

No. 19-6781

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DONATO LUNA-QUINTERO — PETITIONER
(Your Name)

vs.

STATE OF INDIANA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court, U.S.

FILED

NOV 21 2019

OFFICE OF THE CLERK

INDIANA COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DONATO LUNA-QUINTERO
(Your Name)

#220170, ONE PARK Row
(Address)

MICHIGAN CITY, IN 46360
(City, State, Zip Code)

NA

(Phone Number)

QUESTION PRESENTED

Is a defendant's Constitutional right to a jury trial properly waived, and is counsel providing effective assistance, when the defendant, a foreign citizen with limited English proficiency and no prior contact with the American criminal justice system, was never informed by counsel of what a jury trial entails, and the court made no inquiry to ascertain whether the defendant understood the benefits and burdens of a jury trial?

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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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 is unpublished.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 is unpublished.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 A 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 is unpublished.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 MARION COUNTY SUPERIOR court 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 is unpublished.

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 _____.
~~For cases from state courts~~

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 9-12-2019.
A copy of that decision appears at Appendix C.

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 _____.
~~For cases from state courts~~

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

STATEMENT OF THE CASE

On June 27, 2010, Donato Luna-Quintero was charged in Marion County Superior Court #1, Indiana, with the murder of Octavio Velasquez. From the beginning, Luna-Quintero insisted he acted in self-defense.

At the initial hearing on June 29, 2010, Luna-Quintero, a citizen of Mexico, was declared a person of Limited English Proficiency (LEP), and interpreters were present for all further court proceedings.

At the pretrial phase, Luna-Quintero refused to accept any plea deals offered by the State. The State's prosecutor then emailed a suggestion to Luna-Quintero's attorney, to tell Luna-Quintero that he should waive his right to jury trial and accept a bench trial because then he would get less time if convicted.

On June 23, 2011, defense counselor Robert Alden presented Luna-Quintero a form, "Verified Waiver of Trial by Jury." The form stated that a jury consists of twelve people; no other information was given regarding what a jury trial entails. The form was in English and even contained a line that read, "I read, write, and understand the English language."

Luna-Quintero signed the waiver form. The court engaged in a very brief colloquy with the defendant, and was satisfied that the waiver was knowing and voluntary. The court, as well as counsel, informed Luna-Quintero of nothing more about a jury trial other than a jury consists of twelve people.

A bench trial ensued, and Luna-Quintero's self defense claim was rejected by the judge. The sentence was fifty years in prison for murder.

A direct appeal was filed, raising sufficiency of evidence. The Indiana Court of Appeals affirmed the conviction in an unpublished opinion.

On March 4, 2013, Luna-Quintero filed a petition for post-conviction relief. The claim presented throughout these collateral review proceedings was that counsel was ineffective when he failed to inform the defendant what a right to a jury trial entailed before advising him to waive that right.

Post-conviction relief was denied by the trial court on February 21, 2019. Luna-Quintero appealed the denial to the Indiana Court of Appeals, which found for the State on May 15, 2019.

In denying Luna-Quintero relief, the Indiana Court of Appeals held that Indiana courts are not required to advise a defendant of the consequences of waiving his right to a jury trial, citing COLEMAN V. STATE, 694 NE2d 269, 278 (IND. 1998). The court also held that Luna-Quintero's attorney made a "strategic" decision to elect a bench trial due to the possibility of a lesser sentence upon conviction. This "strategic" excuse was employed by the court even though the defense attorney flatly denied that the decision to waive a jury trial was his decision; the attorney had conducted 30 murder trials and never waived a jury on any of them; the attorney emphatically stated that Luna-Quintero decided upon a bench trial; and that no person had ever expressly detailed for Luna-Quintero exactly what a jury trial involves.

Rehearing was denied on July 22, 2019. A Petition to Transfer to the Indiana Supreme Court was denied on September 12, 2019, and this timely Petition for Writ of Certiorari ensues.

REASONS FOR GRANTING THE PETITION

It is well-settled that the waiver of one's right to a jury trial must be "knowing, voluntary, and intelligent." *BRADY v. UNITED STATES*, 397 U.S. 742, 748 (1970) (waiver must be done with sufficient awareness of the relevant circumstances and likely consequences).

The question presented here, reworded, is basically: How ignorant can a defendant be and still make an "intelligent" waiver of a jury trial? Is knowing that a jury is composed of twelve people — and no other information whatsoever — sufficient to make the waiver intelligent?

And if not, then WHO is responsible for ensuring that the defendant knows what a jury trial is? There are only two possible answers to this — the Court, or counsel.

As for the courts' responsibility to ensure an intelligent waiver is made, the jurisdictions are in disarray nationwide over how much colloquy, if any, the court must perform with the defendant.

See *UNITED STATES v. LILLY*, 536 F.3d 190, 197-198 (3rd Cir. 2008).

The Fifth, Eighth, and Eleventh Circuits do not endorse any form of colloquy with the defendant, while the other eight circuits require the court to inform the defendant of the factors outlined in UNITED STATES v DELGADO, 635 F.2d 889, 890 (7th Cir. 1981). DELGADO specifically requires that the defendant be aware ~~that~~:

- (1) twelve members of the community comprise a jury.
- (2) the defendant may take part in jury selection.
- (3) a jury verdict must be unanimous.
- (4) the court alone decides guilt or innocence if the defendant waives a jury trial.

These four factors are also cited as "advisory" to state courts in Indiana, per NUNEZ v. STATE OF INDIANA, 43 NE3d 680 (Ind. App. 2015) (citing UNITED STATES v DUARTE-HIGAREDA, 113 F.3d 1000, 1002 (9th Cir. 1997)).

However, if the trial court fails to establish that the defendant knows of these four factors, it is not a fundamental error in Indiana. HUTCHINS v. STATE OF INDIANA, 493 NE2d 444, 445 (IND 1986) (comprehensive advisements need not be given in order to accept waiver of right to jury trial).

In short, the court's failure to ensure that a defendant is fully advised of what a jury trial

is may be reversible error in a majority of federal jurisdictions, but is not error in the state of Indiana. Had Luna-Quintero been three blocks away, in U.S. District Court in Indianapolis, he would have been subject to a colloquy ~~with~~ the court before waiving his right to a jury trial. As it was, his only protection was the effective assistance of counsel, which the facts clearly show he did not receive.

IF the court is not responsible for protecting the defendant's right to a jury, then counsel is.

At no time in any of the proceedings—pretrial, trial, or post-conviction—did any person claim to have explained to Luna-Quintero the four factors outlined on the previous page. The attorney's testimony was that he was trying to persuade Luna-Quintero to plead guilty and forego trial entirely. Luna-Quintero refused, but was persuaded to waive the jury trial after the prosecutor suggested he would get less time if convicted at a bench trial.

So, please understand all of the information Luna-Quintero had to consider when he elected to waive a jury: Twelve people are on a jury; you probably got a lesser sentence if convicted by a judge. That's it. Unless this Court issues a Writ for Certiorari, that will stand as sufficient to satisfy the "intelligent" requirement for waiving a Constitutional right.

For the foreign-born, non-English-speaking person who has never had contact with the American criminal justice system, we cannot presume any foreknowledge of our jury system. Luna-Quintero was told twelve people comprise a jury, but he was not told where these people come from. In some countries, jurors are professionals, part of the justice system, not peers from the community. Not all countries allow defendants to strike potential jurors. Not all jury verdicts, even in America, must be unanimous. These facts would bear upon most defendants' decision-making, especially one like Luna-Quintero, who insisted upon a trial with a self-defense claim.

Furthermore, this Court ought to accept this case to make a statement on the abuse of the "strategic" appellation lower courts so often wrongly assign to counsel's decisions as a way to defeat STRICKLAND claims. STRICKLAND v. WASHINGTON, 466 U.S. 668, 690 (1984) advises us that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"; however, we cannot ignore the important caveat in STRICKLAND that these actions "are usually based, quite properly, on informed Strategic choices made by the defendant." STRICKLAND, at 691. In this case, Luna-Quintero's choice lacked the informed modifier, and therefore cannot be strategic.

In conclusion, if the court is not required to conduct a colloquy with the defendant to ensure that he knows the nature of the Constitutional right being waived, then the Constitution requires counsel to do so in order to be considered the effective assistance of counsel. To protect a

defendant's jury trial right, someone must inform him or her of the four DELGADO factors, at a minimum, and this advisement must be in the record.

If these advisements are not required, courts will continue to allow severely disadvantaged defendants like Luna-Quintero to waive their right to a jury trial, which they will surely do when given no information about how a jury trial benefits them, and when subjected to the coercive effect of a prosecutor who entices them with the prospect of "less time" if they make his job easier by waiving a jury.

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*NOTE: This Petition was written by Lay Advocate TY EVANS #158293 with the translator assistance of VAUGHN BOUTWELL #119711, prisoners at Indiana State Prison. DONATO LUNA-QUINTERO accepts responsibility for the contents,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DONATED LUNA QUINTERO.

Date: November 19th 2019