

No. 19-7264

ORIGINAL

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C. 20543

Lazaro Zapata

(Your Name)

— PETITIONER

vs.

State of Illinois

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF ILLINOIS

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

PETITION FOR WRIT OF CERTIORARI

Lazaro Zapata

(Your Name)

P.O. Box # 1000 (Menard C.C.)

(Address)

Menard, Illinois. 62259

(City, State, Zip Code)

(Phone Number)

Question(s) Presented

- 1: Whether Lazaro Zapata was denied his Right to a Fair Trial where the trial Court refused to instruct the jury on second Degree Murder based on Provocation? 'A trial court's refusal to provide essential jury instructions when warranted by the evidence deprives the defendant of his Rights to Due process and a fair jury trial.' U.S. Const., amends. VI, XIV; Ill. Const. art. I, §§ 2, 8; People v. Bryant, 113 Ill. 2d 497, 502 (1986) (Citing Beck v. Alabama, 447 U.S. 625, 636-37 (1980))
- 2: Whether or not the decision of the Appellate Court of Illinois First Judicial District, Fourth Division entered on May 30, 2019 in petitioner's case conflicts with the decision of another United States Court of appeals decision on the same important matter (People v. Johnson, 4 Ill. App. 3d 249 (1972)) in such a way as to call for an exercise of this Court's Supervisory power?

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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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☐ is unpublished.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☐ is unpublished.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 C 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 Appellate Court of Illinois 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 5/30/19.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: 9/25/19, and a copy of the order denying rehearing appears at Appendix C.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. VI, XIV; Ill. Const. art. I, §§ 2, 8..

720 ILCS 5/9-2(a)(1) (West 2011)

720 ILCS 5/9-2(b) (West 2011)

STATEMENT OF THE CASE

Irene Ayala (defendants-girlfriend) was physically assaulted and kidnapped from her and the defendants home by their neighbors Delilah and Raul Medina, on June 1, 2011. Irene was held captive for hours in a car outside of the city by Delilah and her husband, Raul, while they continuously phoned Irene's boyfriend - the defendant, Lazaro Zapata - demanding that he find their missing television and the people who took it. After the Police refused to help Lazaro locate Irene, Lazaro complied with Delilah and Raul's demands, recovered Delilah's television and returned it to her apartment. Delilah and Raul returned to the city with Irene late that night, and after a confrontation between Lazaro, Raul, Delilah and others, Raul was killed. Lazaro was charged with first degree murder. He was found guilty following a jury trial and was sentenced to 40 years in prison.

The Trial

Irene Ayala and Lazaro Zapata testified that on June 1, 2011, they had been living together for a month or two in the second floor apartment at 4138 South Albany. (R. 617, 673) Delilah Medina lived in the apartment above them. (R. 617, 673) On the evening of June 1, Lazaro was hanging out on the back porch of the apartment drinking beers with some friends. (R. 674) Irene was in the living room watching television. (R. 618)

to a report of a Kidnapping on June 1, 2011. (R.609-610) Kelenyi testified that he spoke to Lazaro, who explained that his girlfriend had been kidnapped and was being held in a vehicle somewhere. (R.11) Lazaro made a phone call and put the phone on speaker. (R.612) A woman on the other end of the line said that she was fine, that Lazaro was an "asshole," and that she was not in any danger or harm. (R.612) Kelenyi determined that there was no kidnapping and left. (R.613)

Lazaro continued to get calls from Delilah after the police left. (R.693) When Delilah, Raul and Irene got back into the city, around midnight, they drove by 4138 South Albany where Lazaro was standing outside. (R.635, 696) Lazaro jumped on a bicycle and followed them. (R.636, 696) Raul drove two to three blocks before pulling over near the corner of 40th Place and Kedzie. (R.635, 696) Raul and Delilah got out of the car and began arguing with Lazaro. (R.636, 696) Delilah was yelling about who took her stuff, and Lazaro told her that he had gotten her stuff back and begged them to let Irene out of the car. (R.697) As Pipes went to open the door for Irene, Raul went back to get into the driver's seat of the car. (R.697, 637) Lazaro and Raul fought for ten to twenty seconds and then Carlos Galindo, a friend of Lazaro's, arrived and began hitting Raul. (R.698, 638)

Delilah approached Lazaro and swung at him and he swung back at her. (R.698)

Carlos testified that around midnight on June 1, he saw Lazaro engaged in a fist fight with an older man near the corner of 40th place and Kedzie. (R.415)

Carlos had never before seen the person Lazaro was fighting. (R.414) Carlos ran to help Lazaro, but before he got there, another friend of theirs, Dukes, arrived and started fighting alongside Lazaro. (R.416) The man that they were fighting was twice the size of Lazaro and Dukes, and was winning the fight. (R.416) Carlos blind-sided the man, punching him twice. (R.417)

Raul started walking away, and Lazaro told Irene and Carlos to get in the car, and he got in the driver's seat. (R.417-418, 639, 699) Lazaro made a right turn

on Kedzie to avoid hitting Raul who was chasing after the car. (R.700) Lazaro testified that Raul shouted,

"Bitch, motherfucker, I'm going to kill you," and threw something at the car. (R.700) Carlos testified that Raul

shouted, "That's why I took your bitch," as he threw something at the car. (R.420) Lazaro testified that he

drove about twenty feet before he made the U-turn. (R.701) He

turned the car around because he felt like he needed to find some resolution because he knew Raul was never

going to stop. (R.700) Carlos testified that as Lazaro made

the u-turn, he said that he was going to park. (R.421)

Lazaro intended to stop the car in front of Raul, but he hit the clutch instead of the brake and the car kept

Maria saw a car parked at 40th and Kedzie. (R.457)
The car door shut and the car made a right turn, heading north on Kedzie. (R.459) Maria turned around thinking that was the end of it, but then heard a screech, and when she looked out the window again, the car was heading south and ran into a pole. (R.459) Maria saw the driver of the car get out, go to the front of the car and stomp on something. (R.461) A female got out of the car and started yelling, before she and the driver ran down 40th place. (R.462) Another man got out of the car and was hopping and yelling for help. (R.462) The driver and woman came back and helped the man back down 40th place. (R.462)

Graciela was in the dining room of the apartment around mid-night when she heard a scream and looked out the living room window. (R.476) Graciela saw a man walking down Kedzie, shaking his hand as if something was wrong with it. (R.477) A car drove by the man at a high rate of speed and the man and occupants of the car exchanged words. (R.478) The car drove away heading north and the man crossed the street. (R.479) Graciela then heard a loud screech and saw the car coming back, south on Kedzie. (R.479) Graciela ran into the kitchen and when she looked out the kitchen window, the car had already crashed into a pole. (R.480) Graciela saw the driver of the car get out, walk around the car and stomp and kick in front of the car. (R.480)

Officer Nicholas Pronek responded to the scene and found Carlos under a porch in a backyard. (R.494) Pronek

Called Carlos an ambulance. (R. 494)

Forensic Investigator Eric Sawed processed the scene at 40th place and Kedzie. (R. 498; People's Exhibits #43-86) Sawed recovered blood and hair from the front passenger side of the hood of the car and the air bag from inside the car. (R. 514-515) Sawed went to Mt. Sinai Hospital and took photos of Raul, and then went to Area One and took photos of Lazaro, Irene, and Delilah. (R. 515-527; People's Exhibits #88-105) Sawed recovered Lazaro's clothing, including his shoes that appeared to have blood on them. (R. 528; People's Exhibits #106-109)

The parties stipulated that the blood recovered from the front passenger side hood of the car matched Raul, that two of the three blood stains found on Lazaro's shoes matched Raul, and that blood recovered from the air bag matched Lazaro. (R. 545-551)

Dr. Lauren Moser Woertz, an Assistant Medical Examiner, opined that the cause of Raul's death was multiple injuries due to an automobile striking a pedestrian in the manner of a homicide. (R. 598)

Jury Instructions

Lazaro requested that the jury be instructed on self-defense, second degree murder based on unreasonable belief in self-defense, and second degree murder based on provocation. (R. 750-762) The trial Court granted the defense request as to self-defense and second degree murder based on unreasonable belief in self-defense, but denied the request as to second degree murder based on provocation. (R. 760)

Verdict and Sentencing

The jury found Lazaro guilty of first degree murder, and the trial court sentenced him to 40 years in the Department of Corrections. (R. 853, 950)

Lazaro Zapata next appealed from the final judgement of conviction to the Appellate Court of Illinois First Judicial District. He was sentenced on February 19, 2016, (C. 194) and Notice of appeal was timely filed on February 19, 2016. (C. 186)

Denial of Appeal by Appellate Court of Illinois First District ON MAY 30th, 2019 an order was filed by the Appellate Court upholding the Circuit Court's decision(s) not to instruct the jury on second degree murder based on provocation... (Appendix A) No Petition For Rehearing was filed.

Petition for Leave to Appeal was timely filed on July 8th, 2019 and Petitioner was permitted to proceed as a poor person. (Appendix C)

On September 25, 2019 the Supreme Court of Illinois ~~DENIED~~ the Petition for Leave to Appeal in above entitled cause. (Appendix C)

REASON FOR GRANTING THE PETITION

The first question presented to this court is whether Lazaro Zapata was denied his right to a Fair Trial where the trial court refused to instruct the jury on Second Degree Murder based on provocation? A trial court's refusal to provide essential jury instructions when warranted by the evidence deprives the defendant of his rights to Due Process and a Fair Trial. U.S. Const., amends VI., XIV.; Ill. Const. art. I, §§ 2, 8; *People v. Bryant*, 113 Ill. 2d 497, 502 (1986) (Citing *Beck v. Alabama*, 447 U.S. 625, 636-37 (1980)).

At the close of the evidence, Lazaro Zapata requested that the jury be instructed on self-defense (Defense of Another), second-degree murder based on an unreasonable belief in self-defense, and second degree murder based on provocation. Recently, the Illinois Supreme Court clarified that the standard to be used in determining whether a criminal defendant is entitled to a second degree murder instruction is whether there is "some evidence" (as opposed to "some credible evidence") that, if believed by a jury, would reduce the charge to a lesser offense. *People v. McDonald*, 2016 IL 118882, at ¶25. In this case, there was some evidence that warranted the provocation instruction. Raul and Delilah Medina kidnapped Lazaro's girlfriend, Irene Ayala, beat her and choked her, hanging her out of a third story window, before putting her in the trunk of Raul's car, and driving her around for hours moving her back and forth from the trunk to the backseat, all the while continuing to beat her, and calling Lazaro on his cellphone forcing him to listen to Irene being beaten, while they made demands of him and further threats to harm Irene if he chose not to comply with their demands. Lazaro did what any reasonable person is expected to do and called the police, but they refused to help him find Irene, and told Lazaro that if he called them again then, "he would be the one to go to jail." In his attempt to get Irene back, Lazaro complied with the kidnappers

demands and located their missing stuff. Raul and Delilah still refused to let Irene go, even after Lazaro begged and pleaded for them to do so. Lazaro then engaged in a fist fight with Raul and Delilah in order to protect Irene and get her back, and just before Raul was hit by the car, Raul threatened to kill Lazaro. Certainly the jury could have found "serious provocation" under these circumstances, and the trial court, therefore, erred in refusing to instruct the jury on second degree murder based on provocation. Based on this reason and others cited in petitioner's writ of Certiorari This Court should exercise its supervisory power in order to reverse Lazaro's conviction and remand for a new trial.

In Illinois, a mitigating factor exists to reduce first-degree murder to second degree murder if, at the time of the killing, the defendant acts under a sudden and intense passion resulting from "serious provocation." 720 ILCS 5/9-2(a)(1) (West 2011). A "serious provocation" is defined as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2011). Illinois courts have recognized four categories that constitute serious provocation: substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. McDonald, 2016 IL 118882, ¶59; People v. Garcia, 165 Ill.2d 469, 429 (1995). The distinction between first degree murder and second degree murder is "a recognition of human failings under stress, and the distinction is designed to aid the person who, through no fault of his own, finds himself in a stressful situation where perceptions and judgement may be impaired." People v. Monigan, 97 Ill. App. 3d 885, 887 (1st Dist. 1981). The question is whether there is evidence of the defendant's "rage, anger, resentment or terror sufficient to establish provocation." See People v. Leach, 465 Ill. App. 3d 297, 315-16 (1st Dist. 2010). The state of mind for second-degree murder based on

provocation has also been "described as an act of passion or sudden act of revenge." *People v. Dare*, 140 Ill. App. 3d 413, 419-20 (1st Dist. 1986); see John F. Decker and Christopher Koperz, *Illinois Criminal Law: A Survey OF CRIMES AND DEFENSES*, p. 6-64 (5th ed. 2012) (this quoted language "best describes" the "State of mind in 'provocation' second degree murder").

In this case, the trial court rejected defense counsel's request to have the jury instructed on a "Serious provocation" theory of second-degree murder. (R. 760; see Illinois Pattern Jury Instructions ("IPI"), Criminal, 7.03, 7.06B. The definition instruction for second degree murder based on provocation, IPI 7.03, instructs:

'A mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if, at the time of the killing, the defendant acts under a sudden and intense passion resulting from serious provocation by the deceased. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. IPI Criminal 7.03'

A trial court's refusal to provide essential jury instructions when warranted by the evidence deprives the defendant of his rights to due process and a fair jury trial. U.S. Const., amends. VI, XIV; Ill. Const. art. I, §§ 2, 8; *People v. Bryant*, 113 Ill. 2d 497, 502 (1986) (citing *Beck v. Alabama*, 447 U.S. 625, 636-637 (1980)). The amount of evidence necessary to justify a jury instruction "has been described as 'any,' 'some,' 'slight,' or 'very slight,'" *People v. Norak*, 163 Ill. 2d 93, 108-109 (1994) (abrogated on other grounds). Illinois Supreme Court has held that when "slight" evidence exists, an instruction is warranted even when the evidence is inconsistent, conflicting, or of doubtful credibility. See *People v. Washington*, 2012 IL 110283, ¶ 43; *People v. Hari*, 218 Ill. 2d 275, 296 (2006); *People v. Davis*, 213 Ill. 2d 459, 478 (2004); *People v. Jones*, 175 Ill. 2d 126, 132 (1997).

In deciding whether to instruct on a certain theory, "it is not the court's role to weigh the evidence"; rather, the court's only duty is to determine

whether some or slight evidence exists. Jones, 175 Ill. 2d at 132; McDonald, 2016 IL 118882, ¶125. Thus, if there is some "evidence of serious provocation and sudden intense passion, which, if believed by a jury, would cause the killing to be [second degree murder] rather than [first-degree] murder, an instruction to the jury defining [the provocation theory of second-degree murder] must be given." People v. Robinson, 189 Ill. App. 3d 323, 349 (1st Dist. 1989). The determination as to whether there is sufficient evidence to justify the giving of a jury instruction is reviewed for an abuse of discretion. McDonald, 2016 IL 118882, ¶42.

Under the facts of this case, there was at least "some evidence" that supported a second degree murder instruction based on serious provocation. McDonald, 2016 IL 118882, at ¶125. Lazaro and Irene gave detailed testimony regarding the dispute that had led up to Raul's death. Around 8:00 p.m. on June 1, 2011, Lazaro received a phone call from Delilah asking for his help with some gang-bangers that were bothering her and Raul at Jewel's Grocery Store. (R. 618, 681) Lazaro went to Jewel's but when he got there, Delilah was not there. (R. 682) In the meantime, Delilah had returned to the apartment building, where she lived above Lazaro and Irene, to find her television missing. (R. 686) Delilah and Raul went to Lazaro and Irene's apartment looking for Lazaro, but he was not there. (R. 623) Delilah left, but returned a few minutes later and dragged Irene up to her apartment by the hair. (R. 624) Delilah kept Irene in the apartment for 30 minutes, hitting her, choking her and hanging her out the window. (R. 625-627) Delilah and Raul then took Irene down to Raul's car and put her in the backseat. (R. 628-629) Delilah sat in the backseat with Irene as Raul drove them on the expressway toward the western suburbs. (R. 629) As they drove, Delilah beat Irene with the seatbelt buckle. (R. 630) After about 40 minutes, they stopped and put Irene in the trunk of the car. (R. 631) After another hour, they took Irene out of the trunk and put her back in the

backseat. (R.633) Raul then headed back toward the city. (R.634)

Irene testified that throughout this harrowing ordeal, Delilah was continuously on her phone, speaking in an angry tone to the person on the other end. (R.627, 634) Lazaro confirmed that he was on the phone with Delilah continuously throughout Irene's kidnapping. (R.693) During their first call, Delilah told Lazaro that she was on the expressway and that she had Irene in the trunk. (R.686) Delilah said that if he wanted to see Irene again, he had better get her television back for her. (R.686) Delilah had told Lazaro that he had one hour to get the television back or Delilah would start chopping off Irene's ears. (R.687) When Lazaro got back to the apartment building, he found both his apartment and Delilah's apartment wide open, the televisions were missing from both apartments, and Irene was gone, leaving behind her shoes and her cell phone. (R.682) Lazaro was scared, and called 911 to report that Irene had been kidnapped. (R.683)

Lieutenant Kelenyi confirmed the 911 call, and testified that he and other officers responded to the apartment building. (R.609) Lazaro was on the phone with Delilah when the officers arrived, but when he put her on speaker, she changed her tone and said that Irene had not been kidnapped, that she did not want to talk to Lazaro and for him to quit calling. (R.690-691) Based on this, the officers concluded that Irene had not been kidnapped and left, telling Lazaro that if he called again, he would be the one to go to jail. (R.692-693)

Around midnight, Delilah, Raul and Irene drove past the apartment building. (R.635, 696) Lazaro jumped on a bicycle and followed them for two to three blocks until Raul pulled the car over. (R.636, 696) Raul and Delilah got out of the car and began arguing with Lazaro. (R.696)

Delilah and Raul were demanding to know who had taken their stuff, and Lazaro was begging them to let Irene go, telling them that he had gotten their stuff back. (R.697) When Lazaro's friend Pipes showed up, he asked Pipes to let Irene out of the car, but as Pipes went to open the car door, Raul moved to get back in the driver's seat. (R.697) In order to stop Raul, Lazaro grabbed him and punched him. (R.697) A fist fight then ensued involving Raul, Delilah, who came up behind Lazaro and swung at him, Lazaro and Lazaro's friend Carlos, who had just shown up. (R.698) Carlos testified that when he arrived on the scene, Raul, who was twice as big as Lazaro, was "beating the shit" out of Lazaro. (R.416) At some point, the fight dissipated, and Raul began walking away. (R.699)

Lazaro jumped into the driver's seat of Raul's car and told Carlos and Irene to get in. (R.699) Lazaro made a right turn, and as he passed Raul, who was chasing after the car, Raul shouted, "Bitch, motherfucker, I'm going to kill you motherfucker," and he threw something at the car. (R.700) Lazaro turned the car around because he felt like he had to find some resolution, he knew that Raul was never going to stop. (R.700) Lazaro's intention was to stop the car in front of Raul, but he hit the clutch pedal instead of the brake, and the car hit Raul before crashing into a pole. (R.702)

Lazaro testified that he felt angry and infuriated. (R.736) He said:

I felt a lot of emotions inside. I felt -- you know, it all happened so fast. It's not like I woke up and, you know what I mean it happened. You know what I mean, I felt a lot of emotions. It happened really fast and there was

a lot of emotions that I was feeling at the time that this happened.
(R.738)

Under these circumstances, there was, at the very minimum, "some evidence" to support a serious provocation instruction. The jury heard that prior to Lazaro hitting Raul with the car, Raul and Delilah kidnaped his girlfriend for hours, threatened her life after beating her repeatedly if Lazaro did not find Delilah's television, the police refused to help Lazaro find Irene, there was a verbal and physical altercation with Raul and Delilah, and then a final threat to Lazaro's life by Raul. Certainly this series of events could "excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2011). In fact, Lazaro testified that he was feeling so many emotions, including anger and infuriation. See Leach, 405 Ill. App. 3d at 315-16 (the question is whether there is evidence of the defendant's "rage, anger, resentment, or terror sufficient to establish provocation).

Moreover, Raul and Lazaro were engaged in mutual combat or quarrel. Mutual Combat is sufficient to require an instruction to the jury on second degree murder based on serious provocation. People v. Austin, 133 Ill. 2d 118, 125 (1989). Mutual Combat is a fight that both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat. McDonald, 2016 IL 118882, ¶159, citing Austin, 133 Ill. 2d at 125. Here, Raul, along with Delilah, instigated the quarrel. See Austin, 133 Ill. 2d at 126 (one who instigates combat cannot rely on the victim's response as evidence of mutual combat sufficient to mitigate the killing of that victim from murder to manslaughter). Raul and Delilah went to Lazaro's home and physically assaulted and kidnapped Irene for several hours during which they made demands of and threats to Lazaro. When Raul and Delilah got out of the car after they pulled over, they immediately started

arguing with Lazaro. When Lazaro asked Pipes to get Irene out of the car, Raul moved toward the driver's seat of the car as if to get back in. Lazaro did nothing to instigate the series of events that led to Raul's death.

In addition, while Lazaro may have punched Raul to prevent him from getting back in the car, Raul then engaged in a fistfight with Lazaro, and according to Carlos was "beating the shit" out of Lazaro when Carlos arrived. And, Lazaro testified that Delilah came up behind him and swung at him, causing Lazaro to swing back at her. Thus, all parties engaged in the struggle willingly, supporting a finding of mutual combat. See Austin, 133 Ill. 2d at 126.

When the mutual combat occurs immediately preceeding or during the infliction of death, the second degree murder instruction may not be refused. *People v. Robinson*, 189 Ill. App. 3d 323, 349-350 (1st Dist. 1989). Here, the mutual combat between Raul and Lazaro occurred immediately preceeding Raul getting hit by the car, and as such, the trial court erred in refusing to instruct the jury on second degree murder based on provocation. Furthermore, the Appellate Court erred in upholding Lazaro's conviction and 40 year sentence.

Petitioner will now present his next question to The Court.

Whether or not the decision of the Appellate Court of Illinois First Judicial District, Fourth Division entered on May 30, 2019 in petitioner's case conflicts with the decision of another United States court of appeals decision on the same important matter (*People v. Johnson*, 4 Ill. App. 3d 249 (1972)) in such a way as to call for an exercise of This Court's Supervisory power?

People v. Johnson, 4 Ill. App. 3d 249, 250-53 (1st Dist. 1972). In *Johnson*, the defendant, who was 17 years old, witnessed a fight between the deceased and one of his friends following a dance. *Johnson*, 4 Ill. App. 3d at 250. After blows were exchanged between the friend and

the deceased, the defendant became involved. *Id.* During the fight, the defendant pulled out a knife and stabbed the deceased in the leg. *Id.* The defendant was convicted of murder, and on appeal, he argued that he acted in self-defense and defense of another, and that his conviction should be reduced to Voluntary Manslaughter. *Id.* at 250.

In examining the evidence, the appellate court noted, "While it is clear that viewing the evidence in calm detachment from the event, defendant did not act reasonably in stabbing an unarmed man in the leg, such a detached reflection cannot be required of a 17-year-old youth who was being pummelled [*sic*] by a bigger man. It is the defendant's state of mind at the time of the incident that is the critical element." Johnson, 4 Ill. App. 3d at 251. The appellate court found that the deceased was the aggressor, and that his conduct was initially justified on the basis of self-defense. *Id.* It went on to consider, however, whether the defendant's conduct was the product of strong provocation warranting a reduction in his conviction from murder to manslaughter. *Id.* at 252-53. It noted that strong provocation applied to a "sudden act of revenge," and that "the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt." *Id.* It noted that the provocation was instigated by the deceased, and reduced the defendant's conviction to voluntary manslaughter. *Id.* at 252-253.

Similarly, Lora's actions were the product of strong provocation. Further evidence of this was introduced to the jury by the state, when the state played a video statement during the trial. The video statement was created at the Chicago Police Department on June 2, 2011 during the investigation surrounding the homicide of Raul Medina. (R.712) During the videotaped statement, defendant told the officers: "I get the car going because it's a stick shift but I'm a truck

driver so I know how to drive a stick shift. So I put the stick shift on and I made a right onto Kedzie then I was headed northbound on Kedzie this guy starts chasing this car on foot and running up the car "motherfucker I'm going to kill you! Motherfucker I'm going to kill you! And he's chasing us in this car. So now I'm feeling threatened again because I'm like you're going to kill me and I'm like thinking like this man is going to come back another time and fuckin' I'm going to have to keep my eyes open all the time now and I'm going to constantly - I'm going to live in fear now cuz this guy just broke into my house, beat on my girlfriend and stole her away and now he's chasing us talking about he's going to kill us and that excited me to make a u-turn because I felt threatened again. So I make a u-turn and I started driving the car towards him and he was still talking shit, still talking shit. And then when he realized what I was going to do - that I was coming straight at him with the car, he tried to take off running and at that time and honestly, I had no type of sympathy or remorse for this guy. I was full of anger and hatred and just you know - basically tried to erase the whole situation. I didn't want this guy coming back to haunt us and I'm going to end this right now. I only had one thing on my mind and that was I'm going to end this right now and I hit him with the car" (People's Exhibit 110; Disc 1, Video 4)

In fact, this video statement contains the very language of serious provocation from beginning to end. Various examples of this language contained within the video statement read as follows:

Lazaro says "I'm going to live in fear now, cuz this guy just broke into my house, beat on my girlfriend, and stole her away,

and now he's chasing us talking about he's going to kill us and that excited me to make a u-turn." A "serious provocation" is defined as "Conduct sufficient to excite an intense passion in a reasonable person." 720 ILCs 5/9-2(b) (West 2011) (emphasis added). Here, Lazaro describes his 'sudden and intense passion' resulting from Raul's conduct immediately after the final threat on his life.

In another instance Lazaro says "I was full of anger and hatred and just you know-basically tried to erase the whole situation. I didn't want this guy coming back to haunt us and I'm going to end this right now. I only had one thing on my mind and that was I'm going to end this right now and I hit him with the car." The question is whether there is evidence of the defendant's "rage, anger, resentment or terror sufficient to establish provocation." (emphasis added) See *People v. Leach*, 405 Ill. App. 3d 297, 315-16 (1st Dist. 2010). Not only does Lazaro explicitly express anger towards Raul but he expresses terror and resentment as well when he uses the phrase 'I didn't want this guy coming back to haunt us' expressing terror and using the word 'hatred' expressing resentment also.

There is more here to be sure, and petitioner will at various times throughout the course of this writ refer back to this video statement and the language used by Lazaro to not only demonstrate evidence of serious provocation, but also show that his case should not be so easily distinguished from that of, *People v. Johnson*, 4 Ill. App. 3d 249 (1st Dist. 1972). Furthermore, petitioner will conduct an in depth examination of the Johnson case and the rulings within (*People v. Hough*, 102 Ill. App. 2d 287, 243 N.E. 2d 520; *People v. Stephany*, 76 Ill. App. 2d 131, 221 N.E. 2d 798;

People v. Gadjia, 87 Ill. App. 2d 316, 232 N.E. 2d 49;') to show that the provocation in petitioner's case which was an ongoing "quarrel of some duration" between Lazaro and Raul is in agreement with and probably more serious than what is minimally required for a finding of voluntary manslaughter (2nd degree murder). Thus, showing that the trial court erred in this case by refusing to instruct the jury on second degree murder based on serious provocation, and that the Appellate Court erred also, when issuing a judgement distinguishing this case from that of Johnson, (1972).

People v. Johnson, 4 Ill. App. 3d 249 at 252 reads as follows:
"The law in Illinois is well settled that mutual quarrel or combat is sufficient to support a finding of serious provocation. People v. Hough, 102 Ill. App. 2d 287, 243 N.E. 2d 520; People v. Crews, 38 Ill. 2d 331, 231 N.E. 2d 451; People v. Stepheny, 76 Ill. App. 2d 131, 221 N.E. 2d 798; People v. Rice, 351 Ill. 604, 184 N.E. 894.

In the Hough case, supra, a fight ensued after a name calling battle. The deceased was struck with a baseball bat while trying to break up the fight. In reviewing the conviction for manslaughter the court said (p. 297, 243 N.E. 2d p. 525):

'From the time the defendant's saw Huey (the deceased) until he was fatally injured, there was no pause in the activities of the participants sufficient to show that the fatal blows were attributable to malice or revenge. There was no 'cooling off period' for the 'voice of reason to return.'

Likewise, there was no pause in the activities of the two combatants in the case before us to show that the fatal blow was attributable to malice or revenge. Indeed the provocation in this case, which was an unlawful physical assault by the deceased, appears to have been more serious than what is thought to be minimally required for

a finding of voluntary manslaughter. In *People v. Stepheny*, *Supra*, the reviewing court found that a quarrel of some duration between the defendant and the deceased over betting in a crap game was sufficient provocation to reduce the homicide to voluntary manslaughter. In *People v. Gadja*, 87 Ill. App. 2d 316, 232 N.E. 2d 49, there was also a quarrel of some duration and the defendant testified that the deceased had physically attacked him. The latter fact was contradicted by the state's evidence. Notwithstanding that, the court found the provocation sufficient to support a conviction of voluntary manslaughter.

As the provocation which aroused the passion of the defendant was sufficient in law and in fact to come within the definition of serious provocation as contemplated by the Manslaughter Statute, the conviction will be reduced from murder to voluntary manslaughter. Our decision makes unnecessary any consideration of the issues of self defense and improper closing argument raised on appeal by defendant. "Johnson, *Id.*

Like wise, as in *Stepheny*, (1966), and *Gadja*, (1967), as cited in *Johnson*, 41 Ill. App. 3d 249 at 252, Lazaro and Raul were engaged in a 'quarrel of some duration' that began when Raul and Delilah went to Lazaro's home and physically assaulted and kidnapped his girlfriend Irene. The evidence of what happened during this ongoing 'quarrel of some duration' was presented to the jury by the defense at trial. There was no break to the sequence of events, from the time Raul and Delilah instigated this quarrel by kidnapping Irene, all the way up into the fight between Lazaro, Raul and Delilah, leading up to the fatal blow. From the time Lazaro saw Raul until he was fatally injured, 'there was no pause in the activities of the participants sufficient to show

that the fatal blows were attributable to malice or revenge. There was no 'cooling off period' for the 'voice of reason to return.' Johnson, 4 Ill. App. 3d 249 at 252 (Citing People v. Hough, 102 Ill. App. 2d 287 at 297 (1968)).

In this case the fight ended between Lazaro, Raul and Delilah when Raul backed up and Lazaro got into the vehicle (R. 417-418, 639, 699). The very next thing that happens is Lazaro makes a right hand turn on Kedzie and Raul starts chasing the car shouting "Motherfucker I'm going to kill you. Motherfucker I'm going to kill you!" (People's Exhibit 110; Disc 1, video 4) (R. 412) Here, at this juncture of the video, for a moment we see Lazaro attempting to conduct himself as a reasonable person would by taking Raul's car and attempting to drive away. At this point it could even be said that Lazaro's actions were justified on the basis of self-defense (defense of another), as Raul had been the aggressor throughout the course of their mutual quarrel or 'quarrel of some duration' which included the fight, that happened towards the end. 'As the deceased had been the aggressor, defendant's conduct was justified on the basis of self-defense.' Johnson, 4 Ill. App. 3d 249, at 251 (1972). However, as Lazaro stated in the video, the continued aggressive-ness conducted by Raul, in chasing the car and shouting verbal threats, accompanied by Raul's conduct throughout the course of their mutual quarrel, or quarrel of some duration, 'excited' Lazaro to make the U-turn. (emphasis in original) (See People's Exhibit 110; Disc 1, video 4). As stated above, there was 'no cooling off period' for the 'voice of reason to return.' Johnson, Id. at 252 (Citing People v. Hough, 102 Ill. App. 2d 287 at 297 (1968)). The 'voice of reason' would certainly told Lazaro to 'just keep driving,' 'just go,' 'just leave,' any of those things or something similar. Instead Lazaro's

thoughts are the following as depicted in the video statement. (People's Exhibit 110; Disc 1, Video 4). 'So I make a v-turn and I started driving the car towards him and he was still talking shit, still talking shit. And then when he realized what I was going to do - that I was coming straight at him with the car, he tried to take off running and at that time and honestly, I had no type of sympathy or remorse for this guy. I was full of anger and hatred and just you know - basically tried to erase the whole situation. I didn't want this guy coming back to haunt us and I'm going to end this right now. I only had one thing on my mind and that was I'm going to end this right now and I hit him with the car.' Clearly, at this time due to serious provocation on the part of Raul, the 'voice of reason' is gone from Lazaro's mind. There's no 'cooling off period' as cited in Johnson, Id. and Houghs, Id. Even when Raul tries to take off running, Lazaro says "I had no sympathy or remorse for this guy (Raul). I was full of anger and hatred," and that's what serious provocation is. A "serious provocation" is defined as "conduct sufficient to excite an intense passion in a reasonable person."

720 ILCS 5/9-2(b) (West 2011). The state of mind for second-degree murder based on provocation has also been "described as an act of passion or sudden act of revenge." People v. Dare, 140 Ill. App. 3d 413, 419-20 (1st Dist. 1986); See John F. Decker and Christopher Kapacz, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES, p. 6-64 (5th ed. 2012) (this quoted language "best describe[s]" the "state of mind in 'provocation' second degree murder"). The question is whether there is evidence of the defendant's "rage, anger, resentment or terror sufficient to establish provocation." See Leach, 405 Ill. App. 3d 297, 315-16 (1st Dist. 2010). The distinction between first degree murder and second degree murder is "a recognition of human failings under stress, and the distinction is designed to aid the person who, through no fault of his own, finds himself in a stressful situation."

where perceptions and judgement may be impaired." *People v. Manigan*, 97 Ill. App. 3d 885, 887 (1st Dist. 1981). These are the factual determinations that the trial court took from the jury by refusing to instruct them on second-degree murder based on "Serious provocation" at Lazar's trial. See *People v. Washington*, 2012 IL 110283, ¶60 (where evidence supported a second-degree murder theory, refusal to give proper instruction was not harmless because it "took the factual determination from the jury"). Indeed, in viewing the evidence from calm detachment of the event one could see that Lazar may have acted unreasonably hitting Raul who was unarmed with the car, but such a detached reflection cannot be required of a 24 year old Young Adult (who was drinking with friends earlier in the day), who was put through such a harrowing ordeal throughout his 'quarrel of some duration' that took place between him and Raul. 'It is the defendant's state of mind at the time of the incident that is the critical element.' *People v. Williams*, 56 Ill. App. 2d 159, 205 N.E. 2d 749 (Also Cited in *Johnson*, 1972)

In *Johnson*, 4 Ill. App. 3d 249 at 251 (1972) a similar ruling was made. The court held that, 'while it is clear that viewing the evidence in calm detachment from the event, defendant did not act reasonably in stabbing an unarmed man in the leg, such a detached reflection cannot be required of a 17-year old youth who was being pummelled by a bigger man. It is the defendant's state of mind at the time of the incident that is the critical element. *People v. Williams*, 56 Ill. App. 2d 159, 205 N.E. 2d 749.'

'Mere words, of course, do not constitute sufficient provocation to reduce a killing from murder to manslaughter.' *People v. Grjds*, 87 Ill. App. 2d 316 (1967) at 322. However, the evidence introduced at trial discloses that a great deal more than mere words

transpired between the deceased and the defendant prior to the fatal shooting. *Gajda*, 87 Ill. App. 2d 316, at 323 (1967). The State introduced evidence of a 'quarrel of some duration.' *Id.* See *People v. Stepheny*, 76 Ill. App. 2d 131, 134, 221 N.E. 2d 798. *Id.*

Likewise, here in this case, more than mere words transpired between Raul and Lazaro prior to the fatal blow. The Defense introduced evidence of a 'quarrel of some duration,' see *People v. Stepheny*, 76 Ill. App. 2d 131, 134, 221 N.E. 2d 798; *People v. Gajda*, 87 Ill. App. 2d 316, at 323 (1967).

In *Gajda*, 87 Ill. App. 2d 316 at 323 (1967). The defendant himself introduced evidence by a violent physical attack upon his person by the deceased; that there was '*** an attempt *** made by the deceased to inflict a personal injury.' See *People v. Harris*, 8 Ill. 2d 431, 434, 134 N.E. 2d 315. *Id.* Finally, the defendant introduced evidence contradicting the State's witnesses to the effect that he had acted in self-defense. *Id.* However, the jury could choose to disbelieve him and find that he had not entertained a 'reasonable' belief in the need to wield deadly force to protect himself. Such a conclusion by the jury would justify a finding of manslaughter. See Ill. Rev. Stat. C. 38.5 9-2(b).

Likewise, here Lazaro introduced evidence by a violent physical attack upon his person by the deceased; that there was '*** an attempt *** made by the deceased to inflict a personal injury.' See *People v. Harris*, 8 Ill. 2d 431, 434, 134 N.E. 2d 315. Furthermore, evidence of this was corroborated by the State's witness Carlos Galindo when Carlos testified that Raul, was "beating the shit" out of Lazaro, (R.416). Moreover, the jury heard evidence of Carlos testifying previously to the Grand Jury that the defendant "just snapped" at that moment Raul chased the car and issued his final threat, (R.427)

Carlos testified that Raul was "running up to fight" and testified that he "looked aggressive" and was "still mad." (R.423)

Certainly, the jury could choose to believe Carlos and find that Lazaro "snapped" after getting the 'shit beat out' of him by Raul who was chasing after the car 'running up to fight' and still 'looking aggressive'. Such a conclusion by the jury would justify a finding of second degree murder based on 'Serious Provocation'.

see 720 ILCs 5/9-2(a)(1) (West 2011); 720 ILCs 5/9-2(b) (West 2011).

Especially, after the defense presented uncontested evidence that Raul had been the aggressor throughout his and Lazaro's 'mutual quarrel' or 'quarrel of some duration' see *People v. Gajda*, 87 Ill. App. 2d 316 at 323; *People v. Stephens*, 76 Ill. App. 2d 131, 134, 221 N.E. 2d 798. Indeed, the jury could have chosen to find that Lazaro had not entertained a 'reasonable' belief in the need to respond to Raul's "serious provocation(s)" by wielding deadly force and such a conclusion by the jury would still justify a finding of second degree murder based on 'Serious Provocation'. Because that's what second degree murder is. It is a legal compromise between murder and exoneration, recognizing the human weakness of an intension passion caused by serious provocation' *People v. Johnson*, 4 Ill. App. 3d 249 at 252 (1972). (Citing Ill. Rev. Stat. 1967, Ch. 38, par 9-2, Committee Comments.). The state of mind involved in voluntary manslaughter has been variously described as an 'act of passion' and 'sudden act of revenge,' differentiating its culpability from that state of mind involved in murder. *Jahson, Id.* 'The law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. *Id.* (Citing 4 Blackstone (7th ed.) 191-192).

In this case, there was some evidence that warranted the provocation instruction. Raul and Delilah kidnapped Lazaro's

girlfriend, Irene Ayala, beat her and choked her, hanging her out of a third story window, before putting her in the trunk of Raul's car, and driving her around for hours moving her back and forth from the trunk to the back seat, all the while continuing to beat her, and calling Lazaro on his cell phone forcing him to listen to Irene being beaten while they made demands of him, and further threats to harm Irene if he chose not to comply with their demands. Lazaro did what any reasonable person is expected to do and called the police, but they refused to help him find Irene and told Lazaro that if he called them again then, "he would be the one to go to jail." In his attempt to get Irene back, Lazaro complied with the Kidnappers demands and located their missing stuff. Raul and Delilah still refused to let Irene go, even after Lazaro begged and pleaded for them to do so. Lazaro then engaged in a fist fight with Raul and Delilah in order to protect Irene and get her back, and just before Raul was hit by the car, Raul threatened to kill Lazaro.

As stated above, these are the facts of the case, they are clear and they are uncontested. Furthermore, the facts of the case show that Lazaro conducted himself as a reasonable person would have throughout the entire duration of his quarrel with Raul, and that Lazaro was pushed, and pushed, and threatened repeatedly during the course of their "mutual quarrel" or "quarrel of some duration." The law in Illinois is well settled that "mutual quarrel" or combat is sufficient to support a finding of serious provocation. (emphasis added) *People v. Johnson*, 4 Ill. App. 3d 249 at 252 (1972). In *People v. Stephens*, *Supra*, the reviewing court found that a "quarrel of some duration" between the defendant and the deceased over betting in a crap game was sufficient provocation to reduce the homicide to voluntary manslaughter. In *People v. Gadja*, 87 Ill. App. 2d 316, 232 N.E. 2d 49, there was also

a "quarrel of some duration" and the defendant testified that the deceased had physically attacked him. (Emphasis added) Johnson, Id. Moreover, it was at the moment immediately after the fight, when Raul started chasing the car and issued his final threat(s) to Lazaro, that Lazaro had finally succumbed "to the human weakness of an intense passion caused by serious provocation." Johnson, Id. (Citing 7 Ill. Rev. Stat. 1967, Ch. 38, par 9-2, Committee Comments). It was in that moment of human weakness that Lazaro made a u-turn and hit Raul with the car. According to the evidence presented at trial Lazaro's state of mind at that moment could best be described as an "act of passion" and "sudden act of revenge." The state of mind involved in voluntary manslaughter has been variously described as an "act of passion" and "sudden act of revenge," differentiating it's culpability from that state of mind involved in murder. Johnson, Id. (The law says that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt.' Id. (Citing 4 Blackstone (7th ed.) 191-92). Certainly, when viewing the evidence of this case, the jury could have come to the same conclusion, that at the time of the killing, Lazaro had acted under a sudden and intense passion resulting from "serious provocation." Such a conclusion by the jury would justify a finding of second degree murder. See 720 ILCS 5/9-2(a)(1) (West 2011); 720 ILCS 5/9-2(b) (West 2011).

For those reasons, as well as the following reasons Lazaro Zapata was denied his right to a fair trial where the trial court refused to instruct the jury on second degree murder based on provocation, and the Appellate Court of Illinois First Judicial District, Fourth Division also erred when it entered a decision on May 30, 2019 in Lazaro's case that conflicts with the decision of another United States Court of appeals decision on the same important matter (People v. Johnson, 4 Ill. App. 3d 249 (1972)).

On May 30, 2019 The Appellate Court of Illinois First Judicial District, Fourth Division filed a Court order and entered a decision that distinguishes Lazaros Case from that of People v. Johnson, 411. App. 3d 249 (1972) and upholding Lazaros conviction and 40 year sentence. In it's decision the Appellate Court stated the following:

Held: The trial Court did not abuse it's discretion in declining to instruct the jury on second degree murder based on provocation where there was insufficient evidence of mutual combat or other "legally-recognized sources of provocation." (emphasis added) (See Appellate Court Order at ¶1 Attached to Appendix A).

The Appellate Court's order is wrong in it's entirety because the Court omits "Mutual Quarrel" from one of the legally recognized sources of provocation and bases it's entire decision on the omission of that source and undermining the case laws governing 720 ILCS 5/9-2(a)(1) (West 2011) and 720 ILCS 5/9-2(b) (West 2011). A further example of this omission is found at ¶35 in the Appellate Court order when the Court gives consideration to Lazaros video statement, but fails to address that Lazaros specifically stated the following:

"I'm going to live in fear now cuz this guy just broke into my house, beat on my girlfriend and stole her away and now he's chasing us talking about he's going to kill us and that "excited" me to make a U-turn." (emphasis added) (People's Exhibit 110; Disc 1 video 4). That U-turn immediately preceded Raul's death. Serious Provocation is conduct sufficient to excite an intense passion in a reasonable person. 720 ILCS 5/9-2(b) (West 2011).

Moreover, The Appellate Court touts People v. McDonald, 2016 IL 118882 throughout the course of it's judgement. However, The Appellate

Court not only incorrectly cites McDonald, 2016, on more than one occasion, but then proceeds to do the very thing that the Illinois Supreme Court in McDonald warned the lower courts in Illinois not to do "It is not the province of the trial court to weigh the evidence when deciding whether a jury instruction is justified." McDonald, 2016 IL 118882 at ¶ 25. Here, in this case the Appellate Court acknowledges that the trial court made its decision not to instruct the jury on serious provocation based on Lazaro's testimony at trial. (See Appellate Court order at ¶ 38 attached to Appendix A). In reaching this decision, the trial court stated:

"[I]t's very clear to me that the testimony that I heard today from this defendant was that he acted in the way he acted because they struck first and he was trying to protect himself and trying to protect Irene Ayala from what they did then and what they were going to do in the future."

In fact, Lazaro testified that he felt angry and infuriated. (R. 736)

[T]he question is whether there is ~~evidence~~ of the defendant's "rage, anger, resentment or terror sufficient to establish provocation." People v. Leach, 405 Ill. App. 3d at 315-16 (1st Dist. 2010)

In addition, the evidence of serious provocation in Lazaro's case could also be found in Irene Ayala's testimony, who was Lazaro's girlfriend at the time, and gave a very detailed account of the harrowing ordeal that her and Lazaro went through during Lazaro's "mutual quarrel," or 'quarrel of some duration' with Raul that started when Raul and Delilah went to her and Lazaro's home and physically assaulted and kidnapped her. The law in Illinois is well settled that "mutual quarrel" or combat is sufficient to support a finding of serious provocation.

(emphasis added) Johnson, 4 Ill. App. 3d 249 at 252 (1972) (See also, People v. Gadja, (1967) and People v. Stephens, (1966) where the court ruled that a

'quarrel of some duration' was sufficient to establish serious provocation).

Evidence of serious provocation in Lazaro's case could also be found in various instances throughout the testimony of State's witness Carlos Galindo who testified that when he arrived on the scene Raul was twice as big and was "beating the shit" out of Lazaro. In Johnson, (1972) the defendant who was a 17-year old youth was also pummelled [sic] by a bigger man. It is the defendant's state of mind at the time of the incident that is the critical element. People v. Williams, 56 Ill. App. 2d 159, 205 N.E. 2d 749. Furthermore, the jury heard evidence that Lazaro "just snapped" and Raul was "running up to fight" and "still looked aggressive" immediately before Lazaro hit Raul with the car. Thus, there was no pause in the activities of the participants to show that the fatal blows were attributable to malice or revenge. Johnson, 4 Ill. App. 3d 249, at 252 (citing Hough, 102 Ill. App. 2d 287 (1968)).

Graciela Sandoval, also testified that Lazaro and Raul exchanged unpleasant words right before Lazaro hit Raul with the car. Mere words, of course do not constitute sufficient provocation to reduce a killing from murder to manslaughter. However, the evidence introduced at trial discloses that a great deal more than mere words transpired between Lazaro and Raul prior to the fatal blow. In this case as in Gadjia, (1967) and Stepheny, (1966) it was more than mere words that were said but also evidence that Lazaro and Raul engaged in a quarrel of some duration.

Finally the defendant's video-statement presented at trial as People's Exhibit 110; Disc 1, Video 4 has been discussed at length throughout the course of this argument and the defendant maintains that the very nature of provocation is found all throughout this video. 'There was no cool off period for the voice of reason to return': Johnson, (1972) (citing Hough). 'Recognizing the human weakness

of an intense passion." Johnson, (1972) (Citing Ill. Rev. Stat. 1967, Ch. 38, par 9-2, Committee Comments). "Regard to human frailty, as to not put a hasty and deliberate act on the same footing with regard to guilt." Johnson, (1972) (Citing 4 Blackstone (7th ed.) 191-92. "Anger and hatred" as stated by Lazaro (see Leach (1st Dist. 2010)). The very essence of provocation is in these words said by Lazaro found in the video-statement, here, Lazaro shows that it's more than Raul's words and actions at this point, but Raul's conduct throughout the course of their "mutual quarrel" or "quarrel of some duration" that was still ongoing after the fight. "I'm going to live in fear now cuz this guy just broke into my house, beat on my girlfriend and stole her away and now he's chasing us talking about he's going to kill us and that excited me to make a u-turn because I felt threatened again. So I make a u-turn and I started driving the car towards him and he was still talking shit, still talking shit. And then when he realized what I was going to do - that I was coming straight at him with the car, he tried to take off running and at that time and honestly, I had no type of sympathy or remorse for this guy. I was full of anger and hatred and just you know - basically tried to erase the whole situation. I didn't want this guy coming back to haunt us and I'm going to end this right now. I only had one thing on my mind and I'm going to end this right now and I hit him with the car." A "serious provocation" is defined as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2011). Quite frankly, it's all there, and for the trial court not to instruct the jury at Lazaro's trial based on a portion of his testimony in light of all the evidence presented, it's just wrong. We hold that the appropriate standard for determining whether a defendant is entitled to a jury

instruction on a lesser-included offense is whether there is "some evidence" in record that, if believed by the jury, will reduce the crime charged to a lesser offense, not whether there is "some credible" evidence. It is not the province of the trial court to weigh the evidence when deciding whether a jury instruction is justified. *People v. McDonald*, 2016 IL 118982 at 925 (Citing *Lockett*, 82 Ill. 2d at 552-53, 45 Ill. Dec. 900, 413 N.E. 2d 378; *Jones*, 175 Ill. 2d at 132, 221 Ill. Dec. 843, 676 N.E. 2d 646. The Court in *McDonald*, (2016) went on to further consider "Requiring that credible evidence exists in the record risks the trial court invading the function of the jury and substituting its own credibility determination for that of the jury." *McDonald*, Id. at 925 (Citing *Willett*, 2015 IL App (4th) 130702, 988, 394 Ill. Dec. 990, 37 N.E. 3d 469) As in this case the trial court invaded the function of the jury and substituted its own credibility determination for that of the jury.

Furthermore, the Appellate Court continues to weigh the evidence in *Lazaros* case from inconsistent statements from various witnesses at trial, to the proportionate manner in which *Lazaros* retaliated, the latter being weighed against omissions and misapplied state law, and it is omissions of this sort that undermine our State Legislature and Fundamental Rule of Law. If left unchecked, these omissions will not only serve to uphold *Lazaros*'s conviction and 40 year sentence, but will improperly serve to distinguish this case from that of *People v. Johnson*, 4 Ill. App. 3d 249 (1972), also, these omissions will serve to improperly set precedent for future courts to omit certain categories of the law, and deprive our citizens of fundamental and fair due process. A trial court's refusal to provide essential jury instructions when warranted by the evidence deprives the defendant of his rights to due process and a fair jury trial. U.S. Const., amends.

VI, XIV; Ill. Const. art. I, §§ 2, 8; *People v. Bryant*, 113 Ill. 2d 497, 502 (1986) (Citing *Beck v. Alabama*, 447 U.S. 625, 636 - 37 (1980))

The Illinois Supreme Court allowed leave to appeal in *People v. McDonald*, No. 118882, 392 Ill. Dec. 368, 32 N.E. 3d 676, on May 27, 2015.

The appeal was taken from an unpublished Rule 23 order, 2014 IL App(1st) 121009-U, 2014 WL 7099293, which discusses the conflict in Illinois precedent on the proper standard of review for reviewing a trial court's decision to give a jury instruction. Arguably, the majority is not even applying its own standard of review in *McDonald*, No. 118882, 392 Ill. Dec. 368, 32 N.E. 3d 676, since it holds that a defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence and, if there is such evidence, it is abuse of discretion for the trial court to refuse to so instruct the jury. See *McDonald*, 2016 IL 118882 at *Supra* 938.

None the less, recently the Illinois Supreme Court clarified that the standard to be used in determining whether a criminal defendant is entitled to a second degree murder instruction is whether there is "some evidence" (as opposed to "some credible evidence") that, if believed by a jury, would reduce the charge to a lesser offense. *People v. McDonald*, (2016). The court in *McDonald* also held that "The only categories recognized by this Court to constitute serious provocation are substantial physical injury or substantial physical assault, 'mutual quarrel' or combat, illegal arrest, and adultery with the offender's spouse." (emphasis added) *McDonald*, 2016 IL 118882, 9159 (Citing *People v. Garcia*, 165 Ill. 2d 409, 429 (1995)).

However, in *Lazara's* case when the Appellate Court cites *McDonald*, (2016) in its court order when considering "the only categories of legally-sufficient provocation recognized by our supreme court" it omits

"mutual quarrel" from the second category. The Appellate Court incorrectly states, "(1) substantial physical injury or assault, (2) mutual combat, (3) illegal arrest, and (4) adultery with one's spouse. See McDonald, 2016 IL 118882 ¶59." (See Appellate Court order at ¶¶ 43, 51 attached to Appendix A). Furthermore, the Appellate Court does not acknowledge or even say the word quarrel, let alone "mutual quarrel" one time throughout the entirety of its judgement, and since the facts of this case and arguments presented by the petitioner show evidence that Raul's death was the end result of an ongoing "dispute" between Lazaro and Raul (mutual quarrel or quarrel of some duration) the Appellate Court order is flawed in its entirety. When reviewing a trial court's denial of a proffered lesser-included offense instruction, the question is the correctness of the trial court's determination that defendant has not presented any evidence that would entitle him to the instruction. See *United States v. Lomax*, 816 F.3d 468, 475-77 (7th Cir. 2016). (For further evidence of the ongoing dispute or quarrel of some duration that occurred between Lazaro and Raul presented to the trial court see Motion Limine argued and heard on September 30, 2014 attached to Appendix D). Instead of considering all of the evidence in Lazaro's case however, The Appellate Court chooses to focus on the mutual combat aspect of what happened, immediately preceding Raul's death, and improperly draws distinctions between the laws of serious provocation (second degree murder) and the proportionate manner in which Lazaro responded to Raul's actions, relying on omissions and misapplied state law.

People v. Austin, 133 Ill.2d 118 (1989), relied on by the Appellate Court is distinguishable. (Appellate Court order ¶45 at Appendix A). In *Austin*, the defendant admitted that she had wrongfully boarded the bus and had attempted to wrongfully take a bus transfer. *Austin*, 133 Ill.2d at 126. By striking the defendant on the hand with the transfer

punch, the driver was preventing defendant from stealing a transfer. *Id.* A fistfight ensued and then the defendant shot and killed the bus driver. *Id.* The Court held that the defendant was not entitled to an instruction on provocation because the defendant had attacked the victim on slight provocation with disproportionate violence. *Id.* Here, on the other hand, Raul and Delilah seriously provoked Lazaro by kidnapping and beating Irene, holding her hostage and making demands of and threats to Lazaro over the course of hours, attempting to prevent Irene from getting out of the car, engaging in a fistfight with Lazaro and then threatening to kill Lazaro. Lazaro's response, therefore, was not disproportionate to the significant provocation. Moreover Raul and Delilah instigated the quarrel. See Austin, 133 Ill. 2d at 126 (one who instigates combat cannot rely on the victim's response as evidence of mutual combat sufficient to mitigate the killing of that victim from murder to manslaughter). Lazaro did nothing to instigate the series of events that led to Raul's death.

In addition, while Lazaro may have punched Raul to prevent him from getting back in the car, Raul then engaged in a fistfight with Lazaro and according to Carlos was "beating the shit" out of Lazaro when Carlos arrived. And, Lazaro testified that Delilah came up behind him and swung at him, causing Lazaro to swing back at her. Thus, all of the parties engaged in the struggle willingly, supporting a finding of mutual combat. See Austin, 133 Ill. 2d at 126.

The Appellate Court's attempt to compare Lazaro's case to those cited in its Appellate order fails in that, the amount of provocation suffered by the defendant(s) in their respective cases, pales significantly to the amount of provocation suffered to

Lazaro by Raul in the instant case.

In McDonald, 2016 IL 118882, at ¶65 according to witnesses the defendant was the one 'spoiling for a fight.' The court also noted the evidence that the defendant had stabbed the deceased on a prior incident.

In Melecio, 2017 IL App (1st) 141434 (2017), ¶¶ 14, 17, the provocation came from an alleged punch by the deceased. Furthermore, the defendant took the stand and denied having any fight or passion toward him on the night of the murder. Melecio, 2017 IL App (1st) 141434, ¶ 106

In Randall, 2016 IL App (1st) 143371, ¶ 49, the provocation was the victim's 'comical' attempts to hurt the defendant. Furthermore, the defendant's actions were even more disproportionate where the defendant in Randall testified that he was "just laughing" at the victim's attempt to swing at him.

In Lauderdale, 2012 IL App (1st) 100939, ¶¶ 27, 34, the provocation was one punch to the face.

In Sutton, 353 Ill. App. 3d at 496, the defendant was of 'superior size and strength' when compared to the deceased. Plus, unlike Lazaro's case Lazaro engaged in the quarrel of some duration and the mutual combat to protect Irene and the jury was instructed on defense of another putting his case more in line with Johnson (1972) rather than Sutton (2004).

People v. Slaughter, 84 Ill. App. 3d 1103, 1110 (1980), is also not on point. In Slaughter, at a party, the victim threw the defendant against a wall and choked him. Id. When the victim eased his grip, the defendant retreated, pulled out his knife and said, "Don't come to me, don't grab me no more." Id. The defendant then left, but returned twenty minutes later. The victim grabbed the defendant again, placing one hand on his jacket and the other on his throat. Id. The defendant.

testified that he stabbed victim because he was afraid that victim, who was bigger and stronger, would kill or seriously injure him. *Id.* This Court held that the defendant was not entitled to a provocation instruction because he was motivated by fear and claimed to have acted in self-defense, rather than motivated by sudden and intense passion due to serious provocation. *Id.*

In this case, not only did Lazaro testify that he felt angry and infuriated, (R.736) But the defense showed evidence of an ongoing 'quarrel of some duration' between Lazaro and Raul that night through the testimonies of Lazaro and his girlfriend Irene Ayala. Furthermore, Carlos Galindo provided evidence corroborating Lazaro and Irene's testimony that a fistfight occurred between Lazaro and a much bigger Raul who was "beating the shit" out of Lazaro when Carlos arrived. The jury also heard evidence that State's Attorney's Witness Carlos Galindo testified at the grand jury that Lazaro "just snapped" after Raul's final threats and aggressive conduct immediately after the fight. Finally, the jury heard the very nature and language of Lazaro's sudden and intense passion brought on by the conduct of Raul in the video-statement presented at trial. (People's Exhibit 110; Disc 1, Video 4). A mitigating factor exists to reduce first-degree murder to second-degree murder if, at the time of the killing, the defendant acts under a sudden and intense passion resulting from "serious provocation" 720 ILCS 5/9-2 (a)(1) (West 2011). A "serious provocation" is defined as "conduct sufficient to excite an intense passion in a reasonable person" 720 ILCS 5/9-2(b) (West 2011). Therefore, Lazaro was entitled to the provocation instruction.

As stated before, none of the cases in the Appellate Court's

judgement addresses a 'quarrel of some duration' and the provocation in those respective cases (including *People v. Castillo*, 2018 IL App (1st) 153147, 936; *People v. Thompson*, 354 Ill. App. 3d 579, 589-590 (2004); *People v. Pugh*, 187 Ill. App. 3d 860, 868 (1989)) pales significantly when compared to the provocation in the immediate case.

Indeed, after conducting a thorough examination of *People v. Johnson*, 4 Ill. App. 3d 249 (1972) and the rulings within (*People v. Hough*, 102 Ill. App. 2d 287 (1968); *People v. Gadja*, 87 Ill. App. 2d 316 (1967); *People v. Stepheny*, 76 Ill. App. 2d 131 (1966)) and comparing the results with the evidence in this case, Lazarus case should not be so easily distinguished from that of *Johnson*, (1972). Contradictory to the Appellate Courts ruling in this case, there was no pause between the activities of the two participants to show that the fatal blow was attributable to malice or revenge. Also, as addressed in this petition Lazarus's response was not grossly disproportionate to Raul's provocation. "Indeed, the provocation in this case, which was an unlawful physical assault by the deceased, appears to have been more serious than what is thought to be minimally required for a finding of voluntary manslaughter. In *People v. Stepheny*, *Supra*, the reviewing Court found that a quarrel of some duration between the defendant and the deceased over betting in a crap game was sufficient provocation to reduce the homicide to voluntary manslaughter. In *People v. Gadja*, 87 Ill. App. 2d 316, 232 N.E. 2d 49, there was also a quarrel of some duration and the defendant testified that the deceased had physically attacked him. The latter fact was contradicted by the State's evidence. Notwithstanding that, the court found the provocation sufficient

to support a conviction of voluntary manslaughter." *People v. Johnson*, 4 Ill. App.3d 249 at 252 (1972). This case was more than just mere words, and more than a fistfight in the street. The 'totality of his experiences' as the Appellate Court states in ¶51 of their judgement was the provocation endured by Lazaro on behalf of the conduct of Raul during the course of their ongoing "mutual quarrel" or 'quarrel of some duration' that started when Raul and Delilah physically assaulted and kidnapped Irene and ended when Lazaro hit Raul with the car. There was no pause to the sequence of events, from the kidnapping, to the fight, to the fatal blow. "I only had one thing on my mind and that was I'm going to end this right now and I hit him with the car." (People's Exhibit 110; Disc 1, Video 4) Certainly, after viewing the evidence in this case the jury should have been allowed to consider whether Lazaro acted under a sudden and intense passion resulting from serious provocation. See Illinois Pattern Jury Instructions ("IPI"), Criminal, 7.03, 7.06B.

The trial court rejected defense counsel's request for the second degree murder based on provocation instruction, and counsel raised these errors in his post-trial motion, so they were preserved for review. (CR. 760, 868; C. 164). Since the State's evidence was not overwhelming given the uncontradicted testimony regarding the kidnapping and the fact that the court agreed to instruct the jury on self-defense and second-degree murder on an unreasonable belief in self-defense, it cannot be said that the evidence of Lazaro's guilt was so clear and convincing as to render the instructional error harmless beyond a reasonable doubt. *People v. Pomykala*, 203 Ill. d 198, 210 (2003); see *Washington*, 2012 IL 110283, ¶60 (Where

evidence supported a second-degree murder theory, refusal to give proper instruction was not harmless because it "took the factual determination from the jury"; See also *People v. Blan*, 392 Ill. App. 3d 453, 460 (2nd Dist. 2009) (erroneous failure to tender a jury instruction on a lesser offense cannot be harmless), citing *Hogan v. Gibson*, 197 F.3d 1297, 1312, n. 13 (10th Cir. 1999) (quotations omitted). Although the States vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, they agree that it must be given when supported by the evidence. See, e.g., *Christie v. State*, 580 P.2d 310 (Alaska 1978); *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979); *Westbrook v. State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *People v. Preston*, 9 Cal.3d 308, 107 Cal. Rptr. 300, 508 P.2d 300 (1973); *People v. White*, 191 Colo. 353, 553 P.2d 68 (1976); *State v. Brown*, 173 Conn. 254, 377 A.2d 268 (1977); *Matthews v. State*, 310 A.2d 645 (Del. 1973); *State v. Terry*, 336 So.2d 65 (Fla. 1976); *Loury v. State*, 147 Ga. App. 152, 248 S.E.2d 291 (1978); *State v. Travis*, 45 Haw. 435, 368 P.2d 883 (1962); *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973); *People v. Simpson*, 57 Ill. App. 3d 442, 15 Ill. Dec. 463, 373 N.E.2d 809 (1978); *Pruitt v. State*, 269 Ind. 559, 382 N.E.2d 150 (1978); *State v. Millspaugh*, 257 N.W.2d 513 (Iowa 1977); *State v. White*, 225 Kan. 87, 587 P.2d 1259 (1978); *Martin v. Commonwealth*, 571 S.W.2d 613 (Ky. 1978); *State v. Carmichael*, 405 A.2d 732 (Me. 1979); *Blackwell v. State*, 278 Md. 466, 365 A.2d 545 (1976), cert. denied, 431 U.S. 918, 97 S.Ct. 2183, 53 L.Ed.2d 229; *Commonwealth v. Santo*, 375 Mass. 299, 376 N.E.2d 866 (1978); *People v. Jones*, 395 Mich. 379, 236 N.W.2d 461 (1975); *State v. Merrill*, 274 N.W.2d 99 (Minn. 1978); *Jackson v. State*, 337 So.2d 1242 (Miss. 1976); *State v. Stone*, 571 S.W.2d 486 (Mo. App. 1978); *State v. Oswald*, 180 Mont. 530, 591 P.2d 646 (1979); *State v. Hegwood*, 202 Neb. 379, 275 N.W.2d 605 (1979);

State v. Salnier, 63 N.J. 199, 306 A.2d 67 (1973); State v. Aubrey, 91 N.M. 1, 569 P.2d 411 (1977); People v. Henderson, 41 N.Y. 2d 233, 391 N.Y.S. 2d 563, 359 N.E. 2d 1357 (1976); State v. Drumgold, 297 N.C. 267, 254 S.E. 2d 531 (1979); State v. Piper, 261 N.W. 2d 650 (N.D. 1977); State v. Kilby, 50 Ohio St. 2d 21, 361 N.W. 2d 1336 (1977); Gilbreath v. State, 555 P.2d 69 (Okla. Cr. App. 1976); State v. Thayer, 32 Or. App. 193, 573 P.2d 758 (1978); Commonwealth v. Terrell, 482 Pa. 303, 393 A.2d 1117 (1978); State v. Funchess, 267 S.C. 427, 229 S.E. 2d 331 (1976); State v. Grimes, 90 S.D. 43, 237 N.W. 2d 900 (1976); Howard v. State, 578 S.W. 2d 83 (Tenn. 1979); Day v. State, 532 S.W. 2d 302 (Tex. Cr. App. 1975); State v. Gillian, 23 Utah 2d 372, 463 P.2d 811 (1970); Painter v. Commonwealth, 210 Va. 360, 171 S.E. 2d 166 (1969); State v. Workman, 90 Wash. 2d 443, 584 P.2d 382 (1978); State v. Wayne, W.Va., 245 S.E. 2d 838 (1978); Leach v. State, 83 Wis. 2d 199, 245 N.W. 2d 495 (1978); Jones v. State, 580 P.2d 1150 (Wyo. 1978). We can not have fundamental rule of law throughout the country and a seperate rule of law in Illinois. This Court should therefore, exercise its supervisory power in order to reverse Lazaros conviction and remand for a new trial. Thus, undistinguishing petitioner's case from that of People v. Johnson, 4 Ill. App. 3d 249 (1972).

Footnote: Effective July 1, 1987, the Illinois General Assembly amended the Criminal Code and abolished the offense of voluntary manslaughter, replacing it with the offense of second-degree murder. The elements of the new offense are essentially the same as the old, except the General Assembly added a section clearly explaining both the State's and defendant's burdens of proof at a murder trial. Ill. Rev. Stat. 1987, Ch. 38, par. 9-2; see People v. Reddick (1988), 123 Ill. 2d 184, 197, 122 Ill. Dec. 1, 526 N.E. 2d 141.

CONCLUSION

For the foregoing reasons, Lazaro Zapata respectfully requests that this Court exercise its supervisory power in order to reverse Lazaro's conviction and remand for a new trial. Thus, undistinguishing petitioner's case from that of *People v. Johnson*, 4 Ill. App. 3d 249 (1972).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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12/15/19