

No. \_\_\_\_\_

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IN THE

SUPREME COURT OF THE UNITED STATES

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CRAIG SANDHAUS,  
*Petitioner,*

v.

STATE OF FLORIDA,  
*Respondent.*

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**On Petition for Writ of Certiorari  
to the Florida Sixth District Court of Appeal**

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**PETITION FOR WRIT OF CERTIORARI**

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**A. QUESTION PRESENTED FOR REVIEW**

Whether the Petitioner's Sixth and Fourteenth Amendment rights were violated when his trial attorneys failed to request a jury instruction on the justifiable use of non-deadly force, which was a defense supported by the evidence at trial, and which gave the Petitioner the best chance to prevail at trial.

## **B. PARTIES INVOLVED**

The parties involved are identified in the style of the case.

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The Petitioner, CRAIG SANDHAUS, requests the Court to issue a writ of certiorari to review the opinion of the Florida Sixth District Court of Appeal entered in this case on February 11, 2025 (App'x at 191)<sup>1</sup> (rehearing denied on March 31, 2025 (App'x at 192)).

**D. CITATION TO OPINION BELOW**

*Sandhaus v. State*, 407 So.3d 446 (Fla. 6th DCA 2025).<sup>2</sup>

**E. BASIS FOR JURISDICTION**

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida Second District Court of Appeal.

**F. CONSTITUTIONAL PROVISIONS INVOLVED**

The Sixth Amendment provides, in pertinent part for a criminal defendant's right "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Sixth Amendment right to counsel "exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). The right to counsel is the right to the effective assistance of counsel. *Id.* at 686.

The Fourteenth Amendment's Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

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<sup>1</sup> References to the appendix to this petition will be made by the designation "App'x" followed by the appropriate page number.

<sup>2</sup> Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

## **G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS**

The Petitioner was charged in Florida state court with Second-Degree Murder with a Weapon. The charges arose from a brawl at the Lodge, a drinking establishment in Orlando, Florida.

A jury trial was held on October 7-11, 2013. On the night in question, Lodge employee Fred Trabold became aware of a no-contact order between the Petitioner and Chris Fuller, a bar patron, based on a battery offense Fuller had committed against the Petitioner.

Trabold escorted the Petitioner out of the bar to an alley, and Eric Sandhaus followed. Trabold told the brothers to wait by the back door while he got the manager, at their request. Two Lodge employees, Milton Torres and Jose Campos, waited outside with the brothers.

During this time, Torres and Eric Sandhaus had a heated verbal exchange, with Torres pointing his finger in the shape of a gun toward Eric Sandhaus' head. Torres then initiated a physical fight by pushing Eric Sandhaus and punching him in the face. Campos also hit Eric Sandhaus, and Torres lunged at Eric Sandhaus, causing him to fall. Torres then punched Eric Sandhaus repeatedly and put his hands on his neck. Eric Sandhaus was held from behind and choked.

Campos attempted to break up the fight by punching Eric Sandhaus, with other bouncers joining the brawl. Surveillance footage showed that Eric Sandhaus was held by one of the bouncers and hit in the head by Torres. The video also showed that Eric Sandhaus' eyes were covered by his shirt.



The Petitioner knew that his brother was not a fighter, that he was vulnerable due to a recent surgery on both sides of his head, and that he was diagnosed with bipolar disorder and anxiety. Torres, on the other hand, was a skilled fighter and had both the upper hand and additional help in the fight. Eric Sandhaus' head was bleeding. The Petitioner feared for Eric's safety.

At trial, the prosecutor and a State witness read aloud the Petitioner's testimony from a pretrial immunity hearing:

I'm watching [Eric Sandhaus] being pummeled by [Mr. Torres], who obviously knew how to fight. And my brother doesn't know how to fight, and there was nothing I could do. I couldn't stop him. I couldn't protect him. I was being restrained, so there was nothing I could possibly do.

In fear for his brother's life and he, himself, being restrained by two men, the Petitioner blindly jabbed the small knife toward Torres. Torres was punctured by the knife in three places: one of the punctures was fatal, one was potentially fatal, and the third was non-fatal. At trial, the Petitioner asserted a defense of himself and his brother. At the charge conference, the trial court specifically asked:

Court: . . . Is the defense requesting a self-defense instruction?

Counsel: Yes. We're requesting justifiable use of deadly force, Your Honor.

Court: Okay. You are not requesting justifiable use of non-deadly force?

Counsel: No, your Honor.

The exchange indicated that the trial judge was prepared to instruct the jury on justifiable use of non-deadly force.

Later in the charge conference, counsel asserted that the defense was "relying on justifiable use of non-deadly force for another." However, this instruction was not

requested by trial counsel and was not provided to the jury. The jury was instead instructed both orally and in writing only on the defense of justifiable use of deadly force.

During closing argument, the prosecutor asserted that the Petitioner “knows his brother was not facing great bodily harm or death at the time he took the knife out.” “Never was Eric Sandhaus . . . in any state of real danger . . . .” The State repeatedly argued that the Petitioner was not justified in using deadly force where an individual was “bruised or battered or hit.”

The jury found the Petitioner guilty as charged. The Petitioner was sentenced to 45 years in the Florida Department of Corrections (“FDC”).

On direct appeal, Florida’s Fifth District Court of Appeal reduced the charge to Manslaughter with a Weapon and remanded for resentencing. *Sandhaus v. State*, 200 So. 3d 112 (Fla 5th DCA 2016). The Fifth District concluded as follows:

In this case, no reasonable jury could conclude that the evidence, taken in the light most favorable to the State, established beyond a reasonable doubt that Appellant stabbed Torres based upon ill will, malice, hatred, spite, or evil intent. On the other hand, a reasonable jury could find that the evidence proved, beyond a reasonable doubt, that Appellant impulsively overreacted to seeing Torres hitting Appellant’s younger brother as others joined in the fight. Thus, the evidence supports a conviction for manslaughter, but not a finding of guilt for second-degree murder.

*Sandhaus*, 200 So.3d at 116. The Fifth DCA’s description of the incident reflects its conclusion that Mr. Sandhaus may have impulsively overreacted, but it does not indicate that Sandhaus intentionally sought to inflict death or serious bodily injury.

Thereafter, the Petitioner was resentenced to 207 months, or 17.25 years, in prison. (App'x at 194-96).

The Petitioner filed his Amended Motion for Postconviction Relief on August 7, 2019. The Petitioner alleged ten grounds for ineffective assistance of counsel, arguing, *inter alia*, that trial counsel rendered ineffective assistance in failing to request a jury instruction on the justifiable use of non-deadly force ("Ground Three").<sup>3</sup>

An evidentiary hearing on Ground Three was held before the Honorable Chad K. Alvaro on March 23, 2022. (App'x at 18-190). After legal argument, the postconviction court stated that it was convinced that the Petitioner would have been legally entitled to a jury instruction on justifiable use of non-deadly force had it been requested. (App'x at 158-59). The State conceded that the prejudice prong would be met if the postconviction court determined that the Petitioner was legally entitled to a non-deadly-force instruction. (App'x at 186).

On July 19, 2022, the postconviction court entered its Order Denying Defendant's Amended Motion for Postconviction Relief ("Order"). (App'x at 3-15). On Ground Three, the postconviction court change course and concluded that the Petitioner was not legally entitled to a non-deadly-force instruction for several reasons: (1) the record did not support his assertion that he "blindly" stabbed at Mr. Torres; (2) the video does not depict the Petitioner using the knife in a non-deadly fashion; (3) the location of Mr. Torres' wounds establish that the foreseeable

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<sup>3</sup> This Petition will not address the remaining grounds.

consequence of the Petitioner's actions was death; and (4) the type of knife used supports the conclusion that the Petitioner used deadly force. (App'x at 5-11).

Importantly, the postconviction court concluded that, if the Petitioner was legally entitled to an instruction on justifiable use of non-deadly force, he was prejudiced. The postconviction court reasoned that "[w]here self-defense (or defense of others) is at issue, it will virtually always be in a defendant's interest to have both the deadly force and non-deadly force jury instructions given, as opposed to just the deadly force instruction. The simple reason is that it is more difficult to establish that a defendant's actions were justified if only the deadly force jury instruction is given." (App'x at 10).

On August 26, 2022, the postconviction court entered its Amended Order Denying Defendant's Motion for Rehearing on Ground Three. (App'x at 16-17). Florida's Sixth District Court of Appeal affirmed the postconviction court's Order. (App'x at 191). On March 21, 2025, the Sixth District denied the Petitioner's motions for rehearing, written opinion, and rehearing *en banc*. (App'x at 192).

## **H. REASON FOR GRANTING THE WRIT**

### **1. The Question Presented is Important**

The question presented in this case is as follows:

Whether the Petitioner's Sixth and Fourteenth Amendment rights were violated when his trial attorneys failed to request a jury instruction on the justifiable use of non-deadly force, which was a defense supported by the evidence at trial, and which gave the Petitioner the best chance to prevail at trial.

As explained below, the Petitioner requests that this Court grant his certiorari petition to consider this important question. The large number of self-defense cases that regularly arise in the court system and the importance of an individual's constitutional right to defend himself support this Court granting this petition.

The Sixth Amendment provides for a criminal defendant's right "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Sixth Amendment right to counsel "exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). The right to counsel includes the right to the effective assistance of counsel. *Id.* at 686.

The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the functioning of the adversarial process that the trial cannot be relied on as having a just result. *Id.* at 694. To obtain relief in a post-conviction motion on a claim of ineffective assistance of counsel, a defendant must establish two prongs: (1) deficient performance by trial counsel; and (2) prejudice to the defendant as a result of trial counsel's deficient performance. *Id.* at 667. The deficient-performance prong is satisfied where the conduct of trial counsel is outside the range of competent performance under prevailing professional standards. *Id.* at 688.

Here, trial counsel's performance was deficient because it deprived the Petitioner of the defense that gave him the best chance to prevail at trial. Based on Florida law, any reasonable attorney would have requested a jury instruction on justifiable use of non-deadly force.

The prejudice prong is satisfied where trial counsel's deficient performance is shown to have affected the fairness and reliability of the proceedings to the extent that confidence in the outcome of the trial is undermined. *Id.* at 694. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

Based on the evidence presented at trial, the jury should have been instructed on the justifiable use of non-deadly force. Under Florida law, a person is justified in using deadly force in self-defense where he "reasonably believes that such force is necessary to prevent imminent death or great bodily harm or to prevent the imminent commission of a forcible felony." *Michel v. State*, 989 So.2d 679, 681 (Fla. 4th DCA 2008) (internal citations omitted). "Non-deadly force may be used when and to the extent that a person reasonably believes that the use of force is necessary to defend himself or herself or another against the imminent use of unlawful force." *Id.* at 681 (internal citations omitted).

When the evidence does not establish as a matter of law whether the force used by the defendant was deadly or non-deadly, the defendant is entitled to jury instructions on both types of force. *DeLuge v. State*, 710 So.2d 83, 84 (Fla. 5th DCA 1998); *Michel*, 989 So.3d at 681. When determining whether the force used is deadly

or non-deadly, the proper focus is the nature of the force used by the defendant, rather than the end result. *Cruz v. State*, 971 So.2d 178, 182 (Fla. 5th DCA 2007).

A knife may be used in self-defense without constituting deadly force. *DeLuge*, 710 So.2d at 84; *Hart v. State*, 247 So.3d 556, 559 (Fla. 4th 2018). “Deadly force occurs where the natural and foreseeable consequences of the defendant’s acts are death.” *Id.* (internal quotations and citations omitted). “It is not clear that death is the natural, probable, and foreseeable consequence of swinging a knife somewhat blindly and with limited ability to aim - in the general direction of a victim.” *Hart*, 247 So.3d at 559.

“[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Matthews v. State*, 485 U.S. 58, 63 (1988). Under Florida law, there is very relaxed standard for defendants seeking instructions on self-defense.

In the specific context of self-defense, Florida's courts have repeatedly recognized that the question of self-defense is one of fact, and is one for the jury to decide where the facts are disputed. If there is any evidence to support a theory of self-defense, the trial court should give the requested instruction however flimsy the evidence is which supports that theory or however weak or improbable the testimony may have been. Where evidence presented at trial supports an instruction on self-defense (use of deadly force as well as non-deadly force), it is error not to give it.

Additionally, in assessing whether there is any evidence to support a theory of self-defense, no particular type of evidence is required. A defendant is not required to testify at trial to receive a jury instruction on self-defense.” A defendant's statements

admitted into evidence at trial may be sufficient evidence for a self-defense instruction. The cross-examination of State witnesses can also support a claim of self-defense. Finally, if a jury can reasonably infer from circumstantial evidence presented at trial that the defendant had the state of mind necessary for self-defense, then the defendant is entitled to a jury instruction on self-defense.”

*Smith v. State*, No. 6D2023-2239, 2025 WL 1786726, at \*5 (Fla. 6th DCA June 27, 2025) (internal punctuation and citations omitted) (emphasis added) (citing cases from various appellate courts throughout Florida).

In fact, “it is enough if the defense is *suggested* by the evidence presented.” *Id.* at \*4; *See also Elder v. State*, 296 So.3d 440, 444 (Fla. 4th DCA 2020); *Chavers v. State*, 901 So.2d 409, 410 (Fla. 1st DCA 2005).

Here, it is impossible to conclude that the evidence introduced at trial did not at least suggest that Sandhaus was lawfully using non-deadly force to defend his brother when he stabbed Milton Torres while his hands and arms were restrained by several other individuals. Therefore, Sandhaus was entitled to an instruction on the justifiable use of non-deadly force. Trial counsel’s failure to request that instruction constituted deficient performance which unquestionably prejudiced Sandhaus.

A trial attorney’s failure to request an instruction on non-deadly force constitutes ineffective assistance of counsel where the evidence supports that instruction. *See e.g. Mathis v. State*, 973 So.2d 1153 (Fla. 1st DCA 2006). A defendant is prejudiced by the absence of such an instruction where the jury could reasonably believe that he was entitled to use non-deadly force but was not justified in using deadly force. *Marty v. State*, 210 So.3d 121, 127 (Fla. 2d DCA 2016).



Sandhaus established both deficient performance and prejudice. He is entitled to a new trial.

**2. The Postconviction Court Erred in Concluding That the Record Did Not Support the Petitioner's Claim That He "Blindly" Stabbed at Mr. Torres.**

In concluding that the record did not support the Petitioner's claim that he blindly stabbed at Mr. Torres, the postconviction court overlooked portions of the Petitioner's testimony at his pretrial immunity hearing, which was introduced at trial. The Petitioner repeatedly testified that he stabbed Torres while he was being restrained by at least two other individuals.

The Petitioner's testimony included the following:

You know, I didn't want to kill the kid. I just wanted him to stop attacking my brother.  
(TT at 1406).

Q: At some point in time, you reach -- you go right to break free and get the knife out of your pocket?

A: Somehow, I was able to pull the knife, and with my right hand make an attempt to stab Milton.

Q: Okay. Did you know if you had made contact?

A: No, I didn't.

Q: Was your plan to stab anyone that night?

A: No.

Q: Was your plan to kill anyone that evening?

A: No, I didn't want anyone to get hurt. I just wanted to have a peaceful evening.

I was being restrained and held, there was nobody else trying to stop Milton. The only thing I could do was to

stab him or to inflict injury to him so he would stop hurting my brother.

In *Hart*, the Fourth District concluded:

Hart was attacked while wearing a neck brace that **limited his mobility and range of vision**. Without knowing what he was holding, Hart grabbed an object and swung it in the victim's direction **without knowing where the blows were landing or of the resulting injuries**. He did not intend to injure the victim, **but only intended for the victim to let him go**. It is not clear that death is the natural, probable, and foreseeable consequence of swinging a knife **somewhat blindly-and with limited ability to aim-in the general direction of the victim**. Consequently, the nature of the force was not deadly as a matter of law, and whether Hart's actions constituted deadly or non-deadly force was a question for the jury.

*Hart*, 247 So.3d at 559 (emphasis added).

Although the Petitioner himself never used the term “blindly,” a reasonable jury could find that the Petitioner stabbed at Torres at least “somewhat blindly” with a “limited ability to aim.” The Petitioner did not even know whether the knife made contact with Torres’ body. Because a reasonable view of the evidence supports the Petitioner’s theory that his acts constituted non-deadly force, he was entitled to a non-deadly-force instruction.

**3. The Postconviction Court Erred in Concluding That The Video of the Incident Did Not Support the Petitioner’s Claim That He Used the Knife in a Non-Deadly Fashion.**

The postconviction court’s conclusion that the video failed to contain evidence that the Petitioner’s use of his knife constituted non-deadly force is not supported by

the record. In The Petitioner's initial direct appeal, the Fifth District Court of Appeal aptly described the evidence:

The argument suddenly escalated into a fight when Torres first pushed, then hit, [the Petitioner]'s brother. Some other individuals got involved in hitting and grabbing Defendant's brother. [The Petitioner] quickly pulled a knife from his pocket and stabbed Torres three times in his torso. **The altercation, which lasted a total of twenty-five seconds from the first shove to the conclusion, was caught on a video surveillance camera. No knife or stabbing could be seen on the video. Torres could be seen on the video as he pulled up his shirt to examine his wounds before he collapsed.**

*Sandhaus*, 200 So.3d at 113 (emphasis added).

The fact that no knife or stabbing can be seen on the video corroborates the Petitioner's statements that he stabbed Torres while he was being restrained by at least two other individuals and while his arms were being held. Under those circumstances, the large number of people in a close area would preclude the knife and stabbing from being visible. Thus, the video provides additional support for the Petitioner's claim that he used non-deadly force.

At worst, the video could be considered neutral as to whether the Petitioner's use of force was deadly or non-deadly. "[W]here the evidence is inconclusive or conflicting, the failure of the trial judge to provide a charge which lays down standards for the jury to follow under varying permissible views of the evidence constitutes reversible error." *Glenn v. State*, 78 So. 3d 675, 677 (Fla. 5th DCA 2012)

Despite the postconviction court's suggestion to the contrary, the Petitioner was not required to threaten Torres with the knife before stabbing him in order to be justified in using non-deadly force. Whether a threat was made is irrelevant because a threat would not constitute the actual use of force, either deadly or non-deadly. At

the time of the alleged offense, a person was justified in using non-deadly force when the person reasonably believed that the use of force was necessary to defend himself or another against the imminent use of unlawful force. *See* § 776.012, Fla. Stat. (2011).

Next, the postconviction court's conclusion that the video does not reflect that the Petitioner stabbed Torres accidentally is also irrelevant. The Petitioner never argued that the stabbing was an accident. Instead, he asserted that there was a viable argument that his acts constituted the justifiable use of non-deadly force.

Finally, the postconviction court's conclusion that a reasonable jury could, and did, find that the video depicted the Petitioner stabbing Torres is also without consequence. By asserting that he was justified in using non-deadly force, the Petitioner would admit that he stabbed Torres but would argue that he was lawfully justified in doing so. Throughout his pretrial testimony, which was admitted into evidence at trial, the Petitioner repeatedly acknowledged that he stabbed Torres, albeit in defense of his brother.

**4. The Postconviction Court Erred in Concluding That the Location of Mr. Torres' Wounds Precluded a Non-Deadly-Force Instruction.**

The postconviction court relied upon the location of Mr. Torres' wounds to support its conclusion that the Petitioner used deadly force as a matter of law. The postconviction court's conclusion on this issue was based primarily on the Fourth District's decision in *Larsen v. State*, 82 So3d 971 (Fla 4th DCA 2011).

In *Larsen*, the district court held that where a defendant stabs a victim in the chest or the neck, where vital organs are located, the stabbing constitutes deadly force

as a matter of law because a stab wound to those areas is likely to cause death or great bodily harm. 82 So.3d at 974-975. In *Larsen*, however, the defendant was not being restrained and his mobility was not impaired. Unlike the Petitioner, the appellant did not claim that he stabbed the victim in order to break free from being restrained and to stop the victim from attacking another individual. Nor did the appellant testify that he was unaware that the knife he used had made contact with the victim's body. Instead, the appellant simply testified that he stood up and intentionally stabbed the victim in the neck. *Larsen*, 82 So.3d at 971.

The postconviction court's reliance on *Larsen* ignores the Fourth District's subsequent decision in *Hart*. There, the Fourth District distinguished its previous decision in *Larsen*, concluding that the location of the victim's wounds is not dispositive, and found that the issue of whether the defendant's actions constituted deadly or non-deadly force was a question for the jury. *Hart*, 247 So. 3d at 55 95-60; The *Hart* Court reasoned:

The trial court relied upon *Larsen* in erroneously determining that the force was deadly as a matter of law because the neighbor's injuries were to vital locations on his body. Despite similarly involving knife-inflicted injuries to the neck, *Larsen* is distinguishable. *Larsen* **intentionally** stabbed his victim in the neck, whereas *Hart* did not intend the wounds he imposed . . . . **The mere comparability of the injuries does not support a conclusion that the force was deadly as a matter of law under the facts of this case.**

*Hart*, 247 So.3d at 559-60 (emphasis added).

Like the defendant in *Hart*, the Petitioner here did not intentionally stab Mr. Torres in a location that would seriously injure or kill him, nor or did he intend to

seriously injure or kill Mr. Torres. Instead, the Petitioner was simply trying to stop Mr. Torres from continuing his violent attack on his brother, Eric Sandhaus.

The Petitioner's pretrial testimony establishes this lack of deadly intent. As previously indicated, the Petitioner's freedom of movement and ability to aim the knife were severely restricted by the fact that he was being restrained by at least two other persons. In light of that fact, the evidence and defense theory also supported an instruction on both deadly and non-deadly force.

Trial counsel should have been aware of the decision rendered by the district court in *Hart*, and of the low threshold for obtaining self-defense instructions in Florida. Thus, trial counsel should have requested an instruction on justifiable use of non-deadly force. "A reasonably effective criminal defense attorney must keep himself or herself informed of significant developments in the criminal law, including decisions of other district courts around Florida." *Johnson v. State*, 796 So. 2d 1227, 1228 (Fla. 4th DCA 2001).

Pursuant to the applicable caselaw, including *Hart*, Torres's death was not the natural, probable, and foreseeable consequence of the Petitioner blindly stabbing a knife at him while being restrained. In determining whether force is deadly as a matter of law, it is the nature of the force and not the end result that must be evaluated. A non-deadly-force instruction was therefore required.

**5. The Postconviction Court Erred in Concluding That the Features of the Knife Precluded a Non-Deadly-Force Instruction.**

The postconviction court erroneously relied upon the size of the Petitioner's knife, the sharpness of the blade, and the type of knife to support its conclusion that

his actions constituted deadly force as a matter of law. The use of a deadly weapon in self-defense does not automatically equate to the use of deadly force. *See Copeland v. State*, 277 So. 3d 1137, 1140 (Fla. 5th DCA 2019).

Therefore, whether a knife constitutes deadly force as a matter of law depends on how it was used. *See Hart*, 247 So.3d at 559. Thus, the features of a knife are not dispositive, and whether the use of force is deadly or non-deadly remains a factual question for the jury. *See id.* at 559-60 (serrated knife); *Howard v. State*, 698 So.2d 923, 924-26 (Fla. 4th DCA 1997) (butcher knife and fillet knife with lengthy and sharp blade).

**6. The Petitioner's Sixth and Fourteenth Amendment Rights to the Effective Assistance of Counsel Were Violated.**

As explained above, the postconviction court's factual findings on Ground Three are not supported by competent substantial evidence. Thus, the evidence did not establish deadly force as a matter of law. Therefore, the postconviction court erroneously concluded that the Petitioner was not entitled to a non-deadly-force instruction.

The Petitioner demonstrated that his trial counsel performed deficiently in failing to request a non-deadly-force instruction. A reasonably effective trial attorney would have requested that instruction.

The Petitioner was prejudiced by counsel's deficient performance. In *Claudio-Martinez v. State*, 324 So.3d 45 (Fla. 2d DCA 2021), the district court held that where justifiable use of non-deadly force is an applicable defense, a defendant is prejudiced when the jury is only instructed only on justifiable use of deadly force. The district

court reasoned that the deadly force instruction requires a much more onerous showing by the defendant and applies to a much narrower set of circumstances. 324 So.3d at 49-50.

As a result, the district court held that the defendant was provided ineffective assistance of counsel based on his trial attorney's failure to request a non-deadly force instruction. The district court reversed the defendant's conviction for aggravated battery with a deadly weapon. *Id.*

Pursuant to the instructions provided at trial, the jury may have believed the Petitioner's account of the incident, but not that he had a reasonable fear of imminent death or great bodily harm to himself or his brother. However, had the jury been instructed on the justifiable use of non-deadly force, there is a reasonable probability that they would have concluded that the Petitioner had a reasonable fear that Mr. Torres and other bouncers were going to continue to use unlawful force against him and his brother. If the jury reached that conclusion, or even had a reasonable doubt on that issue, there is at least a reasonable probability that they would have concluded that the Petitioner's acts only constituted non-deadly force and were justified. Therefore, the omission of an instruction on non-deadly force deprived the Petitioner of his best defense at trial.

Importantly, the prejudice was exacerbated by the State's closing argument that the Petitioner could not lawfully use deadly force because he did not believe that his brother was in danger of being killed or suffering great bodily harm. Had the jury been properly instructed that the Petitioner only needed to reasonably believe that



Torres and other bouncers were going to use unlawful force against him or his brother before resorting to the use of non-deadly force, the prosecutor's argument would have been completely ineffective and unpersuasive.

There is no conceivable or reasonable strategic reason for trial counsel's failure to rely on a viable defense which was easier to establish than the justifiable use of deadly force. Trial counsel's failure to request an instruction on justifiable use of nondeadly force constituted deficient performance which prejudiced the Petitioner. Therefore, the Petitioner met his burden of establishing ineffective assistance of counsel.

The question presented in this case has the potential to impact other criminal prosecutions nationwide. By granting this petition, the Court will have the opportunity to address this important question. Accordingly, for the reasons set forth above, the Petitioner prays the Court to grant his certiorari petition.

## **I. CONCLUSION**

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

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