No.

In The
Supreme Court of the United States

October Term, 2022

ANTONIO GARRETT,

***Petitioner*,**

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

***Respondents*.**

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN DENYING GARRETT A CERTIFICATE OF APPEALABILITY ON HIS 28 U.S.C. SECTION 2254 HABEAS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN REQUESTING AN INCORRECT JURY INSTRUCTION WHICH DEPRIVED HIM OF HIS ONLY DEFENSE AT TRIAL?

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Antonio Garrett, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit entered in *Antonio Garrett v. Secretary, Florida Department of Corrections, Attorney General, State of Florida,* in Eleventh Circuit Case Number 22-10510, filed May 2, 2022 denying Garrett's request for a certificate of appealability of the denial of his petition filed under Title 28, United States Code § 2254. The order of the Eleventh Circuit is unreported, but a true and correct copy is included in Appendix A, *infra*.

The United States District Court for the Middle District of Florida had previously denied Garrett's 2254 petition and certificate of appealability in an unpublished order entered January 13, 2022, a copy of which is also included in the Appendix.

OPINION BELOW

The decision and orders of the Eleventh Circuit were unreported. The decision and orders of the district court were also unreported, but copies are included in the Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit denying Garrett's request for certificate of appealability pursuant to Title 28 U.S.C. § 1254(1). *Hohn v. United States*, 118 S.Ct. 1969, 141 L.Ed.2d 242, 66 U.S.L.W. 4489 (1998).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Pursuant to Title 28, United States Code § 2253(c)(1)(A), and Rule 22(b), Federal Rules of Appellate Procedure, Antonio Garrett ("Garrett"), is requesting a Certificate of Appealability ("COA") from the Order denying his Petition filed under 28 U.S.C. § 2254. Rule 22(b) of the Federal Rules of Appellate Procedure and Title 28 U.S.C. § 2253 require issuance of a COA before an appeal may be heard of a denial of a petition for relief under 28 U.S.C. §2254. Garrett filed a timely notice of appeal after the District Court denied his § 2254 petition and COA. Thereafter the Eleventh Circuit Court of Appeals denied the COA request by an unreported order. This certiorari petition followed in a timely manner.

PROCEDURAL HISTORY AND FACTS IN SUPPORT OF § 2254 ISSUE

Petitioner Garrett was tried by jury on a charge of first degree murder, convicted and sentenced to life imprisonment. He appealed to Florida's First District Court of Appeal and argued that his conviction should be vacated because the jury was erroneously instructed on Florida's Stand Your Ground self-defense law. His conviction was affirmed despite the conceded error in the jury instruction because his trial counsel had not preserved the error for appeal. Discretionary review was sought at the Florida Supreme Court which affirmed the lower appellate decision based on

the failure of trial counsel to preserve the error, with a written dissent by Justice Pariente that the error was fundamental and therefore the conviction should be vacated despite the failure to preserve the claim.

Garrett then filed a timely state post-conviction motion in which he raised a Sixth Amendment claim of ineffective assistance of counsel based on his trial counsel's failure to request the correct jury instruction. That claim was denied. He appealed the denial to the Florida First District Court of Appeal which affirmed the denial of the post-conviction claim.

Garrett then filed a timely federal habeas petition under 28 U.S.C. § 2254 again raising the claim of ineffective assistance of counsel with respect to the jury instruction. His claim was denied by the District Court which also denied a certificate of appealability.

Garrett filed a notice of appeal and request for certificate of appealability from the Eleventh Circuit Court of Appeals, which likewise denied his request in a written order concluding that he had not been prejudiced by his trial counsel's failure to request the correct jury instruction.

This petition followed in a timely manner.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN DENYING GARRETT A CERTIFICATE OF APPEALABILITY ON HIS 28 U.S.C. SECTION 2254 HABEAS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN REQUESTING AN INCORRECT JURY INSTRUCTION WHICH DEPRIVED HIM OF HIS ONLY DEFENSE AT TRIAL?

Garrett was charged with murder in the second degree and possession of a firearm by a convicted felon based on an incident which took place September 9, 2011.

At the time of the alleged crime, Florida had two separate statutory provisions governing self-defense, one found in Florida Statutes, § 776.012 and the other in Florida Statutes § 776.013. These are two entirely separate statutory provisions. Both create what is known as a "Stand Your Ground" right of self-defense, meaning that a person may exercise force, even deadly force, in self-defense without any duty to retreat. The difference between the two provisions, so far as the difference is pertinent to this case, was that the stand your ground right found in § 776.013 did not apply if you were "engaged in an unlawful activity," and by the time of Garrett's trial, February 11-14, 2013, the law had established *that for purposes of § 776.013 possession of a firearm by a felon was unlawful activity*.

Florida Statute § 776.012, a stand alone right of self-defense, did *not* include any limitation based on being engaged in criminal activity. No Florida court had ever

held that being in possession of a firearm by a felon precluded stand your ground self-defense under § 776.012.

However, at Garrett's trial his own defense counsel proposed the jury instruction (which the trial court gave) and that instruction was an amalgam of the law of self-defense under *both* § 776.012 and § 776.013. The instruction was not read as if there were two separate defenses, instead, the two provisions were *tied together* in a single instruction. The jury was instructed by the Court:

> If Antonio Garrett was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.
>
> However, if you find that Antonio Garrett was engaging in unlawful activity, then you must consider if Antonio Garrett had a duty to retreat.
>
> Antonio Garrett cannot justify the use of force likely to cause death or great bodily harm unless he used every reasonable means within his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that Antonio Garrett was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if, by retreating, he could have avoided the use of that force. However, if Antonio Garrett was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat, then his use of force likely to cause death or great bodily harm was justifiable.

This instruction incorrectly instructed the jury that Garrett had a duty to retreat

if he were engaged in unlawful activity.

This instruction would have applied if Garrett's right of self-defense were governed by Florida Statute § 776.*013*, but Garrett's right of self-defense arose under § 776.*012* as to which there was no duty to retreat whether engaged in unlawful activity or not.

There was no law to the contrary at the time of his trial. The decisional law in effect at the time of Garrett's trial was limited to decisions which held that possession of a firearm by a felon precluded stand your ground self-defense under § 776.*013*. *See e.g., Dorsey v. State*, 74 So. 3d 521 (Fla. 4th DCA 2011) (*Dorsey* I). It was this decision which the State cited to the trial court when it requested an addition to the defense proposed instruction adding the statement that possession of a firearm by a felon constituted unlawful activity.

As the Florida First District Court of Appeal explained, this decision, and the other decisions in effect at the time of Garrett's case, were all decisions interpreting § 776.*013*, *not* § 776.*012*:

> We recognize that the trial court did not have the benefit of *Garrett* or the other decisions at the time of trial, and we also recognize that *Dorsey* opinion relied on by the trial court to craft the jury instructions did hold that the common law duty to retreat continues to apply to a defendant who is engaged in an unlawful activity at the time he is attacked. *Dorsey v. State*, 74 So. 3d 521 (Fla. 4th DCA 2011) (*Dorsey* I); *accord Morgan v. State*, 127 So. 3d 708, 715-17 (Fla. 5th DCA 2013); *Darling v. State*, 81 So. 3d 574, 578-79 (Fla. 3d DCA 2012). However, the focus of *Dorsey* I was on the defense provided by section 776.013(3), not section

776.012(1). The same is true of *Morgan* and *Darling*. Moreover, in a subsequent opinion in the *Dorsey* case, the Fourth District held that it was fundamental error to instruct the jury that a defendant engaged in an unlawful activity had a duty to retreat when the defendant's self-defense claim was based on section 776.012(1). See *Dorsey* II, 149 So. 3d at 147.[1]

McGriff v. State, 160 So.3d 167, n. 2 (Fla. 1st DCA 2015).

Relying solely upon this one appellate decision interpreting § 776.*013*, the State requested the trial court give an additional instruction that being a felon in possession of a firearm constituted unlawful activity.

Compounding this error, an error created by the defense counsel's own proposed instruction, *defense counsel stipulated that Garrett was a six time convicted felon and this stipulation was read to the jury*. This was done despite the fact that Garrett did not testify in the trial, therefore there was no evidentiary basis upon which the jury would otherwise have been informed of Garrett's prior felony record but for defense counsel's stipulation. The judge read the stipulation to the jury immediately after the lead detective had gone over the statements Garrett had made after his arrest, the statements Garrett relied upon to establish his defense:

> THE COURT: Ladies and gentlemen of the jury, it is stipulated and agreed between the state and defense and you should accept as fact that

[1] *Dorsey v. State*, 149 So. 3d 144, 147 (Fla. 4th DCA 2014)(*Dorsey* II).

the defendant, Antonio Garrett, has six previous felony convictions.[2]

Given that the defense *stipulated* to the jury that Garrett was a convicted felon, if the jury followed the jury instructions the court gave, and this Court must presume the jury did so,[3] then the jury could not acquit Garrett based on self-defense, because

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[2] It was well settled under controlling Florida precedent before the trial in Garrett's case that a jury must not hear evidence of a felon in possession charge during any other substantive offense trial and that it was reversible error to do so.

> Second, we agree with Appellant that the trial court abused its discretion when it "re-joined"[4] count II (possession of a firearm by a convicted felon) with the other charges for purposes of trial. The trial court's decision to re-join count II was based on its determination that Appellant's status as a convicted felon in possession of a firearm was relevant to Appellant's claim of self-defense because his duty to retreat or not turned on whether he was engaged in an unlawful activity. However, as the cases cited above now make clear, it was irrelevant whether Appellant was engaged in an unlawful activity when he used the force at issue because his self-defense claim was based upon section 776.012(1), not section 776.013(3). Accordingly, the trial court should have severed count II from the remaining charges for purposes of trial. *See State v. Vazquez*, 419 So. 2d 1088, 1090 (Fla. 1982); *Shuler v. State*, 929 So. 2d 645 (Fla. 1st DCA 2006); *Monson v. State*, 627 So. 2d 1301, 1302 (Fla. 1st DCA 1993).

McGriff v. State, 160 So.3d 167, 169 (Fla. 1st DCA 2015).

[3] "A jury is presumed to follow the instructions given to it by the district judge," *United States v. Ramirez*, 426 F.3d 1344, 1352 (11th Cir. 2005) (per curiam), cited in *United States v. Mock*, 523 F.3d 1299, 1303 (11th Cir. 2008); *see also Richardson v. Marsh*, 481 U.S. 200, 206 (1987), "This accords with the almost invariable assumption of the law that jurors follow their instructions, *Francis v. Franklin*, 471

Garrett presented no evidence of any retreat.

This is exactly what the State argued in rebuttal closing argument:

> By his own admissions just to take his story, say his version is the truth, he still is not entitled to a claim of self-defense. He tells those detectives where did you shoot him? Shot him in the back as he's running away.
>
> *Not only that, but this defendant had a duty to retreat which he did not do. Instead if Mr. Ford had a firearm and this defendant had pulled out his gun he had a duty to retreat. He wasn't at his own house. He was on the sidewalk. He had a duty to leave and he didn't.* Shot once, shot twice, shot seven times. His interview talking to the detectives, he dropped the gun but I still fire.

[emphasis supplied.]

The State's rebuttal argument drew no objection from the defense nor could it because it was entirely consistent with the jury instruction the defense itself proposed and which were given by the trial court. Jurors are correctly presumed to follow the law as instructed by the court. Here, assuming the jurors followed the trial court's instruction on the law as driven home by the State in rebuttal closing argument, the jury could not acquit. The only defense Garrett had was taken from him by these jury instructions - instructions his own counsel requested - as emphasized by the State in

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U.S. 307, 325, n. 9 (1985), which we have applied in many varying contexts."

closing argument.

The judge concluded the jury instruction on self-defense by instructing the jury that being a felon in possession of a firearm constitutes unlawful activity:

> Possession of a firearm by a convicted felon constitutes unlawful activity.

On this record it is clear that Garrett's counsel's performance in submitting jury instructions which took from him his sole defense, was deficient performance and having taken his sole defense the State's closing argument assured that the jury understood that he had no defense, therefore Garrett was prejudiced by his counsel's deficient performance.

Summarizing the above:

(1) The jury was instructed by the Court at the request of the defense that the defendant had a duty to retreat if he were engaged in unlawful activity;

(2) The jury was read a defense *stipulation that the defendant was a six time convicted felon*;

(3) The jury was instructed that being a felon in possession of a firearm was unlawful activity;

(4) The defendant shot the victim with a firearm;

(5) The defense put on no evidence of any effort to retreat; and

(6) The State argued in rebuttal closing argument, based on the Court's jury instructions, that even if the jury accepted the defendant's version of events, because he had a duty to retreat and had not done so, self-defense was not available to him and the jury must convict - which it did.

This record satisfies both prongs of the *Strickland*[4] standard - deficient performance and prejudice and the Florida Courts denial of Garrett's ineffective assistance of counsel claim was an unreasonable application of controlling Supreme Court precedent.[5]

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[4] *Strickland v. Washington*, 466 U.S. 468 (1984).

[5] *See* 28 U.S.C. § 2254(d):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The law is well settled that confusing jury instructions can deny a defendant a fair trial.

> With respect to jury instructions, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)). "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde v. California*, 494 U.S. 370, 378, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) (quoting *Cupp, supra*, at 146-47). If the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, supra, at 72 (quoting *Boyde, supra*, at 380).

McGriff v. Inch, No. 4:19cv16/MW/EMT, 2020 U.S. Dist. LEXIS 85967, at *18-19 (N.D. Fla. Mar. 24, 2020).

The incorrect instructions in this case took from Garrett his sole defense and were used by the State to argue that he had no defense.

Conclusion

Garrett has established that he was denied effective assistance of counsel guaranteed by the Sixth Amendment - his counsel's performance was deficient and prejudiced his defense. The State court's conclusion is contrary to and a misapplication of *Strickland v. Washington* and Garrett is entitled to habeas relief.

II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

Garrett requests, therefore, that this Court exercise its discretionary certiorari jurisdiction, grant certiorari, vacate the judgment below, and remand the case ("GVR") so that the Court of Appeals can correct the obvious error affecting Garrett's substantial rights. Title 28 U.S.C. § 2106 confers upon this Court a broad power to GVR, the power to remand to a lower federal court any case raising a federal issue that is properly before it in its appellate capacity. *Lawrence v. Chater*, 516 U.S. 163, 166, 116 S.Ct. 604, 606 (1996). "The GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Id.* "[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit [this Court's] plenary review." *Id.* at 168, 116 S.Ct. at 606; *see also Stutson v. United States,* 516 U.S. 193, 116 S.Ct. 600 (1996) (applying *Lawrence* to a criminal case). This case, in fact, presents the classic situation warranting a summary reversal, which has been described as the "kind of reversal order [that] usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full

briefing and argument would be a waste of time." Eugene Gressman et al., Supreme Court Practice 344-45 (9th ed. 2007); See, e.g., *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (explaining that summary reversal was appropriate because the case did not "decide any new or unanswered question of law, but simply correct[ed] a lower court's demonstrably erroneous application of federal law").

CONCLUSION

Therefore, based on the arguments above, Petitioner Antonio Garrett respectfully submits that he has made a substantial showing of the denial of a constitutional right and is entitled to the issuance of a certificate of appealability. We respectfully request that this Court summarily vacate and remand to the Eleventh Circuit for reconsideration.

Respectfully submitted,

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