked during

petitioner's *Anders v. California,* 386 U.S. 738 (1967) appeal has already been deemed a plain error[1] in the Second District Court of Appeal;

3). Whether this case is of national significance and/or presents a question of great public importance.

In contrast to petitioner's case, the Second District Court of Appeal for the State of Florida reversed Routenberg's case for a new trial after incurring the same plain error in his self-defense jury instruction. *Routenberg v. State of Florida*, 301 So.3d 325 (2d DCA 2020) Exhibit A

In sum, Routenberg was a neighborhood drug dealer who woke up one night and saw his 115-pound woman friend stealing his oxycontin. When he confronted her, she allegedly brandished a knife and cut him a few times because Routenberg would not let her leave with his drugs. Routenberg explained that the fatal wound occurred during their scuffle. "And then whenever I go behind her, I snatched her arms up like that. And then whenever the knife was already right here. I didn't

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[1] Florida's fundamental error doctrine parallels the federal plain error doctrine, whose foundational parameters were based on *United States v. Atkinson*, 297 U.S. 157, 160 (1936). See (*Rosier v. State of Florida*, 276 So.3d 403 (Fla. 1st DCA 2019)(Quoting Atkinson)

know it, 'cause when I shoved her arms up like that, the knife did go in her." He admitted twice that the victim suffered a wound to her neck while he was trying to restrain her. He also showed the detective scars on his back and shoulder from wounds the victim inflicted on him. Authorities learned of the killing about six weeks after it occurred, when another of Routenberg's acquaintances informed an assistant state attorney that Routenberg had killed the victim and had demanded that the informant help him dispose of her body. Later Law Enforcement found the body buried in Routenberg's backyard.

Routenberg's defense at trial was that his use of deadly force was justified because it occurred when the victim was committing both a robbery and an aggravated battery against him. In the States initial and rebuttal closing arguments, the State argued that "there is no evidence" that the victim was robbing Routenberg when he stabbed her or that the victim's actions constituted an aggravated battery.

The court when instructing the jury on self-defense erroneously instructed the jury that it could find that he acted in self-defense only if the State proved beyond a reasonable doubt that the victim was robbing

him or committing an aggravated battery against him when he used deadly force, *as the court did at petitioner's trial.*

The jury found Routenberg guilty as charged, and the trial court sentenced him to life imprisonment. In Routenberg's Habeas petition alleging ineffective assistance of appellate counsel, Routenberg argued that his appellate attorney should have claimed error in the trial court's jury instructions on justifiable use of deadly force. The Second District agreed and reversed contending that by instructing the jury that Routenberg's actions were not justified unless the State proved the very facts it disputed, the instruction prevented the jury from finding that Routenberg's use of deadly force was justified. The instruction amounted to a directed verdict on Routenberg's sole defense and thereby deprived him of a fair trial. *See* Martinez v. State of Florida, 981 So. 2d at 453 (2008) As such, the jury instruction constituted fundamental error.

Despite the shocking evidence, in Routenberg's case the appellate court for Florida's Second District Court of Appeal deemed the jury instruction error to be so egregious that it deprived Rotenberg of a fair trial, and reversed for a new trial.

Petitioner has raised the same jury instruction error in the Fifth District Court of Appeal, where the evidence presented was far better than Routenberg's, but was denied. Petitioner's request for a written opinion was also denied. There was no rational reason for not giving a written opinion for there was a clear conflict between the two district courts on whether the jury instruction error arose to the level of a fundamental.

Reasons for granting rehearing

A common practice, which largely goes uncheck, is Florida's ability to issue unelaborated denials otherwise known as a Per Curiam Affirmance (Silent Opinions). Under Florida law, a per curiam affirmance, issued without opinion by a Florida District Court of Appeal, cannot be appealed to the Florida Supreme Court. See Fla. Rule. App. Proc. 9.030(a)(2)(A)(i-iv). Consequently, once the District Court denies the petition on the merits without expressing an opinion, the claim thereafter is forever barred from being litigated again in the State of Florida by the Law of the Case doctrine[2] or in petitioner's case

[2] Canty v. State of Florida, 715 So.2d 1033 (1st DCA 1998)(A per curiam decision is sufficient to establish the law of the case).

Res Judicata. Topps v. State of Florida, 865 So.2d 1253 (2004) (Claim preclusion).

Petitioner represents the class of American people affected by these unelaborated denials, which give no explanation as to why there is so much disparity in cases like Routenberg's and Petitioner's on the same question of law.

According to a study done by the Judicial Management Counsel on Per Curiam Affirmed decisions.[3] The use of PCA decisions fosters unprofessionalism by the bench and bar, diminishes the appearance of fairness and meaningful access to the courts, limits possible review by the Supreme Court of Florida, *conceals inconsistent results*, and allows the judiciary to avoid difficult results. Accordingly, 90.2% of all Ander's cases are per curiam affirmed.[4]

This Court on several occasions has reviewed PCA cases from the State of Florida each time reversing after perceiving significant constitutional issues worthy of comment, occasionally in a scathing opinion. Cases that have been reversed are: Florida v. Rodriguez;

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[3] http://www.flcourts.org/sct/sctdocs/library.html#reports
[4] Out of 1,174 Anders cases, 1059 were per curiam affirmed.

Ibanez v. Florida Department of Business and Professional regulation, Bd. Accountancy; Hobbie v. Unemployment Appeals Commission of Florida; Brooks v. Florida; Callender v. Florida; Lawrence v. Florida; Rodriguez v. Florida; and Moore v. Florida[5]

Petitioner's case presents a perfect example of Florida's abuse of the per curiam decision. This Court's supervisory authority is required in cases like this, where it is evident on the face of the record that a substantial jury instruction error affected petitioner's Constitutional right to a fair trial.

CONCLUSION

In sum, petitioner has shown that this case merits the use this Courts valued time and finite resources as such, this Honorable Court should grant rehearing and set this case for briefing.

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[5] Florida v. Rodriguez, 469 U.S. 1 (1984); Ibanez v. Florida Department of Business and Professional regulation, Bd. Accountancy, 512 U.S. 136 (1994); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987); Brooks v. Florida, 389 U.S. 413,315 (1967); Callender v. Florida, 380 U.S. 519 (Fla. 1965); Lawrence v. Florida, 701 So.2d DCA 1997); Rodriguez v. Florida, 511 So.2d1021 (Fla. 2d DCA1987); and Moore v. Florida, 706 So.2d 291 (Fla. 1st DCA 1995).

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APPENDIX IN SUPPORT OF PETITION FOR REHEARING

Index to Appendices

EXHIBIT A

WILLIAM C. ROUTENBERG, Petitioner, v. STATE OF FLORIDA, Respondent.
COURT OF APPEAL OF FLORIDA, SECOND DISTRICT
301 So. 3d 325; 2020 Fla. App. LEXIS 1147;

45 Fla. L. Weekly Fed. D 241
Case No. 2D19-1632
January 31, 2020, Opinion Filed

Editorial Information: Prior History

Petition Alleging Ineffective Assistance of Appellate Counsel. Pinellas County; Keith Meyer, Judge. Routenberg v. State, 191 So. 3d 470, 2016 Fla. App. LEXIS 7309 (Fla. Dist. Ct. App. 2d Dist., May 13, 2016)

Counsel William C. Routenberg, Pro se.

Ashley Moody, Attorney General, Tallahassee, and Johnny Salgado, Assistant Attorney General, Tampa, for Respondent.

Judges: NORTHCUTT, Judge. KELLY and SALARIO, JJ., Concur.

CASE SUMMARY In a Fla. R. App. P. 9.141(d) petition, appellate counsel was ineffective for failing to challenge defendant's conviction based on an erroneous jury instruction on defendant's claim of self-defense. The instruction prevented the jury from finding that defendant's use of deadly force was justified.

OVERVIEW: HOLDINGS: [1]-In a Fla. R. App. P. 9.141(d) petition, appellate counsel was ineffective for failing to challenge defendant's conviction based on an erroneous jury instruction on defendant's claim of self-defense; by instructing the jury that defendant's actions were not justified unless the State proved the very facts it disputed, the instruction prevented the jury from finding that defendant's use of deadly force was justified, amounting to a directed verdict on defendant's sole defense and thereby depriving defendant of a fair trial.

OUTCOME: Petition granted.

LexisNexis Headnotes

Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Defenses > Self-Defense

The State must prove the defendant's guilt beyond a reasonable doubt, and when the defendant presents a prima facie case of self-defense, the State's burden includes proving beyond a reasonable doubt that the defendant did not act in self-defense.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Exceptions to Failure to Object
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Jury Instructions

Instructions are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred.
Criminal Law & Procedure > Jury Instructions
Criminal Law & Procedure > Appeals > Standards of Review

A trial judge has the responsibility of correctly charging the jury. That responsibility includes giving instructions that are not confusing, contradictory, or misleading. The Court of Appeal of Florida has held that when a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant.

Criminal Law & Procedure > Appeals > Standards of Review
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense

Where the challenged jury instruction involves an affirmative defense, as opposed to an element of the crime, fundamental error only occurs where a jury instruction is so flawed as to deprive defendants claiming the defense of a fair trial.

Criminal Law & Procedure > Jury Instructions
Criminal Law & Procedure > Appeals > Standards of Review

When assessing whether a mistaken instruction constituted fundamental error in a defendant's trial, the appellate court must consider the effect of the erroneous instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

To prevail on a claim of ineffective assistance of appellate counsel, the petitioner must show (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Opinion
Opinion by: NORTHCUTT
Opinion
{301 So. 3d 326} NORTHCUTT, Judge.

In his petition filed under Florida Rule of Appellate Procedure 9.141(d), William C. Routenberg makes thirteen claims of ineffective assistance of appellate counsel. We grant relief as to ground five of the petition, which asserts that Routenberg's appellate attorney was ineffective for failing to challenge his conviction based on the giving of an erroneous jury instruction on Routenberg's claim of self-defense. We reject his other claims without comment.

Routenberg represented himself at his jury trial for second-degree murder. When questioning the State's witnesses, he revealed to the jury that he sold drugs from his home and that he frequently allowed customers and acquaintances to stay with him. One such guest was the victim of the homicide for which Routenberg was tried. Authorities learned of the killing about six weeks after it occurred, when another of Routenberg's acquaintances informed an assistant state attorney that

Routenberg had killed the victim and had demanded that the informant help him dispose of her {301 So. 3d 327} body.1 Law enforcement found the body buried in Routenberg's backyard.

Routenberg gave two statements to detectives, one before the victim's body was found and one after. During the former, the interrogating detective told Routenberg that the victim was considered a missing person, and Routenberg claimed that he did not know her whereabouts. In the second interview, Routenberg was confronted with the fact that the victim had been discovered buried in his yard. This time he acknowledged that he had killed her, but he claimed that he did so in self-defense. Routenberg recounted that he awoke to find the victim in his bedroom and that he saw that she was stealing his oxycontin.2 When he confronted her, she brandished a knife. Routenberg told the detective that the victim "cut me a couple of . . . . times because I wouldn't let her leave with my shit." He explained that the fatal wound occurred during their scuffle. "And then whenever I go behind her, I snatched her arms up like that. And then wheneverthe knife was already right here. I didn't know it, 'cause when I shoved her arms up like that, the knife did go in her." He admitted twice that the victim suffered a wound to her neck while he was trying to stop or restrain her. He also showed the detective scars on his back and shoulder from wounds the victim inflicted on him.

Routenberg's defense at trial was that his use of deadly force was justified because it occurred when the victim was committing both a robbery and an aggravated battery against him. In its initial and rebuttal closing arguments, the State argued that "there is no evidence" that the victim was robbing Routenberg when he stabbed her or that the victim's actions constituted an aggravated battery. The jury found Routenberg guilty as charged, and the trial court sentenced him to life imprisonment. This court affirmed the judgment and sentence on direct appeal. *See Routenberg v. State*, 191 So. 3d 470 (Fla. 2d DCA2016) (table decision).

In ground five of his petition alleging ineffective assistance of appellate counsel, Routenberg maintains that his appellate attorney should have claimed error in the trial court's jury instructions on justifiable use of deadly force. He points out that the court erroneously instructed the jury that it could find that he acted in self-defense only if the State proved beyond a reasonable doubt that the victim was robbing

him or committing an aggravated battery against him when he used deadly force.

Indeed, the instructions were incorrect. The oral and written instructions in large part were consistent with the then-standard instruction for justifiable use of deadly force. But at the point where the then-standard jury instruction directed the court to "[i]nsert and define applicable felony that defendant alleges victim attempted to commit" the trial court erroneously stated that the State must prove beyond a reasonable doubt that the victim committed the elements of robbery and aggravated battery against Routenberg.3 To the {301 So. 3d 328} contrary, it was the State's burden to overcome Routenberg's claim of self-defense by proving beyond a reasonable doubt that the victim was not attempting to rob or batter Routenberg when he used deadly forcea position the State adamantly argued during its closing arguments. *See Fowler v. State*, 921 So. 2d 708, 711 (Fla. 2d DCA2006) ("The State must prove the defendant's guilt beyond a reasonable doubt, and when the defendant presents a prima facie case of self-defense, the State's burden includes 'proving beyond a reasonable doubt that the defendant did not act in self-defense.'" (quoting *Thompson v. State*, 552 So. 2d 264, 266 (Fla. 2d DCA1989))).

Routenberg did not object to the instructions, and therefore his appellate counsel was ineffective for failing to challenge them in the direct appeal only if they constituted fundamental error. *See State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991) ("Instructions . . . are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred."). We conclude that the instructions were, in fact, fundamentally erroneous.

A trial judge has "the responsibility of correctly charging the jury." *State v. Floyd*, 186 So. 3d 1013, 1022 (Fla. 2016). "That responsibility includes giving instructions that are not 'confusing, contradictory, or misleading.'" *Dooley v. State*, 268 So. 3d 880, 885 (Fla. 2d DCA2019) (quoting *Butler v. State*, 493 So. 2d 451, 452 (Fla. 1986)). This court has held that when "a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant." *Carter v. State*, 469 So. 2d 194, 196 (Fla. 2d DCA1985).

Subsequent to our *Carter* decision, the supreme court explained in *Martinez v. State*, 981 So. 2d 449, 455 (Fla. 2008), that it had "never held that the failure to give an instruction or to give an erroneous instruction on an affirmative defense always {301 So. 3d 329} constitutes fundamental error." Rather, "[w]here the challenged jury instruction involves an affirmative defense, as opposed to an element of the crime, fundamental error only occurs where a jury instruction is 'so flawed as to deprive defendants claiming the defense . . . of a fair trial.'" *Id.* (quoting *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988)).

In *Martinez*, the supreme court held that the trial judge erred by instructing the jury on the forcible-felony exception to the affirmative defense of justifiable use of deadly force because Martinez was not charged with an independent forcible felony. Id. at 454; *see also* 776.041(1), Fla. Stat. (2006). However, after "review of the complete record," the court concluded that the erroneous instruction did not deprive Martinez of a fair trial for two reasons. *Martinez*, 981 So. 2d at 455. First, Martinez did not rely solely on self-defense; he also argued that the evidence established only a lesser included offense. *Id.* at 456. "[A]lthough the forcible-felony instruction was erroneous and could have confused the jury, it did not deprive Martinez of his sole, or even his primary, defense strategy." *Id.* Second, the court explained that Martinez's claim of self-defense was "extremely weak" and "strained even the most remote bounds of credulity." *Id.*

Thus, when assessing whether the mistaken instruction constituted fundamental error in Routenberg's trial, we "must consider 'the effect of the erroneous instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel.'" *Dooley v. State*, 206 So. 3d 87, 89 (Fla. 2d DCA2016) (quoting *Garrett v. State*, 148 So. 3d 466, 469 (Fla. 1st DCA2014)). In contrast to *Martinez*, here the record on appeal reveals that justifiable use of deadly force was the only defense Routenberg presented at trial. It also reflects that, although Routenberg's defense may not have been strong, a properly-instructed reasonable juror could have concluded that the State did not meet its burden to prove beyond a reasonable doubt that Routenberg's use of deadly force was not justified.4

Routenberg's statements to the acquaintance he recruited to help him dispose of the victim's body differed in some respects from what he told law enforcement in his second interview, but he consistently maintained that he used deadly force only after the victim brandished a knife and stabbed him. Although Routenberg's recorded statement reflects that he told law enforcement that he did not fear the "little 115-pound girl" because she "couldn't hurt him," or the knife, he also explained that he would have reacted differently if the victim had not just wakened him:

THE DEFENDANT: No. Like I said, that's why I was able to react the way I did. You know what I mean? But it was justI don't know, man. It's just I was {301 So. 3d 330} not thinking, you know? I should know better. I'm too fucking big. I'm tooI should haveyou're right. I should of just [ ] let her leave. But like I said, I just woke up. I didn't have time to think. All I was doing was reacting.And Routenberg told the jury during his closing argument:

The Defendant specifically, in that statement that you heard played to you, said that he wasn't in fear until the victim stabbed him. This is a forcible felony by the laws of this State. Whenever a person has a weapon and is trying to remove your property, in my definition I would consider that robbery and an aggravated battery. I would definitely consider if somebody is stabbing me, and that's what happened in this case. The State has not presented any evidence to refute that.

In sum, Routenberg's claim of self-defense was viable. But by instructing the jury that Routenberg's actions were not justified unless the State proved the very facts it disputed, the instruction prevented the jury from finding that Routenberg's use of deadly force was justified. This instruction amounted to a directed verdict on Routenberg's sole defense and thereby deprived him of a fair trial. *See Martinez*, 981 So. 2d at 453. As such, the jury instruction constituted fundamental error.

Appellate counsel's failure to raise the jury instruction error in Routenberg's direct appeal was ineffective assistance of counsel. *See Downs v. Moore*, 801 So. 2d 906, 909-10 (Fla. 2001) ("[T]o prevail [on a claim of ineffective assistance of appellate counsel], the '[p]etitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range

of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.'" (alterations in original) (quoting *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985))). Because a new appeal would be redundant in this case, we reverse Routenberg's judgment and sentence for second-degree murder and remand for a new trial.

Petition granted.

KELLY and SALARIO, JJ., Concur.

Footnotes

1

The customer testified that he also anonymously reported the homicide the day he learned of it.

2

The State presented no evidence that Routenberg unlawfully possessed prescription drugs.

3

The written instructions stated in relevant part:

The use of deadly force is justifiable only if the defendant reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself while resisting:

1. another's attempt to murder him, or

2. any attempt to commit Robbery and/or Aggravated Battery upon him, or

3. any attempt to commit Robbery and/or Aggravated Battery upon him or in any dwelling or residence occupied by him.

To prove the crime of Robbery, the State must prove the following four elements beyond a reasonable doubt:

1. [the victim] took the prescription medication from the person or custody of William R[o]utenberg.

2. Force, violence, assault, or putting in fear was used in the course of the taking.

3. The property taken was of some value.

4. The taking was with the intent to permanently or temporarily deprive William R[o]utenberg of his right to the property or any benefit from it appropriate the property of William R[o]utenberg to her own use or to the use of any person not entitled to it . . . .

To prove the crime of Aggravated Battery, the State must prove the following two elements beyond a reasonable doubt. The first element is a definition of battery.
1. [the victim] intentionally touched or struck William R[o]utenberg against his will.
2. [the victim] in committing the battery
a. intentionally or knowingly caused permanent disfigurement to William R[o]utenberg, or
b. used a deadly weapon.
A weapon is a "deadly weapon" if it is used or threatened to be used in a way likely to produce death or great bodily harm.
A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent
1. imminent death or great bodily harm to himself, or
2. the imminent commission of a Robbery and/or Aggravated Battery against himself.The oral instructions contained the same errors. 4
In its two court-ordered responses to this claim of ineffective assistance of appellate counsel, the State maintains that the instruction "was correct" and "did not mislead the jury to believe that the State must prove their victim committed robbery and[/]or aggravated battery against the Appellant." Perhaps because the State failed to acknowledge that the justifiable use of deadly force instruction contained language that is not contemplated by the directions in the standard jury instructions, it made no reference to the evidence and argument presented at Routenberg's trial, and it did not address whether the language at issue constitutes fundamental error. The State suggested in its second response that no error occurred because "[t]he instruction also includes the use of justifiable deadly force when necessary to prevent imminent death or great bodily harm to oneself while resisting another's attempt of murder." However, this was not a scenario that Routenberg argued to the jury or one that was necessarily supported by evidence.

CERTIFICATE OF SERVICE

I, Rocky Christian, hereby certify that a true and correct copy of the Rehearing on petition for writ of Certiorari and appendix was served on counsel for respondent on this 14th day of November 2022, via First Class United States Mail, addressed to: **Attorney General's Office, State of Florida, 444 Seabreeze Blvd., Daytona Beach, FL 32118.** I declare under the penalty of perjury that the foregoing is true and correct.

Rocky Christian

Rocky Christian
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Monticello, Fl. 32344

CERTIFICATE OF PARTY UNREPRESENTED BY COUNSEL

I, Rocky Christian, hereby certify that the grounds mentioned herein are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented. Additionally, petitioner certifies that this petition for rehearing is submitted in good faith and not for delay.

Rocky Christian

Rocky Christian
FDC# X84903
Jefferson Correctional Institution
1050 Big Joe Rd.
Monticello, Fl. 32344

CERTIFICATE OF SERVICE

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