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IN THE
SUPREME COURT OF UNITED STATES

Orlando S. Díaz Rivera
Petitioner,

VS.

State of Florida
Respondent (S)

FILED

MAR 19 2025

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SUPREME COURT, U.S.

ON UNTIMELY PETITION OF Writ
OF CERTIORARI TO

Second District Court of Appeal
of Florida

Orlando S. Díaz Rivera

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Question(s) Presented

I Whether or Not the trial court erred in denying Diaz-Rivera motion for Judgment or Acquittal on the murder count where the state failed to prove he didn't act in self defense.

II Whether or Not the trial court committed fundamental error by failing to instruct the Jury on the parameters of Diaz-Rivera's duty to retreat.

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981 SO. 2d 708, 711 (Fla. 2d DCA 2006)

Pagan v. State 6
830 SO. 2d 792, 803 (Fla. 2002)

Thompson v. State 6
552 SO. 2d 264 (Fla. 2d DCA 1989)

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575 SO. 2d 643, 644 (Fla. 1991)

Martinez v. State 7
981 SO. 2d 449, 445 (Fla. 2008)

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74 SO. 3d 501, 527 (Fla. 4th DCA 2011)

Opinions Below

The opinion of the highest Florida state court to review the merits is not has been designated for publication but is not yet reported, or is unpublished.

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

Jurisdiction.

The Florida Supreme court entered its opinion affirming Mr Diaz conviction and sentence denying his timely motion for rehearing on November 22, 2024. NO. 2D-2623-2371 the Jurisdiction of this court is invoked under 28 U.S.C. 1257 (a) Mr. Diaz having asserted in the state court below and asserting in this court that the state of Florida has deprived him of rights secured by the constitution of United States.

Provision of Law

The eight Amendment Provides:

Excessive bail shall not be required.
Not excessive fines imposed, not cruel and unusual punishments inflicted.

Section one of the fourteenth Amendment provides in pertinent part:

... 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 with out due process of Law.

(c) This court reviews the denial of motion for judgment of acquittal de novo. Fowler v. State. 921 So. 708. 711 (Fla. 2d DCA 2006) (citing Pagan v. State. 830 So. 2d. 792. 803. (Fla. 2002))

Self Defense

The state must prove a defendant guilty beyond a reasonable doubt. Fowler v. State.

921 So. 2d. 708. 711 (Fla. 2d DCA 2006)

when the defendant presented a prima facie case of self defense. The state must then prove beyond a reasonable doubt the defendant didn't act in self defense. Id. (citing Thompson v. State. 552

So. 2d. 204. 266 (Fla. 2d. DCA 1989). If the states evidence is legally insufficient to rebut the defendants testimony establishing self defense, the trial court must grant a motion for judgment of acquittal.

Id. Question of whether a defendant committed homicide in justifiable self defense is ordinarily one for the jury. However when the states evidence is legally insufficient to rebut the defendants testimony establishing self defense, the court must grant a motion for judgment of acquittal.

While the defendant may have the burden of going forward with evidence of self defense, the burden of going through proving guilt beyond reasonable doubt and it never shifts from state and this standard broadly include the requirement that.

the State proves that the defendant did not act in self-defense beyond a reasonable doubt.

(II) Absent an objection at trial an argument that the court gave an erroneous jury instructions can be raised on appeal on if fundamental error occurred State v. Delva 575 So 2d 643, 644 (Fla. 1991) where the challenge jury instructions involves an affirmative defense fundamental error occurs where the instructions are flawed as to deprive the defendant of a fair trial. Martinez v. State. 981 So 2d. 449, 445 (Fla 2008).

Statement of the Case

The state charged Orlando S. Diaz Rivera "Petitioner" with committing the second degree murder of Marco Gonzalez Rodriguez on March 7, 2023 and for possessing a firearm as a convicted felon. (2117-18) on October 26th of 2023. Petitioner Orlando S. Diaz Rivera was found guilty by jury and the Judge imposed a sentence of life without parole with 25 years minimum mandatory for the murder count and imposed a maximum penalty of 15 years for possession of firearm by a convicted felon.

The Shootings

The shootings took place at Courtney Contes home. Petitioner theory of defense was that he acted in self defense to protect himself.

his girl friend, and their child.

Courtney Conte lived with her children in a double-wide mobile home on over eight acres of land. (T 442, 444-45). Her boyfriend, Christopher Fleming, sometimes stayed with her. (T 357-58-444).

Marcos Gonzalez-Rodriguez was living with Fleming and would stay at Conte's house whenever Fleming did. (T 359, 442).

Jahaira Sanchez was married to Gonzalez-Rodriguez but they had been separated for 13 years. (T 572, 756-57). Adrian had been with Gonzalez-Rodriguez since March 4th. (T 760-61). Katiana Nieves is

Sanchez daughter from an earlier relationship. (T 573). Sanchez had been in a relationship with petitioner for a number of years.

(T 572). They had a daughter together and lived with her 3 younger kids. (T-758).

Gonzalez-Rodriguez had lived with Sanchez and petitioner for 3 months. (T-970). They

had a lot of problems because Gonzalez-

Rodriguez also used narcotics in front of the children. (T-971). Petitioner saw him inhale

heroin and shoot smashed oxycodone pills through straws. (T-971-974). Gonzalez-

Rodriguez also used crystal meth. He would inhale it, eat it, smoke it, and inject it. (T-974).

Gonzalez-Rodriguez and petitioner had been arguing back and forth on Facebook messenger for five years. (T-1054). Gonzalez-Rodriguez

enlisted Nieves to arrange a meeting with petitioner in order to fight him. (T-1056). On Sunday March 6, Gonzalez-Rodriguez texted Nieves to try to set up a fight at lowes. (T-578). Petitioner also told him to stop using drugs and that he was going to call the police on him. (T-1055). Petitioner had seen Gonzalez-Rodriguez get aggressive and paranoid after he used meth. (T-974). He wouldnt sleep for days. (T-974). His eyes would get really big and red thats the same way Gonzalez-Rodriguez looked on March 7, 2002. (T-975). On March 7, 2002 Both Fleming and Gonzalez-Rodriguez were staying at Contes. (T-359-442). Gonzalez-Rodriguez son was also there (T-359, 443). They arrived at Contes house the day before. (T-360). Richard Driggers and his girlfriend, Mona Jackson had arrived at Conte house around 2 or 2:15 pm. (T-374, 446). From Contes Back door there are some steps and then a grass driveway. (T-363, 64). Then there is a 20x60 metal shop with a chainlink folding door. (T-364). There was an SUV parked between Contes home and the shop. (T-368). Driggers had also parked his truck between the home and the shop. (T-375, 421). The shop is around the corner from the home. About 20 yards away. (T-375-72). The top of the SUV is just short of 6ft tall. (T-366). If someone was standing in the shop, they would have to be outside to see the majority of Contes's Back door. (T-369). They would have to be outside of the shop to see it entirely. (T-369). Sanchez wanted a drop to come back to

her house (T-763). Sanchez called the school and learned that Adrian wasn't there. (T-764). She and petitioner go in the car with their daughter. (T-766-968). They went to Confe home to try and find Adrian. (T-967). Petitioner trying since the early morning to find Adrian. (T-1037-38). Sanchez pulled her van up to the bumper of the SUV parked at Confe's. (T-~~1041~~) Sanchez told petitioner to wait in the car. (T-968). He was feeding his daughter chicken nuggets when he heard Sanchez yell "where is Adrian? The police are on the way." (T-969). He looked up and saw Sanchez standing by the shop, looking towards the trailer (T-969-980). He saw Gonzalez-Rodriguez outside on the top of the stairs with an open knife in his right hand and some baggies in his left hand. (T-969-70, 976, 977). When Gonzalez-Rodriguez lived with him, he used the baggies for his narcotics. (T-976). He could tell Gonzalez-Rodriguez was high. (T-970). Rodriguez put the baggies in his left pocket and said while looking at him "Today is your last day on this Earth." (T-978-79). Because Petitioner knew how Gonzalez behaved when he was high he was afraid for Sanchez and their daughters lives. (T-980). From the passenger seat, he ~~could~~ see Gonzalez-Rodriguez come down and off the stairs. (T-1043). Walked quickly towards his car (T-981). Petitioner couldn't lock the doors because Sanchez had turned off the car and the locks were electronic. (T-1045). Sanchez kept a gun in the glove compartment. So petitioner opened

So Petitioner opened it up and grabbed the gun (T-981). He opened the door, racked the gun, and fired "2" warning shots into the ground (T-981). He had walked four or five feet from the car towards Gonzalez - Rodriguez before firing the shots to prevent Gonzalez - Rodriguez from getting closer to his daughter (T-987). After the warning shots Gonzalez - Rodriguez paused briefly (T-981). Then he continued towards Petitioner (T-982). They were one or two feet apart when Gonzalez - Rodriguez try to grab Petitioner right shoulder with his left hand (T-982-83). Then Gonzalez - Rodriguez brought his right hand with the knife in it up close to his ear (T-983). Petitioner was afraid that he was going to be murdered in front of his daughter so he fired a third shot into Gonzalez - Rodriguez right - leg (T-985-86). The only other people out side were Sanchez and two people in the street (T-988). Diaz Rivera "Petitioner" and Sanchez left (T-991).

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Reason For Granting the writ

Facts and Argument

- (1) IN This Case no witness, Saw what happened. Fleming and Conte were inside her home and Driggers and Jackson were inside the shed. Sanchez was standing in the doorway of the shed facing in talking to Driggers and Jackson. While Driggers state that he could see Gonzalez - Rodriguez when he was still on the top of the stairs he could no longer see him once he was beside the SUV. And although he said he didn't see anything in Gonzalez hands he couldn't definitively say there wasn't. Sanchez testified there was something in his hand, but she couldn't tell what was. She'd previously told the police that it was a knife then a phone but she never told them he had nothing in his hand the knife in Gonzalez pocket was consistent with the knife petitioner describe for the police. His testimony that they "2" morning shots was consistent with the witnesses that they heard two shots, a pause and then a third shot. Although he fled the scene after the shooting this was equally consistent with acting in poor judgment as showing of consciousness of guilt. When the police apprehended him he immediately asserted self-defense and his explanation of what happened. Was consistent apart from where the gun was before and after the shooting. Gonzalez blood test was positive for amphetamine

methamphetamine and oxycodone, consistent with Diaz-Rivera testimony during his reenactment that he'd looked like a crazy guy even under it. Lower Burden of proof the state failed to prove that Diaz-Rivera "petitioner" didn't act in self defense.

Therefore the Reason for granting the writ of Certiorari.

- (2) In common law and under the current statutory scheme where a defendant was engaged in an unlawful activity or was in a place where they didn't have the right to be at the time he was attacked. He had a duty to retreat. Dorsey v. State 74 So.3d 521, 527 (Fla 4th DCA 2011). However this duty to retreat ends when the defendant has retreated "to the wall" or where retreat would be futile. Here petitioner was on trial for felonious possession of firearm in addition to second-degree murder. For the jury to find him guilty of the possession charge it was instructed it simply had to find that Diaz-Rivera knowingly had in his care, custody, possession or control a firearm. It was undisputed that he was engaged in unlawful activity and had a duty to retreat. The trial court did not instruct the jury on the parameters of petitioner's duty to retreat. It did not inform them that if Diaz-Rivera "Petitioner" had retreated as much as he could, or that retreat would be futile.

he was justified in using deadly force.
Petitioner testified that Gonzalez-Rodriguez
was coming towards him with the knife
while he was still in the car. Sanchez was
out of the car by the wheel. and shed
turned the car off. He couldn't lock the
doors because the locks were electronic.
His young child was in the backseat
Petitioner "push to the wall" the backseat.
because he had no place to go. thus the
incomplete and flawed instruction the duty
to retreat eliminate his self-defense
depriving him a fair trial.

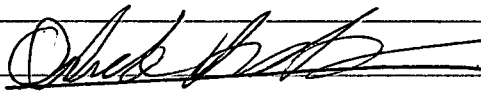
Therefore granting the reason for granting
the writ of Certiorari.

Conclusion

Based upon the foregoing facts and circumstances and
case law, Mr. Diaz respectfully prays upon
this honorable court to grant this instant
request and motion for writ of Certiorari.

Respectfully submitted.

Orlando S. Diaz Rivera



Date: April 18 2005

Proof of Service

I, Orlando S. Díez Rivera do swear or declare that on this date April 15 2025 as required by Supreme Court Rule 29 I have serve untine petition for a writ of Certiorari on each party to the above Proceeding or that party Counsel, and on every other person required to be served by depositing an envelope mail properly addressed in the United States mail properly addressed to each of them and with first class postage Commercial carrier for delivery within 3 Calendar days.

The name and Address of those serve are as follows. Supreme Court of United States one First St. W.E. Washington DC 20566.

I declare under penalty of perjury that the foregoing is true and correct

Executed on April 18 2025

Orlando S. Díez Rivera
