

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Esau Escobar — PETITIONER
(Your Name)

vs.
People of the State of — RESPONDENT(S)
Illinois
ON PETITION FOR A WRIT OF CERTIORARI TO

THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Esau Escobar ^{DOC# MS2294}
(Your Name)

Pontiac C.C. P.O. BOX 99
(Address)

Pontiac, IL 61764
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. The Appellate Court's Finding that Petitioner Escobar was Not Entitled to a Serious Provocation Instruction Because He Testified that He Acted out of Fear For His Life Conflicts with Both, this Court's and The Illinois' Supreme Court's Precedent.
2. This Case Presents an Important Question: Whether a Defendant in a Murder Prosecution is Entitled to a Second Degree Murder Jury Instructions based on Serious Provocation Stemming from the Substantial Physical Injury of the Defendant's Close Friend.
3. The Appellate Court was wrong when It Refused to Consider my Serious Provocation Argument on the Merits Sidestepping the Issue and Finding Dispositive that Petitioner Testified to the Inconsistent defense of Self-Defense.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
1. People v. Calhoun, 404 Ill. App. 3d at 387	(4)
2. Mathews v. United States 108 S.Ct. 883, 887	(8)
3. People v. Everette, 565 N.E. 2d 1295 (1990)	(8)
4. United States ex rel. Bacon v. DeRobertis (N.D. Ill. 1982), 551 F.Supp. 269 at 273	(8)
5. Federal Court of Appeals (7 th Cir. 1984), 728 F.2d 874, 875	(8)

STATUTES AND RULES

1. ILCS 5/9-2(a)(1): A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this code and either of the following mitigating factors are present:
 - (1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.
OTHER
2. ILCS 5/9-2(b): Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A1 to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was May 30, 2018.
A copy of that decision appears at Appendix 3.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- ILCS: 720 ILCS 5/9-2(a)(1) and (b)

A person commits the offense of second degree murder when he or she commits the offense of first degree murder and either of the following mitigating factors are present. 9-2(a)(1): At the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed. 9-2(a)(2)... Serious provocation is conduct sufficient to incite an intense passion in a reasonable person. 9-2(b)

- U.S. Constitution Amendment XIV Section 1:

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 laws.

1. Procedural Background.

Petitioner was convicted of first degree murder after a jury trial. Following the close of evidence, the jury was instructed on the elements of first degree murder; the affirmative defense of self-defense; and second-degree murder based upon an actual but unreasonable belief that the force used was justified. Relying on the suddenness in which the entire case unfolded and especially pointing to the substantial injury to his close friend, Juan Lozano, Petitioner requested that the Court instruct the jury on second degree murder based on serious provocation, which reduces the offense of first degree murder to second degree murder if, "at the time of the killing, defendant was acting under a sudden and intense passion resulting from serious provocation" by the deceased. See III. Pattern Jury Instr. Crim. 7.03 (2015). The trial court, relying on People v. Calhoun, 404 Ill. App. 3d at 387, denied petitioner's request, finding that in cases of physical injury to a third person, the serious provocation only applies where the physical injury occurs to a family member of

defendant.

On appeal, Petitioner argued that the trial court misinterpreted Calhoun and erred in refusing the instruction as a matter of law. The appellate court sidestepped the question of law and held that the trial court properly denied the serious provocation instruction because Petitioner failed to provide any evidence to suggest that he was acting under a sudden and intense passion. Specifically, the court found that Petitioner's testimony that he was fearful for his and Lozano's lives precluded a finding that he was acting under a sudden and intense passion. Because it resolved the issue on other grounds, the appellate court declined to address the legal question presented by the trial court's ruling: whether the serious provocation instruction based on substantial physical injury to another is limited to situations where defendant has a familial relationship with the injured party.

II. Factual Background

On July 29, 2011, Petitioner Esau Escobar and Juan Lozano were driving in a vehicle with José Guevara. (A3). Lozano and Petitioner had just procure a gun for Guevara, who ~~gas~~ was ~~in possession~~ sitting in the back seat with Lozano. Guevara, who was in possession of the gun, examined the gun and complained

multiple times that it was missing bullets. (A.3) Guevara sounded angry when he was arguing with Lozano. (A.3; A.8). Guevara then shot Lozano in the head. (A.3) After firing the ~~gun~~ Gun, Guevara exclaimed, "ahh chingado," which can denote anger or surprise. (A.8; A.9) While bleeding profusely, Lozano struggled with Guevara over control of the Gun. (A.3).

Petitioner testified that as he's driving down the alley, he hears a gun shot go off on the back seat of the car he's driving. He then stops the car and looks in the back to see his friend Lozano struggling with Guevara trying to keep control of Gun. As all of this is happening, Lozano, bleeding profusely, pleads for help. Petitioner immediately jumps out of the car, opens the rear door where Guevara is seated, and wrestles with Guevara over the Gun. As soon as Petitioner takes control of Gun, Guevara jumps out of the car and charges toward Petitioner. (A.9)

Petitioner shoots Guevara twice as he's (Guevara) charging at Petitioner. Guevara continues running at petitioner and brushes pass him. Petitioner turns and fires two more times. (A.9). Petitioner testified that he fired at Guevara because he was "in fear of [his] life and the life of [his] friend. (A.30).

Petitioner jumps back in the car, drives down the alley, and tossed the gun in dumpster. (A9). He then drives Lozano to the Hospital. (A9).

At trial, Lozano testified that Petitioner was his "best friend" and that they had been friends for ten years. (A.22-A.23). He testified that he did not remember what happened after Petitioner took control of the gun, and did not see Petitioner shoot Guevara. (A.3) He also testified that he told Assistant State's Attorney that Petitioner shot Guevara as Guevara was running away, but he stated that he said that because the police were feeding him information, and he was agreeing with whatever they said because he was tired and did not want to continue with the interview. (A3) Lozano also testified that during the interview with the police and the Assistant State's Attorney he was on medications for pain that made him nauseous and tired. (A3)

REASONS FOR GRANTING THE PETITION

1. It has been repeatedly held by this Court as well as the Illinois Supreme Court that a defendant is 'entitled' to an instruction as to any recognized defense for which there is evidence sufficient for a reasonable jury to find in his favor." See Mathews v. United States 108 S.Ct. 883, 887. And People v. Everette, 565 N.E.2d 1295 (1990). This is so even in instances where the instruction to such defense is inconsistent with the defendant's own testimony. See MATHEWS at 887 and Everette at 565 N.E.2d 1298-99. See also United States ex rel. Bacon v. DeRobertis (N.D.Ill.1982), 551 F.Supp. 269, id at 273, where the U.S. District Court quoted Illinois law establishing that a defendant need only meet a low threshold of evidence to support a tendered instruction. "Moreover, 'once that low evidence threshold is met, the instruction must be provided even if inconsistent with the defendant's theory of defense.' Furthermore, the Federal Court of Appeals (7th Cir. 1984), 728 F.2d 874, 875 affirmed the District Court's decision. With all this history of

precedent establishing that a defendant has the right to any instruction supported by "some evidence" even if said instruction is inconsistent with the defendant's own testimony, the appellate court's reasoning is incorrect. The court erroneously concluded that Petitioner's testimony that he was fearful for "his life and the life of [his] friend" necessitated a finding that he was not acting under sudden and intense passion. (A.14) This factual conclusion ignored the other evidence in the record, including the shooting of Lozano and the ensuing struggle. Petitioner was barred from presenting a cognizable defense to the jury even though there was ample evidence to support the instruction.

2. The appellate court declined to reach the legal question of whether the instruction for serious provocation based on physical injury to another applied in situations where the person injured was not a family member of the defendant. The trial court refused Petitioner's instruction on provocation, not because it found that the evidence was insufficient but because it concluded that as a matter of law Petitioner was not entitled to the serious provocation instruction because the

injured party was not a family member of the defendant. Petitioner argued in the appellate court that the trial court misinterpreted People v. Calhoun, which extended physical injury to family members, as limiting it to family. However, there is no existing case law or Statute that precludes a defendant from obtaining a second-degree murder instruction based on serious provocation from the substantial physical injury to a defendant's close friend.

In Illinois, the offense of first degree murder is reduced to second degree murder when the defendant proves by a preponderance that, at the time of the killing, he acted under a sudden and intense passion resulting from serious provocation by the deceased. 720 ILCS 5/9-2 (a)(1). This is a procedural process in which Illinois' law gives a defendant the opportunity to prove a mitigating factor reducing first degree to the lesser mitigated offense of second degree murder. By declining to address this question of first impression, the appellate court let stand the trial court's order denying Petitioner and every other defendant, similarly situated, a serious provocation instruction because the person injured was a non-family member. This miscarriage of justice ought to be addressed and a more "just outcome" be reached.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Erica Grobarz

Date: August 21, 2018