No. 23A295

23-6650

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

PABLO GUZMAN— PETITIONER

VS.

STATE OF FLORIDA— RESPONDENT

UNITED STATES COURT OF APPEAL
ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Pablo Guzman DC# M85632
South Bay Corr. Facility
P.O. Box 7171 South Bay, Florida 33493

QUESTION(S) PRESENTED

Does *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), prevent federal habeas corpus relief regardless of substantive prejudice, when the United States Supreme Court precedent that existed at the time of trial was not clearly inconsistent with the subsequent state court decision and prejudice is apparent?

Did the Eleventh Circuit Court of Appeal fail to assess the effect of the incomplete jury instruction as a result of application of *Lockhart v. Fretwell* based upon misapplication of *Knight v. State*, 286 So 3d 147 (Fla. 2019) The intervening state law is not applicable to Guzman and therefore *Fretwell* does not apply. A reasonable state appellate court would have reversed for new trial based on the incomplete instruction, both then and now, had appellate counsel presented the point on appeal.

Absence of jury instruction deprived jury of fair consideration of Petitioner's defense on offense of conviction and absence of point on appeal resulted in fundamentally unfair appellate proceeding.

LIST OF PARTIES

[XXX] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Florida Attorney General
Ashley Moody, Attorney General
Department of Legal Affairs
Office of the Attorney General
The Capitol PL-01
Tallahassee, Florida 32399-1050

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at **Appendix A**, to the petition and is

[xx] reported at (the facility's computers are not updated so I am aware of the citation.
[XX] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is:

[ ] reported at Guzman v. Sec. FDOC,
[ ] has been designated for publication but is not yet reported; or;
[XX] is unpublished.

[ ] For cases from state courts: N/A

The opinion of the highest state court to review the merits appears at Appendix ___ to the petition and is

[ ] reported at
[ ] has been designated for publication but is not yet reported; or.
[ ] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals, 11th Circuit decided my case was:

Affirmed on: July 14, 2023

[++] A timely petition of rehearing was rejected by the United States Court of Appeals, Eleventh Circuit, on the following date: August 11 2023, and a copy of the Order rejecting Rehearing appears at Appendix A "1"

[++] An extension of time to file the petition for a writ of certiorari was granted to and including November 11, 2023, per Order of Justice Thomas dated October 4, 2023, as a result of good cause shown.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter regards Petitioner's Sixth Amendment constitutional guarantee to affective assistance of appellate counsel, and his Fourteenth Amendment Due Process guarantee to have the jury correctly instructed on the offense of conviction. At the time of his state trial the law required that the complete instruction be provided. Absence of the complete instruction was determined to be fundamental error.

It cannot be said that Petitioner was afforded Due Process of Law as the Federal Courts denied timely application for relief based upon authority of *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), without sufficient analysis of prejudice standard. Intervening state court decision was not applicable to Guzman, as an incomplete instruction on the charge of conviction was provided as opposed to a lesser included offense.

Lastly, the Eleventh Circuit erred as a matter of record concluding that full instruction was provided for the charge of conviction. (Appx. "A" at pg. 5, 8) This error is fatal to the applied prejudice standard.

STATEMENT OF CASE AND FACTS

The State of Florida charged Petitioner Guzman with one count of attempted first degree premeditated murder resulting from a confrontation at a Miami nightclub. On March 8, 2013, Petitioner was found guilty by jury trial of attempted second degree murder as a lesser included offense, via discharge of a firearm. The trial court, Miami-Dade County, Florida, adjudicated Petitioner guilty of attempted second degree murder and sentenced him to 40 years' imprisonment, with a minimum mandatory sentence of 25 years based on firearm discharge.

Petitioner's defense at trail was that of self defense and that he acted justifiably in defending himself. The victim of the offense did not testify at the trail.

At the charge conference the following dialog occurred regarding the Florida homicide of Petitioner's conviction:

THE STATE: The next paragraph however talks about the excusable or justifiable. Excusable should be out. Excusable not [sic] a defense being pursued here.

DEFENSE: I would ask for excusable.

THE COURT: I'm going to get rid of those instructions.

THE STATE: I just want to lay a proper record, judge. I know counsel is not asking for excusable, if he can lay grounds as to what the accidental act was --

DEFENSE: The inference judge, he is being excused for acting in self defense.

THE STATE: That's not what the defense is. The excusable defense is I accidentally pulled the trigger when I

tripped. The gun went off and this person died. I don't believe that's what we have here.

THE COURT: Okay I agree, excusable going to come out.

The Court instructed on all offenses but *did not* provide the definition of excusable attempted homicide.1

Petitioner's appellate counsel did not present on appeal the absence of the excusable—justifiable homicide instruction, which at the time was determined to constitute "fundamental error."

After a complete round of state postconviction, Petitioner sought habeas corpus relief per 28 USC §2254. Petitioner plead that appellate counsel was ineffective for failing to present on appeal the incomplete jury instruction on the crime charged. At the time the petition was filed, Florida still determined that the failure to provide the complete instruction constituted fundamental error. During litigation of the Federal habeas corpus, Florida abrogated the seminal decisions voiding the per se reversal rule but not as to the charge of conviction.*2 The Eleventh Circuit determined in sum, that *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) prevented relief as a result in Florida's change in decisional law.

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1 In this fact the Eleventh Circuit failed, as it incorrectly concluded that the complete instruction for attempted second degree murder was provided. (Appx. "A" at pg. 5, 8)

2 In *Knight v. State*, 286 So 3d 147 (Fla. 2019)

Previous review by the magistrate recommended that the writ be granted.. The magistrate wrote:

> The standard jury instruction permits a jury to return a verdict of attempted manslaughter by act if it found either justifiable homicide or excusable homicide. Fla. St. Jury Instr. (Crm) 6.6 (2010) At trial, when instructing the jury on attempted voluntary manslaughter, although the court instructed the jury on justifiable homicide, it did not instruct the jury on excusable homicide. The prosecutor stated that such an instruction was improper because the evidence showed that petitioner did not accidently shoot the victim. The court declined to give the instruction, simply stating that it "agree[d] with the prosecutor." Counsel did not object. *Furthermore, the court did not provide a definition for excusable homicide in any other instruction.*

APPENDIX B "1"pg. 11

> Upon de novo review the district court judge wrote:
>
> In instructing the jury the trial court outlined the lesser-included offenses after reading the instruction on attempted first degree murder. In descending order, the trial court read each applicable lesser offense: attempted second degree murder, attempted voluntary manslaughter, and aggravated battery. *The trial court never instructed the jury on the excusable homicide defense.* The court did, however, advise the jury of the justifiable homicide defense with the attempted voluntary manslaughter instruction.

APPENDIX B "2" at 14

Both the District Court Order and the Eleventh Circuit denying the Writ erroneously relies on Knight v. State, 286 So 3d 147 (Fla. 2019) for application of *Lockhart v. Fretwell.*

Knight holds in sum:

> Defendant was not entitled to relief from his conviction of attempted second-degree murder with a weapon on the ground that the jury instruction *on the lesser included offense* of attempted voluntary manslaughter with a weapon erroneously included the element of intent to kill, as fundamental error did not occur in that there *was no error in the jury instruction on the offense of conviction,* the evidence supported that offense, and the court receded from its precedents relying on a right of access to a partial jury nullification as a basis for finding fundamental error in jury instructions. Petitioner's habeas ground is far stronger and does regard the constitutional *error in the jury instruction on the offense of conviction.*

See APPENDIX A, at five and eight, referencing *Knight* and erroneously concluding that a complete instruction on the charge of conviction was provided and establishing the mistaken contention that *Knight* requires the writ be denied.

The application of *Fretwell* by the Eleventh Circuit could not be applied based upon *Knight,* as *Knight* was not applicable to Guzman. Application of *Knight* circumvented the proper prejudice evaluation. In this instance, the lack of a complete instruction deprived Guzman's jury of evaluating whether the offense was justifiable or not.

The opinion of the Eleventh Circuit reveals that by misapplication of *Knight,* the prejudice review of *Fretwell,* coupled with the factual error that Guzman received the complete instruction on the crime charged, is irreconcilable with Due Process. Applying *Fretwell* to prevent relief when the prejudice resulting from appellate counsel's failure to brief on appeal the absence of the excusable—justifiable homicide instruction on the offense of conviction, is palpable and denies the spirit of the great writ.

REASON FOR GRANTING PETITION

Jurisprudence would be best served by this Court resolving if *Lockhart v. Fretwell* could be applied based upon *Knight and if Guzman* suffered sufficient prejudice resulting from the jury not having been instructed on whether the offense of conviction was excusable or justified. The published opinion in this cause, illustrates that such misapplication deprived Guzman of the proper prejudice standard. Petitioner unlike *Fretwell* can show *Strickland* prejudice warranting new trial, from his attorney's failure to present the point on plenary appeal.

It is without dispute, as the Federal District Court concluded, that Petitioner's appellate counsel was ineffective. Liberty finds no refuge in a jurisprudence of doubt.

CONCLUSION

Correcting this facial, substantial injustice is sought, as only this Court can correct this mater. The Petition for a Writ Of Certiorari respectfully, should be granted and Guzman permitted to proceed.

Respectfully Submitted,

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