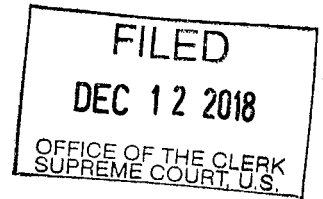


ORIGINAL

No. 18-8450



IN THE

SUPREME COURT OF THE UNITED STATES

Randall Alan Carder — PETITIONER
(Your Name)

vs.

People of the State of California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

California Court of Appeal, Fifth Appellate District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Randall Alan Carder #BA0307
(Your Name)

IRONWOOD STATE PRISON P.O. Box 2199
(Address) B2-238

BLYTHE, CALIF. 92226
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Did the trial court violate petitioner's due process rights by failing to sua sponte instruct the jury on self-defense to a charge of assault with a deadly weapon when petitioner testified, he "counter-attacked" the complaining witness in self-defense after she attacked petitioner with a knife?
2. Was petitioner's Constitutional right to effective assistance of counsel violated when trial counsel failed to request a self-defense instruction to a charge of assault with a deadly weapon after petitioner testified, he "counter-attacked" the complaining witness in self-defense when she attacked him with a knife?

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:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	7

INDEX TO APPENDICES

APPENDIX A	Decision of California Court of Appeal, Fifth Appellate District
APPENDIX B	Order of the California Supreme Court Denying Review
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091.....	5
California v. Trombetta (1984) 467 U.S. 479.....	5
Chapman v. California (1967) 386 U.S. 18.....	5
Clark v. Brown (9th Cir. 2006) 442 F.3d 70.....	5
Mathews v. United States (1988) 485 U.S. 58.....	5
People v. Mayes (1968) 262 Cal.App.2d 195.....	6
People v. Minifie (1996) 13 Cal.4th 1055	5, 6
People v. Pinholster (1992) 1 Cal. 4th 865.....	5
Strickland v. Washington (1984) 466 U.S. 668.....	6
United States v. Alferahin (9th Cir. 2006) 433 F.3d 1148.....	6
United States v. Span 75 F.3d 1383 (9th Cir. 1996).....	6

STATUTES AND RULES

OTHER

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 B 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 California Court of Appeal, Fifth Appellate District court appears at Appendix A 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 September 19, 2018. A copy of that decision appears at Appendix B.

☐ 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

Amendment V of the Constitution (Due Process of Law)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the United States Constitution (Rights of Accused in Criminal Prosecutions)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV, Section 1

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.

STATEMENT OF THE CASE

After a jury trial in Tulare County, California, petitioner was acquitted of one count of assault to commit a felony during the commission of a robbery, two counts of sexual penetration by a foreign object, with force and violence, one count of sexual battery by restraint and one count of first-degree burglary. (Appendix A). Petitioner was found guilty of one charge, assault with a deadly weapon, and two attached enhancements, infliction of great bodily injury and use of a deadly weapon, were found true. (Appendix A.)

At trial, petitioner testified the complaining witness let him into her apartment, and they had an agreement to exchange money for sex acts. Part way through oral sex, the complaining witness asked for payment. Petitioner did not have all the money, and she became "really irate fast" and attacked him with a knife. Petitioner "counterattacked" in self-defense. (Appendix A.) Petitioner struck her a "couple times" with his hands, got the knife from her, and struck her with the knife. Petitioner heard knocking on the front door. Petitioner ran out the back door. (Appendix A.)

The complaining witness had a different version. She testified that petitioner broke into her apartment while she was sleeping, and sexually assaulted her. The complaining witness tried to fight him off, but he choked her and poked her with the knife; the complaining witness felt she was "fighting for [her] life." (Appendix A.) The complaining witness stayed in the hospital for four or five days with a punctured lung, and needed stitches in five or six areas of her arm and chest due to knife wounds. (Appendix A.)

The jury was not instructed on the defense of self-defense to the assault with a deadly weapon charge. Trial counsel did not request a self-defense instruction, and the trial court did not give a self-defense instruction sua sponte. (Appendix A.)

REASONS FOR GRANTING THE PETITION

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63.) "Due process requires that criminal prosecutions 'comport with prevailing notions of fundamental fairness' and that 'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" (*Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 714, citing, *California v. Trombetta*, 467 U.S. 479, 485 (1984).) A trial court's "failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense" provided under the Fourteenth Amendment. (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099.)

In California to "justify an act of self-defense for [an assault charge under Penal Code section 245], the defendant must have an honest and reasonable belief that bodily injury is about to be inflicted on him. [] The threat of bodily injury must be imminent [] and '... any right of self-defense is limited to the use of such force as is reasonable under the circumstances.'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065, *People v. Pinholster* (1992) 1 Cal. 4th 865, 966.) Petitioner's defense to the assault charge was self-defense. The evidence demonstrated petitioner used force against the complaining witness because she threatened him and attacked him with a knife. The trial court's failure to instruct the jury was prejudicial, and the state cannot show beyond a reasonable doubt that the error had no effect on the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Continued to next page

APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS DUE TO TRIAL COUNSEL'S FAILURE TO ENSURE THE JURY WAS PROPERLY INSTRUCTED ON SELF-DEFENSE.

A fundamental right of the accused is the effective assistance of legal counsel. (U.S. Const., Amends. VI, XIV; *Strickland v. Washington* (1984) 466 U.S. 668.) Even where the trial court has a sua sponte duty to correctly instruct the jury on basic principles of law relevant to the issues raised by the evidence in a criminal case, defense counsel must be deemed negligent if he fails to remind the court of that duty and insist that instructions helpful to his client be given. (See *United States v. Alferahin* (9th Cir. 2006) 433 F.3d 1148, 1161 [ineffective assistance of counsel established on direct appeal where counsel rejected jury instruction that would have supported one of the strongest aspects of the defendant's case].)

To establish ineffective assistance of counsel, appellant must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defense. (*Strickland v. Washington, supra*, 466 U.S. at p. 687.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.*, at p. 694.)

Trial counsel's failure to request a self-defense jury instruction to the assault with a deadly weapon charge fell below the applicable standard of care and was prejudicial. Under California law, self-defense is a legal justification of the use of force and in this case assault with a deadly weapon. (See *People v. Mayes* (1968) 262 Cal.App.2d 195, 198; *People v. Minifie, supra*, 13 Cal.4th at pp. 1064-1065.) As self-defense is a complete defense to the single conviction and petitioner's testimony showed he acted in self-defense, there can be no tactical reason for why trial counsel did not request a self-defense jury instruction. (See *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) [a defense attorney ineffectively failed to obtain an instruction on a critical element of the crime and abandoned one of his client's most promising defenses].)

Petitioner testified that the complaining witness attacked him with a knife and he "counterattacked." Petitioner testified he used force only because the complaining witness would not stop and was determined. A self-defense instruction was consistent with petitioner's testimony and trial counsel's closing argument. There is no tactical reason for defense counsel to omit his client's only defense, a defense that had a strong likelihood of success, supported by petitioner's testimony, and was consistent with trial counsel's closing argument.

The prejudice inquiry requires the reviewing court to examine whether it is reasonably probable, not merely possible, that at least one juror who sat on appellant's case would have reached a different result in the absence of the alleged deficient representation. The jury did not believe the complaining witness's version of events. The only other evidence of appellant's use of force was his testimony, which showed that he acted in self-defense. The problem was, absent a self-defense instruction, the jury was deprived of any legal justification for petitioner's use of force against the complaining witness. This error was prejudicial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RANDALL ALAN CARDER

Date: 12/12/18