IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0677

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MIGUEL ANGEL LORENZO BALTAZAR,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT D. ROSENBERG, JUDGE

APPLICATION FOR FURTHER REVIEW

Iowa Court of Appeals Decision: May 15, 2019

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QUESTIONS PRESENTED FOR REVIEW

The 2017 "stand your ground" amendments removed the duty to retreat when the person is lawfully present and not engaged in criminal activity. If the defendant *was* engaged in criminal activity, did he have a duty to retreat before firing the fatal shots?

The Court of Appeals has been applying a presumed-prejudice standard when reviewing ineffective assistance claims based on erroneous jury instructions. Does that presumed-prejudice standard conflict with *Strickland v. Washington*'s burden for the defendant to demonstrate a reasonable probability of a different result?

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STATEMENT SUPPORTING FURTHER REVIWE

In 2017, legislation touted as "stand your ground" altered the duty to retreat before resorting to force in self-defense encounters. Under the new provision, there is no duty to retreat when the person is lawfully present and not engaged in illegal activity. But an important question remains: Does the amended statute imply a duty to retreat when the person *is* engaged in illegal activity?

This issue of first impression and broad public importance should have been answered by the Supreme Court. *See* Iowa R. App. P. 6.1103(1)(b)(4) (stating further review is appropriate when "[t]he case presents an issue of broad public importance that the supreme court should ultimately determine"); *see also* State's Br. at 9 (suggesting this case could be retained to address issues of first impression from the "stand your ground" amendments). The Court of Appeals determined the 2017 amendments "clearly allow the justification defense regardless of whether an alternative course of action was available." *State v. Lorenzo Baltazar*, No. 18-0677, Slip Op. at 6–7 (Iowa Ct. App. May 15, 2019). But the statute's language and its historical context reveal that the "stand your ground" amendments changed—but did not eliminate—the duty to follow an

alternative course of action before using deadly force. Because self-defense is one of the most commonly invoked defenses in murder and assault cases, the Supreme Court should grant further review to provide guidance and define the bounds of this "stand your ground" provision.

Next, the Supreme Court should grant further review to address the Court of Appeals' recent and recurring misuse of a presumed-prejudice standard in ineffective assistance challenges. *See* Iowa R. App. P. 6.1103(1)(b)(1) (stating further review is appropriate when "[t]he court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter"). In this case, the defendant raised his jury-instruction challenge as a claim of ineffective assistance. But the Court of Appeals cited the preserved-error standard that "[e]rrors in jury instructions are presumed prejudicial unless the record affirmatively establishes there was no prejudice." *State v. Lorenzo Baltazar*, No. 18-0677, Slip Op. at 7 (Iowa Ct. App. May 15, 2019). Applying this preserved-error standard conflicts with the established ineffective-assistance burden for the defendant to establish a reasonable probability of a different result. *See, e.g.*, *State v. Maxwell*, 743

N.W.2d 185, 196 (Iowa 2008) ("We have made it clear that ineffective-assistance-of-counsel claims based on failure to preserve error are not to be reviewed on the basis of whether the claimed error would have required reversal if it had been preserved at trial."). The Court of Appeals has made the same error in at least two more cases in the past year. *See State v. Robinson*, No. 17-1416, 2019 WL 319839, at *3–4 (Iowa Ct. App. Jan. 23, 2019), *State v. Asbury*, No. 17-0117, 2018 WL 4635683, at *5 (Iowa Ct. App. Sept. 26, 2018). Therefore, this Court should grant further review to stop the Court of Appeals from continuing to make this error.

STATEMENT OF THE CASE

Nature of the Case

The State seeks further review of the Court of Appeals opinion reversing the defendant's conviction for first-degree murder and remanding for a new trial.

Course of Proceedings

Defendant Baltazar was charged with first-degree murder in the July 28, 2017 death of Jeffrey Mercado. Trial Information (9/7/2017); App. 10. He filed a notice of self-defense and proceeded to trial. Notice (9/25/2017); App. 15. At trial—and without objection from the defense—the jury was instructed that Baltazar was not justified to use force if "[a]n alternative course of action was available to the defendant." Jury Instr. 21; App. 47. The jury convicted him of first-degree murder. Verdicts (4/6/2018); App. 42. The district court sentenced him to life imprisonment. Sentencing Order (4/17/2018); App. 60.

On appeal, Baltazar alleged "counsel was ineffective for failing to object to the outdated justification instructions which negates the self-defense claim in the defendant has an alternative course of action." Def. Br. at 23. The case was transferred to the Court of Appeals. Concerning the breach-of-essential-duty prong, the Court of

Appeals concluded "we see no strategic reason for his counsel to fail to object to this erroneous instruction." *State v. Lorenzo Baltazar*, No. 18-0677, Slip Op. at 7 (Iowa Ct. App. May 15, 2019). Regarding prejudice, the court stated, "errors in jury instructions are presumed prejudicial" and decided "we cannot say the record affirmatively establishes the jury would have rejected his justification defense without the erroneous instructions." *Id.* Therefore, it reversed his conviction and remanded for a new trial. *Id.* at 11.

The State now seeks further review.

Facts

Defendant Baltazar "had some beef" with victim Jeffrey Mercado and had called him an "enemy." Trial Tr. vol. III p. 20, lines 5–20. Baltazar wanted to fight Mercado, and he had asked his friend Anthony Garcia to drive him to the Oakland Avenue neighborhood where Mercado liked to hang out. Trial Tr. vol. III p. 20, line 21 – p. 21, line 11.

On July 28, 2017, Baltazar again asked Garcia to drive him to Oakland Avenue to look for Mercado. Trial Tr. vol. III p. 23, line 2 – p. 26, line 11. Baltazar said he wanted to find and "beat up" Mercado.

Trial Tr. vol. III p. 27, lines 3–18. During the drive, Baltazar pulled out a gun. Trial Tr. vol. III p. 26, line 12 – p. 27, line 2.

When Baltazar and Garcia turned onto Oakland Avenue, they spotted Mercado walking on the sidewalk. Trial Tr. vol. III p. 27, line 19 – p. 28, line 15. Baltazar told Garcia to stop a few feet away from Mercado. Trial Tr. vol. III p. 28, line 4 – p. 29, line 2. Mercado looked scared—he just ran away without ever approaching Baltazar. Trial Tr. vol. III p. 29, lines 3–10, p. 45, lines 3–18.

Baltazar got out of the car with the gun and started shooting directly at Mercado. Trial Tr. vol. III p. 29, line 13 – p. 30, line 11. He fired four or five shots as Mercado was running away. Trial Tr. vol. III p. 30, lines 12–23. Mercado was hit and fell to the ground. Trial Tr. vol. III p. 31, lines 4–8. Baltazar got back in the car and told Garcia to drive away. Trial Tr. vol. III p. 31, lines 9–25. He announced, "Man, I shot the mother-fucker. You saw that mother-fucker fall." Trial Tr. vol. III p. 32, lines 1–4.

Police spotted the getaway car and gave chase. Trial Tr. vol. III p. 33, lines 2–10. Garcia eventually lost control of the car, and Baltazar fled on foot. Trial Tr. vol. III p. 33, line 16 – p. 34, line 20. A police K9 tracked Baltazar through a ravine, and officers captured

him hiding at the end of a 50-yard underground drainage pipe. Trial Tr. vol. III p. 123, line 22 – p. 129, line 20.

Two bullets struck Mercado—one through his back and another through his buttocks. Trial Tr. vol. III p. 89, line 4 – p. 101, line 21. Both bullets followed back-to-front trajectories through his body. Trial Tr. vol. III p. 101, line 25 – p. 104, line 15.

At trial, Baltazar testified that Mercado had threatened him and assaulted family members in the past, so he wanted to "confront Mercado." Trial Tr. vol. V p. 41, line 12 – p. 47, line 13. He admitted he pulled out his pistol on the way to Oakland Avenue, and he claimed he held it to his side because he was afraid of being attacked. Trial Tr. vol. V p. 47, line 16 – p. 49, line 9. He testified that Mercado approached him, so he fired warning shots at the ground. Trial Tr. vol. V p. 49, line 10 – p. 53, line 9. However, in recorded jail phone calls Baltazar never claimed that Mercado "came at me" or that he "had to do it." Trial Tr. vol. V p. 64, line 21 – p. 65, line 1.

ARGUMENT

I. After the "Stand Your Ground" Amendment, a Person Who Is Engaged in Criminal Activity Has a Duty to Retreat Before Using Deadly Force.

The Court of Appeals answered an important issue of first impression regarding the scope of the 2017 legislative amendments that recognized "stand your ground" in Iowa. That court concluded the amendments "clearly allow the justification defense regardless of whether an alternative course of action was available." Slip Op. at 6–7. But that ruling misinterprets the historical context of the self-defense statute as well as the statutory language itself. The 2017 amendment changed—but did not eliminate—the duty to follow an alternative course of action before resorting to force. In this case, defendant Baltazar was not entitled to "stand his ground" because he was engaged in criminal activity when he used force.

Iowa self-defense law has long recognized a duty follow an alternative course of action before responding with force. From the early days of statehood through the 1970s, Iowa's self-defense statute was relatively vague, permitting "[r]esistance sufficient to prevent" an offense. Iowa Code § 4443 (1860); *accord* Iowa Code § 691.2 (1977). Without specific statutory parameters, case law developed a duty to

retreat before using force. *See, e.g.*, *State v. Jones*, 56 N.W. 427, 428 (Iowa 1893) ("If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable."). The case law also developed an exception that there was no duty to retreat from one's own home. *State v. Bennett*, 105 N.W. 324, 325 (Iowa 1905) (creating an exception to *Jones* when "the defendant was on his own premises and was therefore not bound to retreat from the threatened assault . . ."). Over time, the principle was refined into the rule that a self-defender "must retreat as far as is reasonable and safe before taking his adversary's life, except in his home or place of business . . ." *State v. Overstreet*, 243 N.W.2d 880, 884 (Iowa 1976).

Following the 1978 criminal code revision, the Court recognized an implied duty to follow an alternative course of action. The revised self-defense statute permitted a person to use force "necessary to prevent injury or loss." Iowa Code § 704.1 (1979). Although the statute did not contain an express duty to follow an alternative course of action, it did restate the exception by permitting force "even if an alternative course of action is available if the alternative entails a risk to one's life or safety, or the life or safety of a third party, or requires

one to abandon or retreat from his or her dwelling or place of business or employment." *Id.* By including the exception when following an alternative course of action was not necessary, the statute implied a general duty to follow an alternative course of action if none of those factors applied. Case law and the model jury instructions soon recognized this implied duty to follow an alternative course of action by including it as a disqualifying factor for self-defense. *See State v. Rupp*, 282 N.W.2d 125, 126 (Iowa 1979) (stating that under chapter 704 "force should be resorted to at all only as a last resort," but recognizing "there may be circumstances when the attempt to take an alternative course of action will pose a serious threat to one's safety. In such a situation a party may use reasonable force, including deadly force, without first taking an available alternative course."); *see also State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) (quoting the jury instruction that disallows a justification defense if the State proved "[a]n alternative course of action was available to the Defendant"). Thus, the post-1978 version of section 704.1 implied that force was not "necessary" if an alternative course of action was available.

The 2017 amendment changed—but did not eliminate—the duty to follow an alternative course of action. The legislation struck alternative course of action exception and added:

> A person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as specified in this chapter.

2017 Iowa Acts ch. 69, § 37 (codified as Iowa Code § 704.1(3) (2019)). Like the former version of the statute, the current statutory language implies a duty to retreat. By stating there is no duty to retreat when the person "is not engaged in illegal activity" and when "the person is lawfully present before using force," by implication, the duty to retreat remains either if the person is engaged in illegal activity or if the person is not lawfully present.

Other states interpreting similar language in their "stand your ground" statutes have recognized a continuing duty to retreat when the person was committing a crime. *See*, *e.g.*, *Kidd v. State*, 105 So. 3d 1261, 1263 (Ala. Crim. App. 2012) (accepting the state's argument "that, because [the defendant] was a felon in possession of a firearm, he was engaged in an unlawful activity and therefore had a duty to retreat" under Alabama's "stand your ground" statute); *Rios v. State*, 143 So. 3d 1167, 1170 n.3 (Fla. Ct. App. 2014) (suggesting a defendant

who unlawfully carried a concealed weapon would not "get the benefit of the Stand Your Ground law" following a statutory amendment that added an "engaged in criminal activity" exception). This interpretation reflects sound legislative judgment that trespassers and lawbreakers should not be allowed to stand their ground.

Baltazar was engaged in criminal activity, so he had a duty to retreat before using force. At the very least, he was breaking the law by carrying a firearm in public without a permit. *See* Trial Tr. vol. V p. 41, lines 8–11 (Baltazar was 19 years old); Iowa Code § 724.8(1) (stating a person must be at least 21 to obtain a nonprofessional permit to carry weapons). And he likely violated other statutes with his conduct of arming himself with a handgun for the purpose tracking down and confronting his victim. *See*, *e.g.*, Iowa Code §§ 708.1(2)(c) (assault by pointing or displaying a firearm) 708.8 (going armed with intent). Had Baltazar not been engaged in criminal activity before his use of force, Jeffrey Mercado would still be alive. That participation in criminal activity leading up to the confrontation with Mercado disqualified him from standing his ground under the new statute.

The Court of Appeals reached the wrong interpretation in this important issue of first impression. Iowa law has long recognized a duty to follow an alternative course of action before using force. The 2017 "stand your ground" amendment changed, but did not eliminate, the duty to retreat. Baltazar was engaged in criminal activity when confronting Mercado, so under the new law he still had a duty to retreat before firing the fatal shots. Accordingly, there is no reasonable probability that the change in the law would have led to a different result, so Baltazar is not entitled to a new trial.

This Court should grant further review to decide this important issue of broad public importance. Self-defense is one of the most common defenses pursued in murder and assault cases, so this Court's guidance is necessary to prevent injustice in the many cases where this issue might arise. In particular, the criminal jury instructions committee could benefit from the Court's input before it promulgates model instructions on the changes to self-defense law. These circumstances demonstrate that further review is appropriate because this case "presents an issue of broad public importance that the supreme court should ultimately determine." Iowa R. App. P. 6.1103(1)(b)(4).

II. The Court of Appeals Has Been Misusing a Presumed-Prejudice Standard in Ineffective Assistance Cases.

The Court of Appeals granted ineffective assistance relief by misusing a presumed-prejudice standard. Even though Baltazar did not object to the jury instructions and must raise his challenge as a claim of ineffective assistance, the Court of Appeals applied the preserved-error standard that presumes prejudice. That presumption of prejudice conflicts with the controlling *Strickland v. Washington* burden for the defendant to demonstrate a reasonable probability of a different result. The Court of Appeals has misapplied this presumed-prejudice standard in at least three cases within the past year, so further review is warranted to direct that court back on the correct path.

The Court of Appeals granted Baltazar relief by misapplying a presumed-prejudice standard. Although the court recognized he was raising an ineffective assistance claim, it stated the prejudice standard as: "'Errors in jury instructions are presumed prejudicial unless the record affirmatively establishes there was no prejudice.'" Slip. Op. at 7 (quoting *State v. Murray*, 796 N.W.2d 907, 908 (Iowa 2011)). But the court misplaced reliance on *Murray*, which involved a jury instruction challenge that the defendant had preserved by objecting

in the district court. *See Murray*, 796 N.W.2d at 909 ("Murray objected to the use of instruction 16 . . ."). And the court's application of *Murray* and the presumed-prejudice standard was determinative in Baltazar's case—it concluded "we cannot say the record affirmatively establishes the jury would have rejected his justification defense without the erroneous instructions." Slip Op. at 7.

The Court of Appeals' presumption of prejudice conflicts with established ineffective assistance case law. To prevail on an ineffective assistance claim, "The 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." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). This prejudice standard focuses on the final result of the trial and does not consider how appellate review would differ if counsel had preserved error. *See \ Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) ("We have made it clear that ineffective-assistance-of-counsel claims based on failure to preserve error are not to be reviewed on the basis of whether the claimed error would have required reversal if it had been preserved at trial."). Rather than considering Baltazar's challenge as if he had preserved error, the Court of Appeals should have held him to his

burden of demonstrating a reasonable probability of a different verdict.

If the Court of Appeals had applied the correct *Strickland* prejudice standard, it would have affirmed Baltazar's conviction. Had trial counsel objected to the pre-2017 "alternative course of action" language, then the district court would have replaced it with the new statute's implied duty to retreat if the person is not lawfully present or is engaged in criminal activity. *See* Iowa Code § 704.1(3) ("A person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as specified in this chapter."). As discussed above in Section I, Baltazar was engaged in criminal activity when confronting Mercado, so he was not entitled to "stand his ground." The jury would have convicted him under the new law, so there is no reasonable probability of a different result.

Additionally, application of the correct *Strickland* standard would have required affirmance based on the overwhelming evidence of Baltazar's guilt. Having an alternative course of action was not the only method of disproving his justification defense—he was not entitled to use self-defense if he started or continued the incident, if

he did not believe force was necessary to save himself from imminent danger, if he did not have reasonable grounds for that belief, or if he used unreasonable force. Jury Instr. 21, App. 47. The evidence at trial proved Baltazar hunted down and shot his victim multiple times. Baltazar "had some beef" with Mercado and had called Mercado names. Trial Tr. vol. III p. 20, lines 5–20. He had prowled the Oakland Avenue neighborhood where he knew Mercado spent time, purportedly because he wanted to fight Mercado. Trial Tr. vol. III p. 20, line 21 – p. 21, line 11. On July 28, 2017, Baltazar asked his friend to drive him to Oakland Avenue, and along the way he pulled out his gun. Trial Tr. vol. III p. 25, line 22 – p. 27, line 2. Baltazar ordered his friend to stop the car next to Mercado, got out with the gun in hand, and started firing directly at Mercado. Trial Tr. vol. III p. 27, line 19 – p. 30, line 11. The two eyewitnesses—Baltazar's friend and Mercado's girlfriend—observed that Mercado was running away when Baltazar started shooting. Trial Tr. vol. III p. 30, line 12¬23, Trial Tr. vol. IV p. 106, line 21 – p. 107, line 8. Autopsy results confirmed that both shots followed back-to-front paths through Mercado's body—he died from being shot in the back. Trial Tr. vol. III p. 89, line 4 – p. 104, line 15. Because the evidence so overwhelmingly defeated

Baltazar's claim of self-defense, he cannot demonstrate any reasonable probability of a different result under the correct *Strickland* standard.

The Court of Appeals has been repeating its misapplication of the presumed-prejudice standard, so the Supreme Court should grant further review to resolve the conflict and to articulate the correct prejudice burden. In addition to this case, the Court of Appeals has applied the preserved-error, presumed-prejudice standard in at least two more ineffective assistance cases within the past year. *See State v. Robinson*, No. 17-1416, 2019 WL 319839, at *3 (Iowa Ct. App. Jan. 23, 2019) ("'Errors in jury instructions are presumed prejudicial unless 'the record affirmatively establishes there was no prejudice.'"); *State v. Asbury*, No. 17-0117, 2018 WL 4635683, at *5 (Iowa Ct. App. Sept. 26, 2018) ("As we have noted above, '[e]rrors in jury instructions are presumed prejudicial unless the record affirmatively establishes there was no prejudice.'"). This repeated misapplication of the presumed-prejudice standard can result in expensive and time-consuming retrials when no relief is due. Accordingly, this Court should grant further review to stop the Court of Appeals from continuing to make this error.

CONCLUSION

The Court should grant further review and affirm Miguel Lorenzo Baltazar's conviction.

REQUEST FOR ORAL SUBMISSION

Oral argument could assist the Court in interpreting the "stand your ground" amendments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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