

Docket No. _____

IN THE
Supreme Court of the United States

JAQUAN WALTERS,

Petitioner,

- *against* -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAULA J. NOTARI
LAW OFFICES OF PAULA J. NOTARI
125 Park Avenue, 8th Floor
New York, New York 10017
(646) 943-2172

Counsel for Petitioner Jaquan Walters

QUESTION PRESENTED FOR REVIEW

Does "imperfect self-defense," which mitigates murder to voluntary manslaughter where the defendant "intend[ed] to use deadly force in the unreasonable belief that he [was] in danger of death or great bodily harm," *United States v. Manuel*, 706 F.2d 908, 915 (9th Cir. 1983), exist as a partial defense to murder at federal common law?

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States v. Walters*, No. 15-CR-644 (S.D.N.Y. Dec. 4, 2017), *aff'd*, No. 17-3972 (2d Cir. June 4, 2019) (summary order).

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION.....	6
I. The Partial Defense of "Imperfect Self-Defense" Exists at Federal Common Law	6
II. The Second Circuit Misapplied the Doctrine of "Imperfect Self- Defense".....	9

TABLE OF APPENDICES

United States Court of Appeals for the Second Circuit Summary Order entered June 4, 2019	App. 1
United States Court of Appeals for the Second Circuit Order on Rehearing, entered August 9, 2019	App. 9

TABLE OF AUTHORITIES

CASES

<i>Austin v. United States</i> , 382 F.2d 129 (D.D.C. 1967)	12
<i>Commonwealth v. Bracey</i> , 795 A.2d 935 (Pa. 2001)	7
<i>People v. Deason</i> , 384 N.W.2d 72 (Mich. 1985)	8
<i>People v. Goetz</i> , 68 N.Y.2d 96 (N.Y. 1986)	9
<i>People v. Wright</i> , 111 P.3d 973 (Cal. 2005)	10
<i>Peterson v. State</i> , 643 A.2d 520 (Md. 1994)	7
<i>R v. Williams</i> [1987] 3 All ER 411; (1987) 78 Cr App R 276	8
<i>Rinehart v. Brewer</i> , 561 F.2d 126 (8th Cir. 1977)	7
<i>State v. Ordway</i> , 934 P.2d 94 (Kan. 1997)	7
<i>State v. Seifert</i> , 454 N.W.2d 346 (Wis. 1990)	7
<i>United States v. Anderson</i> , 201 F.3d 1145 (9th Cir. 2000)	8
<i>United States v. Manuel</i> , 706 F.2d 908 (9th Cir. 1983)	1
<i>United States v. Milk</i> , 447 F.3d 593 (8th Cir. 2006)	1, 7, 8
<i>United States v. Quintero</i> , 21 F.3d 885 (9th Cir. 1994)	6
<i>United States v. Serawop</i> , 410 F. 3d 656 (10th Cir. 2005)	6
<i>United States v. Toledo</i> , 739 F.3d 562 (10th Cir. 2014)	8
<i>United States v. Velazquez</i> , 246 F.3d 204 (2d Cir. 2001)	12
<i>Wright</i> , 111 P.3d 973	7

STATUTES

18 U.S.C. § 1112(a)	6
---------------------------	---

OTHER AUTHORITIES

2 Wayne R. LaFave, <i>Substantive Criminal Law</i> § 15.3(a) (2d ed. 2007)	7
Model Penal Code § 4.01(1)	13
Richard G. Singer, <i>The Resurgence of Mens Rea: II-Honest but Unreasonable Mistake of Fact in Self Defense</i> , 28 B.C.L.R. 459, 493-97 (1987)	9, 10

OPINION BELOW

<i>United States v. Walters</i> , 775 F. App'x 25 (2d Cir. June 4, 2019)	
--	--

INTRODUCTION

Petitioner Jaquan Walters respectfully petitions this Court for a writ of certiorari to review the judgment of the Second Circuit and answer a question of national importance: to wit, whether the partial defense of "imperfect self defense" to murder exists at federal common law. Imperfect self defense mitigates murder to voluntary manslaughter where the defendant "intend[ed] to use deadly force in the unreasonable belief that he [was] in danger of death or great bodily harm." *United States v. Manuel*, 706 F.2d 908, 915 (9th Cir. 1983) (emphasis added); *see also United States v. Milk*, 447 F.3d 593, 599 (8th Cir. 2006) (noting that "[a]n imperfect self-defense involves the defendant's unreasonable use of deadly force to thwart an assault" and "may be proven by evidence that . . . the defendant unreasonably but truly believed that deadly force was necessary to defend himself").

JURISDICTION

The Second Circuit entered judgment on June 4, 2019, and denied petitioner's petition for rehearing or, in the alternative, for rehearing *en banc* on August 9, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Section 1111(a) of title 18 of the United States Code provides in relevant part:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; . . . or perpetrated from a premeditated design unlawfully and

maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

Section 1112(a) of title 18 of the United States Code provides in relevant part

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

STATEMENT OF THE CASE

The Homicide

On a Bronx sidewalk, Walters and Lamar Moorer engaged in a fistfight over marijuana that Moorer had stolen from Walters. After the two were separated, Moorer made a death threat to Walters. Walters, who suffered from either post-traumatic stress disorder or unspecified trauma and stress-related disorder and feared for his life, retrieved a gun. Passing by the scene of the fistfight on his way to his girlfriend's apartment, Walters again saw Moorer. Walters and Moorer approached each other, and Walters shot Moorer in the head, killing him. All of the above events were captured by surveillance cameras.

Moorer had a reputation as a violent person. Walters told the officers in his post-arrest statement that Moorer routinely robbed people, and that he was a member of the Bloods. A government witness, concurred in Walters' assessment.

As his nickname, Bully, suggests, Moorer used his power to engage in petty torments of those weaker than him. Indeed, the fistfight between Moorer and Walters began after Walters meekly and unsuccessfully requested payment from Moorer for a small amount of marijuana. While Moorer was robbing Walters,

Moorer told Walters that he would take everything from him, indicating that he would impose his will on Walters with impunity. Moorer's abuse and disrespect culminated in blows being thrown. Just as Walters attempted to dismount his bicycle to protest Moorer's refusal to pay him, Moorer swiftly turned his baseball cap around and punched Walters squarely in the head. The fistfight ensued.

Because Walters had first-hand knowledge of Moorer's violent reputation and domineering behavior, he had a good-faith basis to believe Moorer's death threats. In the aftermath of the fistfight, Moorer simulated shooting Walters with an imaginary gun and said, "Matter of fact you a dead man." Walters then heard Moorer tell someone over the phone to bring a gun to Moorer so that he could shoot Walters. Walters assumed that the person on the other end of the conversation was a Blood.

The surveillance video showed Moorer leaning on a black car, fixated on his cell phone, when Walters approached him with his head bowed. Walters and others tried to convince Moorer to withdraw his threats. When Walters encountered Moorer on Burnside Avenue after retrieving the gun, he felt that he could not turn around lest he be attacked while escaping, a fear based on Walters' experience.

In light of Walters' emotional state, Moorer's credible threat triggered a state of hyperarousal. Walters' ex-girlfriend Shalema Hunt described Walters as "paranoid" and testified that he did not trust anyone. It was Hunt's opinion that being shot twice traumatized him.

Both forensic psychology experts who testified at trial agreed that Walters at least had symptoms of PTSD stemming from his being shot twice. The government's expert diagnosed Walters with unspecified trauma and stressor-related disorder and testified that a diagnosis of PTSD was possible. She testified that she was able to eliminate *severe* PTSD mostly on the basis that Walters did not exhibit avoidance, citing his continuing residency on dangerous blocks and selling drugs. (The district court found the absence of avoidance to be particularly persuasive.) But, because he was homeless, Walters presumably did not have the means to relocate, certainly not to a safer neighborhood.

It is undisputed that the instant offense was out of character for Walters and that Walters was generally known as a peaceful person in the neighborhood. When asked whether Walters was a peaceful person, the government's eyewitness, testified: "To me he didn't bother, he didn't bother nobody. Defendant didn't bother nobody. I was just, I was just struck to see him fight." The government's expert agreed that the instant offense was out of character for Walters.

Walters was charged in a two-count indictment with distributing or possessing with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D) and with discharging a firearm during and in relation to a drug trafficking crime resulting in murder in violation of 18 U.S.C. § 924(j)(1). The district court had jurisdiction under 18 U.S.C. § 3231. Walters was convicted after a bench trial of both counts. The parties had stipulated to most of the relevant facts in advance of trial, so the only issue before the district court was whether Walters's

shooting of the victim Lamar Moorer, a/k/a "Bully," constituted murder under § 924(j)(1) or manslaughter under § 924(j)(2). The district court found that, because Walters had acted with malice aforethought, he had committed murder. Walters was sentenced to 300 months' imprisonment and filed a timely notice of appeal

On June 4, 2019, in a summary order, the Second Circuit upheld Walters's conviction and affirmed the district court's findings. The Second Circuit acknowledged in passing that "imperfect self-defense" is recognized in other courts but not in this Circuit. (Slip Op. 6). Without deciding whether the defense exists at federal common law, the Second Circuit found that proof existed that Walters did not hold a subjective belief that he was in danger of death or great bodily harm.

(Slip Op. 7). The Second Circuit cited the following:

- (1) Walters's conduct during the fistfight showed that he was "frequently the instigator or aggressor";
- (2) "after managing to escape the situation," Walters "chose to return and kill Mr. Moorer . . . [and did so] almost immediately and without provocation" after returning to the scene;
- (3) Walters's attempts to conceal the killing by attempting to hide the gun and his bicycle indicate "consciousness of guilt and thereby malice";
- (4) Walters shot Moorer "execution style, firing at least five shots at nearly point-blank range" while Moorer was unarmed and talking on his cell phone and continued to fire even after Moorer was lying on the ground; and
- (5) "evidence suggest[s] that the true motivation behind the killing was retaliation for Mr. Moorer's failure to pay Mr. Walters for marijuana and their subsequent fight as opposed to genuine fear of Mr. Moorer."

(Slip Op. 7-8). Walters filed a petition for rehearing or, in the alternative, for rehearing *en banc*, which the Second Circuit denied.

REASONS FOR GRANTING THE PETITION

I. The Partial Defense of "Imperfect Self-Defense" Exists at Federal Common Law

Whether the partial defense of "imperfect self defense" exists at federal common law is a matter of national importance. Section 1112 of Title 18 of the United States Code defines voluntary manslaughter as the unlawful killing of a human being without malice "upon a sudden quarrel or heat of passion." 18 U.S.C. § 1112(a). Although a finding that a killing was done in the "heat of passion" negates malice, it is not the only basis for a finding of lack of malice. *E.g., United States v. Serawop*, 410 F. 3d 656, 663 (10th Cir. 2005) ("The common law recognized 'heat of passion' as one mitigating factor pursuant to which an otherwise intentional or reckless killing would constitute the less serious offense of voluntary manslaughter and be, because of that mitigating circumstance, 'without malice.'") "Intent without malice, not the heat of passion, is the defining characteristic of voluntary manslaughter." *United States v. Quintero*, 21 F.3d 885, 890-91 (9th Cir. 1994).

The theory of imperfect self-defense arises when "the defendant unreasonably but truly believed that deadly force was necessary to defend himself." *Milk*, 447 F.3d at 599. This theory of imperfect self-defense arises out of a defendant's unreasonable use of deadly force to thwart a perceived deadly threat or assault. *Rinehart v. Brewer*, 561 F.2d 126, 132 (8th Cir. 1977). "[S]uccessful invocation," therefore, "does not completely exonerate the defendant, but mitigates murder to . . . manslaughter." *Id.*

Numerous jurisdictions recognize imperfect self-defense. *See* 2 Wayne R. LaFare, *Substantive Criminal Law* § 15.3(a) (2d ed. 2007) (collecting cases and statutes making unreasonable self-defense a variant of voluntary manslaughter); *see also Wright*, 111 P.3d 973; *Commonwealth v. Bracey*, 795 A.2d 935 (Pa. 2001); *State v. Ordway*, 934 P.2d 94 (Kan. 1997); *Peterson v. State*, 643 A.2d 520 (Md. 1994); *State v. Seifert*, 454 N.W.2d 346 (Wis. 1990); *People v. Deason*, 384 N.W.2d 72 (Mich. 1985); *R v. Williams* [1987] 3 All ER 411; (1987) 78 Cr App R 276 (appeal taken from Eng.). Juries in the Eighth, Ninth and Tenth Circuits must be instructed on the partial defense if properly raised. *United States v. Toledo*, 739 F.3d 562, 568-69 (10th Cir. 2014); *Milk*, 447 F.3d at 599; *United States v. Anderson*, 201 F.3d 1145, 1152 (9th Cir. 2000).

The New York Court of Appeals and the Model Penal Code excuse unreasonable mistakes of fact in self-defense cases. Although the New York Court of Appeals embraced a nominal "reasonableness" standard, it clearly emphasized that the defendant's background is relevant. In *People v. Goetz*, the court observed:

[W]e have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation." . . . [T]hese terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.

68 N.Y.2d 96, 114 (N.Y. 1986); *see* Richard G. Singer, *The Resurgence of Mens Rea: II-Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C.L.R. 459, 493-97 (1987) (hereinafter Singer, *Unreasonable Mistake of Fact*). Likewise, "[t]he MPC . . .

precludes murder liability on the part of any defendant who believes, reasonably or unreasonably, that deadly force is necessary. At the same time, it establishes some liability on the part of those actors whose beliefs are either reckless or grossly negligent." Singer, *Unreasonable Mistake of Fact*, 28 B.C.L.R. at 505.

Imperfect self-defense was also recognized at common law. Professor Richard G. Singer exhaustively traced the doctrine of self-defense and mistake of fact.

According to Professor Singer:

[A] defendant who was unable to avail herself of the self defense claim was convicted of murder; no lesser included offense was thought to be proper since, as a matter of "logic," the defendant, shown to have committed intentional homicide, had shown no excuse or justification for that intentional killing. Since intentional homicide was murder, except when provoked, the defendant was guilty of murder. Moreover, since in many instances the killing was not merely intentional but premeditated, particularly in the strained meaning given to premeditation by nineteenth century courts, the homicide often was considered first degree murder.

A number of common law courts, repulsed by this logical result, created a "halfway house" doctrine by which the unreasonably mistaken defendant, rather than being subject to a murder charge, would be found guilty of manslaughter. This doctrine, called "imperfect self defense," had limited acceptance in the common law jurisdictions. The MPC, however, adopts the doctrine, although by intricate indirection.

Singer, *Unreasonable Mistake of Fact*, 28 B.C.L.R. at 503-04 (internal footnotes omitted).

A persuasive policy justification exists for the adoption of imperfect self-defense. The mens rea of a person whose unreasonable belief that he is acting in self-defense is the same as a person who has a reasonable belief. Because there is an absence of malice in both instances, an unreasonable belief justifies a conviction

for manslaughter only. *See, e.g., People v. Wright*, 111 P.3d 973 (Cal. 2005). The Second Circuit declined to join its sister circuits in recognizing imperfect self-defense as a partial defense that mitigates murder to manslaughter.

II. The Second Circuit Misapplied the Doctrine of "Imperfect Self-Defense"

The Second Circuit erred in endorsing the district court's conclusion that Walters "was frequently the instigator or aggressor during the fight at various points." (Slip Op. 7). As the government's witness, George Moore, who knew both Walters and the victim, made clear, he was surprised by the altercation because he knew Walters to avoid conflict. By contrast, Moore knew Moorner to be violent, a bully and a troublemaker.

Moore's assessment was corroborated by the following undisputed evidence. Moorner was released from prison on January 22, 2015 for armed robbery and was arrested on several other occasions for robberies, firearm offenses and felony assault. Walters knew that Moorner was violent and a member of the Bloods gang.

The conflict leading to Moorner's death began when Moorner committed a strong-arm robbery of Walters's marijuana. While Moorner was robbing Walters, Moorner told Walters that he would take everything from him, indicating that he would impose his will on Walters with impunity. As Walters attempted to dismount his bicycle to protest Moorner's refusal to pay him, Moorner swiftly turned his baseball cap around and punched Walters squarely in the head. A fistfight followed, which was broken up. Moorner simulated shooting Walters with an imaginary gun and said, "Matter of fact you a dead man." Walters then heard Moorner tell someone over

the phone to bring a gun to Moorner so that he could shoot Walters. The surveillance video captured Walters and others then meekly approaching Moorner begging him to take back his death threat.

Additionally, there were two physical altercations in this case within eleven minutes. Both altercations were instigated by Moorner, not the defendant-appellant. The video surveillance corroborates Walters's recorded post-arrest statements, which he made before he had the opportunity to consult with a lawyer or view the video surveillance, and also eyewitness accounts provided to the police. That this was a fight between equals was a baseless inference.

All of the evidence indicates that Walters acted without malice. A defendant does not act with malice if his "reason and judgment . . . was obscured or disturbed by passion . . . to such an extent as would cause an ordinarily reasonable person of average disposition to act rashly and without deliberation and from passion rather than judgment." *United States v. Velazquez*, 246 F.3d 204, 210 (2d Cir. 2001).

The district court concluded that Walters's "actions during, before, and after the crime demonstrate a calm, cool, collected man." But this assertion is belied by the government's own expert, Dr. Cheryl Paradis, who testified at trial:

I think the whole way he describes [the homicide] is consistent with emotion. This is not like a hit, you know, planned hit where you hire someone. There's emotion involved here, but he is thinking. He still retained the ability for rational thought, decision-making. He certainly understood the consequences of what he was doing. He knew he had a gun. He knew he was shooting. He knew that it would hurt the victim, and he knew that he wanted to get away, and the best way to get away would be to hide the gun. He knew, from what I've learned afterwards, to get rid of the gun, get rid of the evidence. So, like I said, that he knew enough to put the gun back in the box right away to me shows,

again, it could be high emotion but not to the point that he is disorganized and doesn't know what he's doing.

Walters presented a heat of passion, not an insanity, defense, so Dr. Paradis's opinion that Walters was able to act with some rationality is irrelevant. *Compare Austin v. United States*, 382 F.2d 129, 137 (D.D.C. 1967) ("An unlawful killing in the sudden heat of passion — whether produced by rage, resentment, anger, terror or fear — is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection."), *with* Model Penal Code § 4.01(1) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.").

What is relevant is that Walters was acting under "high emotion," which the government conceded on appeal. ("Dr. Paradis also testified that while Walters denied having feelings of anger, his actions and other statements strongly suggest that he was mad when he returned to the scene. For example, Walters admitted that 'you got to stand up for yourself,' which 'common sense' suggests means 'he had at least some feelings of anger.'"). This is consistent with Dr. Paradis's testimony that "if someone was in a state of panic and intense fear, I would rather say intense emotion, they may not calm down in five or six minutes; they may stay very emotional"

The notion that Walters was cool, collected and calm six minutes after a fistfight with a violent member of the Bloods has no evidentiary basis. It is undisputed that Moorner had sufficiently provoked Walters. As the government conceded, Walters's inflamed passions had not cooled down. The Second Circuit's decision was thus erroneous and should be reversed.

Dated: New York, New York
November 7, 2019

Respectfully submitted,

/s Paula Notari
PAULA JACLYN NOTARI
Counsel for Defendant-Appellant
JAQUAN WALTERS
125 Park Avenue
8th Floor
New York, New York 10019
T. (646)943-2172