

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ROGER E. CARUTHERS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D16-1567

[December 13, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Mindy F. Solomon, Judge; L.T. Case No. 13-6550 CF10A.

Carey Haughwout, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Richard Valuntas, Assistant Attorney General, West Palm Beach, for appellee.

ON MOTION FOR REHEARING

LEVINE, J.

In a motion for rehearing, the state for the first time cites *Dean v. State*, 42 Fla. L. Weekly S769 (Fla. Aug. 31, 2017), an opinion which issued before oral argument in this case. In a concurring opinion in *Dean*, three justices stated that “where the evidence supports the charged offense as well as the requested instruction on a necessarily lesser included offense, any error in failing to give the requested instruction is harmless because the defendant is not entitled to an opportunity for a jury pardon.” *See id.* (Polston, J., concurring). Because *Dean* did not involve a majority, we are compelled to follow *Daugherty v. State*, 211 So. 3d 29 (Fla. 2017). *See Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994) (“Under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision.”) (citing art. V, §3(a), Fla. Const.) (footnotes omitted). Accordingly, the motion for rehearing is denied.

GERBER, C.J., and MAY, J., concur.