No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2018

CHARLES L. TRICE,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

The Florida Post-conviction Court Unreasonably Applied *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987), in Determining That Trice's Convictions Were Final When the Florida Supreme Court Issued *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999), Thereby Failing to Apply *Weiand* to Trice's Case, and the Eleventh Circuit has Created a Conflict in the Circuits in Finding that the Florida Supreme Court's Decision in *Weiand* Interpreting the Right to Self-defense Did Not Apply a Constitutional Rule Because the Right to Self-Defense is a Fundamental Constitutional Right.

List of Parties and Corporate Disclosure Statement

Charles L. Trice, Petitioner.

Secretary, Florida Department of Corrections, Respondent.

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Petition for a Writ of Certiorari

The Petitioner, CHARLES L. TRICE, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Opinion below

The unreported opinion of the United States Court of Appeals for the Eleventh Circuit, *Trice v. Secretary, Florida Department of Corrections, et al.* is found at ___Fed. Appx. ___, 2019 U.S. App. LEXIS 7339, 2019 WL 1200050 (11th Cir.

2019).

Jurisdiction

The United States Court of Appeals for the Eleventh Circuit rendered its judgment on March 13, 2019. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254.

Constitutional Provisions, Statutes, Treaties, Ordinances, and Regulations Involved

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution provide:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Second Amendment of the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Ninth Amendment to the United States Constitution provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Statement of the Case

Charles L. Trice ("Trice"), a Florida state prisoner, appealed the federal district court's denial of his 28 U.S.C. § 2254 federal habeas corpus petition challenging his Florida state convictions and life sentence for first-degree murder, violation of a domestic violence injunction, and burglary with assault. The Eleventh Circuit Court of Appeals granted a certificate of appealability ("COA") on one issue: whether the state post-conviction court unreasonably applied *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987), in determining that Trice's convictions were final when the Florida Supreme Court issued *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999), and in failing to apply *Weiand* to his case. The Eleventh Circuit affirmed the district court in an unpublished opinion.

I. State Trial Proceedings

A. Murder and Trial Evidence

In 1994, a grand jury indicted Trice, who was a Florida Highway Patrol Trooper, on charges of first-degree murder, violation of a domestic violence injunction, and burglary with assault, all in connection with the killing of his estranged wife, Darla Trice. At his jury trial, it was undisputed that Trice shot and killed Darla with his .357 revolver at their marital residence. At trial, Trice testified, however, that he shot Darla in self-defense after she unexpectedly stabbed him in the

chest with a knife and to prevent her from stabbing him again.

According to Trice's version of the events, after he told Darla that he was not going to give her back the Corvette, she walked away. Trice then went into the office closet to get some supplies for work. While looking in the closet, Trice heard something behind him, turned around, and Darla stabbed him with a knife in the chest. His legs got weak and he dropped to his knees on the closet floor. Darla was standing at the edge of the doorway, yelling and screaming at him. Darla said that she should have killed him a long time ago. Trice turned to stand up and saw his handgun on the closet shelf. He grabbed the gun to scare Darla, but she came at him again, and he had no choice but to shoot her.

B. Castle Doctrine Jury Instruction

Maintaining that he acted in self-defense, Trice persisted in his explanation throughout the trial. As relevant to this appeal, Trice requested a jury instruction on self-defense, including the following instruction, which is commonly referred to as the "castle doctrine" or the privilege of non-retreat from the home. Under Florida law, as an exception to the duty-to-retreat rule, the castle doctrine provides that a defendant has no duty to retreat when attacked in his home:

> If the defendant was attacked in his own home or on his own premises, he had no duty to retreat and had the lawful right to stand his ground and meet force with force, even to the extent of using force likely to cause

death or great bodily harm, if it was necessary to prevent death or great bodily harm to himself.

Although Trice was not residing in the marital home at the time, he contended that he had a superior legal right to his office, where the shooting occurred, and thus the instruction was proper.

The state trial court refused to give the castle doctrine instruction because both Trice and Darla had the legal right to occupy the office at the time of the shooting. In so ruling, the state trial court relied on *State v. Bobbitt*, 415 So. 2d 724, 724-26 (Fla. 1982), in which the Florida Supreme Court held that when an assailant and the victim are legal occupants of the same home and neither has the legal right to eject the other, the "castle doctrine" does not apply.

C. Verdict and Sentence

On June 27, 1995, after hearing testimony from more than 40 witnesses over the course of six days, the jury found Trice guilty on all counts. The state trial court sentenced Trice to life imprisonment for first-degree murder, time served for violating the domestic violence injunction, and a consecutive life sentence for burglary with assault.

D. Direct Appeal

On direct appeal, Trice raised several issues of trial error, but did not challenge

the state trial court's exclusion of the castle doctrine instruction. The Florida Second District Court of Appeal ("Second DCA") affirmed Trice's convictions and sentences and the Florida Supreme Court denied review. See *Trice v. State*, 719 So. 2d 17 (Fla. Dist. Ct. App. 1998); *Trice v. State*, 729 So. 2d 396 (Fla. 1999) (table). Trice's petition for a writ of certiorari with the U.S. Supreme Court was denied on June 24, 1999. *Trice v. Florida*, 527 U.S. 1043, 119 S. Ct. 2410 (1999).

E. 1999 *Weiand* Modifies 1982 *Bobbitt* Rule

Meanwhile, on March 11, 1999, the Florida Supreme Court issued its decision in *Weiand v. State*, which resulted in a substantive change in Florida law regarding the castle doctrine. 732 So. 2d 1044 (Fla. 1999). In *Weiand*, the Florida Supreme Court considered whether the privilege of non-retreat from the home should apply where a defendant wife killed her co-occupant husband in self-defense, after being physically abused and threatened by him. Id. at 1048. There, the evidence showed that the wife suffered from "battered woman's syndrome" and shot her husband during a violent argument, despite having apparent opportunities to leave their apartment that night instead. Id. at 1048.

Expressly reconsidering its contrary rule in *Bobbitt*, the Florida Supreme Court held that "there is no duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee if necessary to prevent death or great bodily

harm, although there is a limited duty to retreat within the residence to the extent reasonably possible." Id. at 1051-58. The Florida Supreme Court noted that imposing a duty to retreat from the home may adversely impact victims of domestic violence, and its decision was an evolution of the common law consistent with the evolution of Florida's public policy. Id. at 1053-55.

In its decision, the Florida Supreme Court also adopted an interim standard jury instruction for its new rule:

> If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a co-occupant [or any other person lawfully on the premises] [he/she] had a duty to retreat to the extent reasonably possible without increasing [his/her] own danger of death or great bodily harm. However, the defendant was not required to flee [his/her] home and had the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to [himself/herself].

Id. at 1057. It explained that where the non-retreat instruction is applicable, the trial court's jury instructions are incomplete and misleading if the new instruction is not given. *Id.* at 1056. Lastly, the Florida Supreme Court directed that its opinion and jury instruction was applicable to all future cases and all cases that were then pending on direct review or not yet final, but was not retroactively applicable to convictions that already were final. *Id.*

II. State Post-conviction Proceedings
Rule 3.850 Motion and Appeal

In 2001, Trice filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Among other things, Trice argued that after the date of his verdict, the Florida Supreme Court revised the castle doctrine in *Weiand*, such that he had no duty to retreat after being stabbed by co-occupant Darla. Trice contended that the trial court's jury instruction was thus erroneous under the current state of the law, which deprived him of federal due process under the Constitution. The state post-conviction court summarily denied this claim, concluding that Trice was not entitled to relief under *Weiand* because his case already was final when the Florida Supreme Court issued that decision.

Trice appealed, arguing that his case was not final when *Weiand* was issued. Rather, his conviction became final only on June 24, 1999, when the U.S. Supreme Court denied his petition for a writ of certiorari, and was therefore still pending on March 11, 1999, when the Florida Supreme Court decided *Weiand*. Accordingly, Trice contended that the rule announced in *Weiand*, that he had no duty to retreat, applied to him and he should be retried with the appropriate jury instructions.

In response, the state conceded Trice's convictions were not final prior to the issuance of *Weiand*. However, it argued that Trice was not entitled to benefit from the

modified jury instruction proposed by *Weiand* because the issue was not preserved by a contemporaneous objection at trial, and Trice's trial counsel could not be ineffective for failing to anticipate a change in the law. The Second DCA affirmed without a written opinion and denied rehearing.

III. Federal Habeas Proceedings

Thereafter, in June 2011, Trice filed a counseled § 2254 petition raising several claims, including that the state post-conviction court improperly denied his request to apply *Weiand* to his case because it erroneously concluded that his case was final when the decision issued. Trice maintained that the substantial change in Florida law regarding the duty to retreat should apply to his case. As such, Trice argued that the state court's denial of this claim violated his federal due process and equal protection rights and was contrary to well-established federal law as determined by the U.S. Supreme Court. As to the latter point, Trice contended that the state court's denial of this claim was contrary to *Griffith v. Kentucky*, 479 U.S. at 322-23, 328, 107 S. Ct. at 713, 716, in which the Supreme Court held that newly declared constitutional rules of criminal procedure must apply retroactively to all criminal cases pending on direct review in state or federal courts.

The district court denied Trice's § 2254 petition. In relevant part, the district court concluded that, although Trice's case was not final when *Weiand* was issued,

Weiand's privilege of non-retreat was inapplicable to him because he was no longer a co-occupant of the residence with Darla at the time of the shooting. Rather, Trice had been barred from the home by a domestic violence injunction that prohibited him from entering the residence, except through the exterior door into the office. Because, as the jury found, Trice violated the domestic violence injunction when he entered the house, the district court concluded that Trice was a trespasser in the residence, not a co-occupant. The district court concluded, therefore, that any reliance on *Weiand* by Trice as a co-occupant would necessarily fail. Finally, the district court noted that because Trice neither objected based on *Weiand* at trial, nor raised the issue on direct appeal, he could not benefit from the change in law.

Trice appealed. The Eleventh Circuit granted a COA as to whether the state post-conviction court unreasonably applied *Griffith v. Kentucky* in determining that Trice's case was final when the Florida Supreme Court issued *Weiand* and in failing to apply *Weiand* to his case.

IV. Eleventh Circuit Decision

The Eleventh Circuit reasoned that in *Griffith*, the Supreme Court announced that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith*, 479 U.S. at 328, 107 S. Ct. at 708. The Eleventh Circuit concluded that a reading of that

sentence alone would seem to indicate that Trice does have a claim for federal habeas relief. However, the Eleventh Circuit found that there is an explicit limitation to *Griffith*'s holding—it only applies to new federal constitutional rules. The Eleventh Circuit concluded that this Court ultimately held that the "failure to apply a newly declared *constitutional* rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Id. at 322, 107 S. Ct. at 713 (emphasis added by Eleventh Circuit).

> We therefore conclude that, while *Griffith* requires retroactive application of new constitutional rules of criminal procedure to cases pending on direct appeal, it does not require retroactive application of new state substantive law to non-final state convictions. See *id.* And in *Weiand*, the Florida Supreme Court only announced a change in state criminal law—broadening the castle doctrine defense under Florida law. *Weiand*, 732 So. 2d at 1048. Because *Griffith* does not extend to such state law changes, the case has no application here.

Slip opinion at p. 18.

Reasons for Granting the Writ

The Florida Post-conviction Court Unreasonably Applied *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987), in Determining That Trice's Convictions Were Final When the Florida Supreme Court Issued *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999), Thereby Failing to Apply *Weiand* to Trice's Case, and the Eleventh Circuit has Created a Conflict in the Circuits in Finding that the Florida Supreme Court's Decision in *Weiand* Interpreting the Right to Self-defense Did Not Apply a Constitutional Rule Because the Right to Self-Defense is a Fundamental Constitutional Right.

Unreasonable Application of *Griffith v. Kentucky* Creating a Conflict in the Circuits

The Eleventh Circuit refused to find that *Griffith v. Kentucky* required the Florida post-conviction court to grant Trice the benefit of the *Weiand* decision, because the Eleventh Circuit found that *Weiand* did not involve the application of a *constitutional rule* of procedure, and *Griffith* only applies to *constitutional rules*. The Eleventh Circuit failed to see that the application of the right of self-defense, which *Weiand* announced, is a constitutional rule, because self-defense is a fundamental constitutional right. Therefore the application of that right in *Weiand* was the application of a constitutional rule to which Trice was entitled under *Griffith v. Kentucky,* and the State post-conviction court's determination that *Griffith v. Kentucky* did not entitle Trice to the benefit of the *Weiand* decision, was contrary to clearly established Federal law, as determined by this Court, and involved an

unreasonable application of clearly established Federal law, as determined by this Court.

The right of self-defense is one of the most fundamental constitutional rights protected by the Due Process clause of the Fourteenth Amendment, by the Ninth Amendment's reservation of unenumerated rights and implicit in the Second Amendment's protection of the right to bear arms.

In concluding that the *Weiand* self-defense decision did not announce a constitutional rule, the Eleventh Circuit created an implicit conflict in the circuits, because three other circuits have held that the right to self-defense is a constitutional right guaranteed by due process. *See Taylor v. Withrow*, 288 F.3d 846, 851 (6th Cir. 2002), *Sloan v. Gramley*, 215 F.3d 1330 (7th Cir. 2000), and *Clemmons v. Delo*, 177 F.3d 680, 685 (8th Cir. 1999).

Self-defense is a Fundamental Right Guaranteed by Due Process

The Due Process clause of the Fourteenth Amendment provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

This Court has said of the Due Process clause of the Fourteenth Amendment:

> [T]the Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against governmental

interference with certain fundamental rights and liberty interests.

Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997) (citations omitted).

In *Glucksberg*, the Court described the two primary features of substantive-due-process analysis:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause.

Id. at 720-21 (citations omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937); *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)).

Several Circuits have found the right to self-defense to be guaranteed by due process. In *Taylor v. Withrow*, 288 F.3d 846, 851 (6th Cir. 2002), the Sixth Circuit

Court of Appeals held that "the right of a defendant in a criminal trial to assert self-defense is [a] fundamental right[ ], and [the] failure to instruct a jury on self-defense when the instruction has been requested and there is sufficient evidence to support such a charge violates a criminal defendant's rights under the due process clause." It noted that "[o]ther Courts of Appeals have already reached the same conclusion." Id. at 852 (citing *Sloan v. Gramley*, 215 F.3d 1330 (7th Cir. 2000); *Clemmons v. Delo*, 177 F.3d 680, 685 (8th Cir. 1999)).[1]

The same result was reached in a very early West Virginia case, *State v. Workman*, 35 W. Va. 367, 14 S.E. 9 (1891), adhered to in *State v. Buckner*, 180 W. Va. 457, 377 S.E.2d 139, 142-43, (W. Va. 1988). *Workman* found that a constitutional right to self-defense was guaranteed by both the Due Process clause of the Fourteenth Amendment to the United States Constitution and article III, section 1of the West Virginia Constitution .

Finally, the four-member plurality in *Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013 (1996), authored by Justice Scalia, suggested that a right to self-defense is fundamental. *Egelhoff* reversed the Montana Supreme Court, which had held that

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[1] The 10th Circuit in *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 n.8 (10th Cir. 1986) (*en banc*), observed that the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and regulations under the act, include an exemption for personal self-defense.

instructing a jury that it could not consider a defendant's intoxicated condition in determining his mental state violated the defendant's right to due process, relying in part on *Martin v. Ohio*, 480 U.S. 228, 233-234, 107 S. Ct. 1098 (1987). In *Martin v. Ohio* this Court had suggested it would be problematic if a jury weighing the State's proof in a murder case was instructed that self-defense evidence could not be considered:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i. e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and plainly run afoul of [*In re*] *Winship*'s mandate. The instructions in this case . . . are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.

In explaining why the Montana court placed unwarranted reliance on that passage from *Martin*, Justice Scalia observed:

> This passage [from *Martin*] can be explained in various ways—e.g., as an assertion that *the right to have a jury consider self-defense evidence* (unlike the right to have a jury consider evidence of voluntary intoxication) *is fundamental, a proposition that the historical record may support.*

Egelhoff, 518 U.S. at 56 (emphasis added).

Self-defense is a Component of the Right to Bear Arms under the Second Amendment

In *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008), this Court decided for the first time that the Second Amendment to the United States Constitution protects an individual right to keep and bear arms. Justice Scalia's opinion for the majority set forth a detailed historical argument that concern for the right to *individual self-defense* was the most important and longstanding basis on which the right to bear arms was regarded as fundamental. He cited Blackstone, among many others:

> By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works, we have said "constituted the preeminent authority on English law for the founding generation," cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, *"the natural right of resistance and self-preservation,"* and *"the right of having and using arms for self-preservation and defence."*

554 U.S. at 593-94 (emphasis added) (citations omitted) (quoting *Alden v. Maine*, 527 U.S. 706, 715, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999); 1 William Blackstone, Commentaries *136, *139-40). The opinion explained why the absence of a textual reference to self-defense in the Second Amendment was unimportant:

> The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the

> Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.
>
> ...It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.

Id. at 598-99 (emphasis added). The majority opinion also observed that the fact that seven of nine state constitutional protections for the right to bear arms enacted immediately after 1789, unequivocally protected an individual citizen's right to self-defense was "strong evidence that that is how the founding generation conceived of the right." Id. at 603.

In *McDonald v. City of Chicago*, 561 U.S. 742, 767, 130 S. Ct. 3020 (2010), the Court held that the Second Amendment right applies to the States by virtue of the Fourteenth Amendment. It reiterated that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and the *Heller* Court held that individual self-defense is 'the central component' of the Second Amendment right." Id. at 744 (quoting *Heller*, 554 U.S. at 599).

Others have read constitutional guarantees of a right to bear arms as implicitly guaranteeing a right to self-defense, however. As observed in *Town of Canton v. Madden*, 120 Mo. App. 404, 96 S.W. 699, 700 (1906):

> [I]f the citizen has reserved to himself the right to bear arms in defense of his home, person or property, he also has reserved the right to effectuate that privilege by employing such arms under the established limitations of the law, when a proper occasion presents itself and renders such employment imperative in order to give life and vigor to this natural right, for the right to bear arms in defense of one's property, his home or his person, would amount to naught if the right to use such arms, under proper circumstances, were denied.

The Second Amendment implicitly guarantees a right to self-defense and must be read as establishing that self defense is an unenumerated right retained by the people under the Ninth Amendment.

The Right to Self-defense is a Constitutional Right Retained by the People Under the Ninth Amendment

The Declaration of Independence began with the famous words "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. "

The *defense* of liberty is inherent in this basic right and is protected by the Ninth Amendment:

The enumeration in the Constitution, of certain rights, shall not be

construed to deny or disparage others retained by the people.

The historical record establishes that the right of self-defense was understood by the founding fathers to be a natural right. Samuel Adams began The Rights of the Colonists: The Report of Correspondence to the Boston Town Meeting, Nov. 20, 1772, with a list of natural rights which were self-evidently true:

> Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature.

Id. at 407).

Professor Eugene Volokh in State Constitutional Rights of Self-Defense and Defense of Property, 11 Tex. Rev. L. & Pol. 399, at 401-07 (2007) (reproducing state constitutional protections), found that twenty-one states chose to expressly identify the right to defend life and liberty, and to protect property, as a natural or inalienable right and included them as such in their state constitutions.[2]

One recent scholar has characterized self-defense as something that "ought to be one of the first things protected under the Ninth Amendment [to the U.S.

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[2] Professor Volokh also cites writings of Blackstone, George Tucker (a leading early American commentator), and Thomas Cooley (a constitutional law commentator of the late 1800s) that characterize the right to self-defense as a natural right. Id. at 416.

Constitution]," Nicholas J. Johnson, *Self-Defense*?, 2 J.L. Econ. & Pol'y 187, 195 (2006).

Justice Scalia in *Heller* outlined the historical record for the right to bear arms and that record which was the basis for the *Heller* decision itself established the historical record in support of the natural right to self-defense. It follows from the historical evidence that the fundamental right to self-defense is a right retained under the Ninth Amendment as a right not expressly enumerated in the Constitution.[3]

The Eleventh Circuit Erred in Failing to Vew *Weiand* as the Announcement of a Constitutional Rule, which Under *Griffith v. Kentucky* Trice was Entitled to Have Applied to His Pending Appeal

Under any of these three possible sources of the constitutional right - the Due Process clause, the Second Amendment or the Ninth Amendment - it is clear that the right to individual self-defense enjoys constitutional protection. Therefore the Florida Supreme Court's announcement of the rule in *Weiand* was the application of a constitutional right. Therefore, under *Griffith v. Kentucky* Trice was entitled to the application of *Weiand* to his case which was not yet final on direct review at the time *Weiand* was announced.

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[3] The arguments presented in this petition have been freely adapted from *State v. Hull*, 2014 Wash. App. LEXIS 3152 (Wash. Ct. App., Dec. 18, 2014).

If Not Plenary Review Then a GVR

If this Court does not find Trice's case appropriate for plenary review, then Trice respectfully requests the Court consider a summary reversal. A summary reversal 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) The Eleventh Circuit's decision that *Weiand* did not apply a constitutional rule was manifestly wrong. Therefore, as an alternative to plenary review, Trice would request the Court consider granting certiorari, vacating the decision of the Eleventh Circuit and remanding the case for further consideration in light of *Heller* and the Circuit cases with which the Eleventh Circuit is in implicit conflict.

Conclusion

Petitioner-Appellant Charles L. Trice respectfully requests this honorable Court grant this petition and vacate the judgment of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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