19-7291

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE ABRAHAM GUZMAN
PETITIONER-APPELLANT,

v.

RAYMOND MADDEN, WARDEN, et al,
RESPONDENT-APPELLEE.

ON PETITIONER FOR A WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSE ABRAHAM GUZMAN,
CDCR# AL-9500 (D•2-139-UP)
CENTINELA STATE PRISON
P.O. BOX 931
IMPERIAL, CA 92251-0931

PETITIONER IN PRO PER

ORIGINAL

QUESTION(S) PRESENTED

WHETHER COUNSEL'S FAILURE TO REQUEST INSTRUCTION ON VOLUNTARY INTOXICATION WAS INEFFECTIVE ASSISTANCE OF COUNSEL

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:

RALPH DIAZ, SECRETARY OF CDCR
XAVIER BECERRA, ATTORNEY GENERAL
BARRY CARRY CARLTON,
SUPERVISING DEPUTY ATTORNEY GENERAL

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DEFENSE COUNSEL'S FAILURE TO REQUEST INSTRUCTION ON INTOXICATION WAS INEFFECTIVE ASSISTANCE OF COUNSEL. U.S. CONST., 6th & 14th AMENDMENTS.; STRICKLAND V. WASHINGTON (1984) 466 U.S. 688, 687-695.)

PETITION FOR A WRIT OF CERTIORARI

PETITIONER JOSE ABRAHAM GUZMAN RESPECTFULLY PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS TO THE NINTH CIRCUIT, DENYING PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY.

OPINION BELOW

THE FOLLOWING OPINIONS AND ORDERS BELOW ARE PERTINENT HERE, ALL OF WHICH ARE UNPUBLISHED: [1] OPINION ON DIRECT APPEAL BY THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT DIV. TWO, AFFIRMING PETITIONER'S CONVICTION AND SENTENCE (06/18/14; [2] ORDER (08/27/14) AND JUDGMENT (09/24/18) BY UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (HON. JUDGE DAVID O. CARTER) DENYING PETITION FOR WRIT OF FEDERAL HABEAS CORPUS (09/24/18); [3] DISTRICT COURT ORDER DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY (09/24/18); [4] ORDER BY NINTH CIRCUIT COURT OF APPEALS DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY (09/27/19). (SEE APPENDIX "J" FOR COPIES.)

STATEMENT OF JURISDICTION

THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT DENIED PETITIONER'S REQUEST FOR CERTIFICATE OF APPEALABILITY. IN HOHN V. UNITED STATES, 524 U.S. 236 (1998), THIS COURT HELD THAT, PURSUANT TO 28 USC § 1254(1), THE UNITED STATES SUPREME COURT HAS JURISDICTION, ON CERTIFICATE OF APPEALABILITY BY A CIRCUIT JUDGE OR PANEL OF A FEDERAL COURT OF APPEALS.

STATUTORY PROVISION INVOLVED

THE RIGHT OF A STATE PRISONER TO SEEK FEDERAL HABEAS CORPUS RELIEF IS GUARANTEED IN 28 USC § 2254. THE STANDARD FOR RELIEF UNDER "AEDPA" IS SET FORTH IN 28 USC § 2254(d)(1).

STANDARD OF REVIEW:

IN MILLER-EL V. COCKRELL, 537 U.S. 322, 123 S. Ct. 1029 (2003) THIS COURT CLARIFIED THE STANDARDS FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY [HEREAFTER "COA"]:

> ...A PRISONER SEEKING A COA NEED ONLY DEMONSTRATE A "SUBSTATIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT." A PETITIONER SATISFIES THIS STANDARD BY DEMONSTRATING THAT JURISTS OF REASON COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF HIS CONSTITUTIONAL CLAIMS OR THAT JURISTS COULD CONCLUDE THE ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER... WE DO NOT REQUIRE PETITIONER TO PROVE, BEFORE THE INSTANCE OF A COA. THAT SOME JURISTS WOULD GRANT THE PETITION FOR HABEAS CORPUS. INDEED, A CLAIM CAN BE DEBATABLE EVEN THOUGH EVERY JURISTS OF REASON MIGHT AGREE, AFTER THE COA HAS BEEN GRANTED AND THE CASE HAS RECEIVED FULL CONSIDERATION, THAT PETITIONER WILL NOT PREVAIL.

Id., ~~[illegible]~~ 123 S. Ct. at 1034, CITING SLACK V. MCDANIEL, 529 U.S. 473, 484 (2000).

STATEMENT OF THE CASE

The case commenced with a complaint filed on December 7, 2010. (1 CT 1.) The operative accusatory pleading was the First Amended Information filed on September 9, 2011. (1 CT 79-81.) It charged appellant Jose Abraham Guzman with the murder of Alexandro Alvarado (Count 1, Pen. Code, § 187, subd. (a)) and alleged that in the commission of the offense Guzman personally used a deadly weapon, a knife (Pen. Code, § 12022, subd. (b)(1)). It further charged Guzman with assault with a deadly weapon (Count 2, Pen. Code, § 245, subd. (a)(1)) and alleged that in the commission of that offense he personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)). (1 CT 79-81.) But, when the case was given to the jury, the assault charge was treated as a lesser related offense of the murder charge. (1 CT 129, ¶ 7; 1 RT 265.)

A seven-day jury trial began on September 19, 2011. (1 CT 87.) On September 29, 2011, the jury found Guzman guilty of first degree murder and found true the allegation of personal use of a deadly weapon. (1 CT 140.)

Sentencing was on June 29, 2012. The court imposed a determinate sentence of one year for the weapon enhancement followed by a consecutive, indeterminate sentence of 25 years to life for first degree murder. Count 2 was dismissed. (1 CT 189-190; 2 RT 357.)

Guzman timely filed his notice of appeal on August 22, 2012. (1 CT 193.)

STATEMENT OF APPEALABILITY

This is an appeal by a defendant from a final judgment of conviction that imposed a sentence and resolved all issues between the parties. (Pen. Code, § 1237.)

STATEMENT OF FACTS

Prosecution case:

Guzman and his family and Erika Valle and her children shared apartment 213B at 213 North Spruce Avenue in Rialto. (1 RT 13, 93, 216.) In the early morning hours of Sunday, December 5, 2010, they were having a party. Ten adults were present. Everyone was drinking. (1 RT 13, 90, 138-141, 193, 233.)[1]

One of the guests was Alexandro Alvarado. He did not know anyone at the party except Lisa Ramirez, who had brought him there. (1 RT 90, 96.) Nevertheless, when two guests, Rosa Valle and David Castrejon, were having a loud, angry argument, he took it upon himself to intervene, which angered David. (1 RT 94-95, 122, 194, 219.)

Alvarado and Lisa decided to leave. They had brought beer when they arrived, and Lisa took some of it as they were leaving. (1 RT 95, 120, 122 195.) This enraged Guzman's wife, Yesenia. She fought with Lisa, and Lisa ended up on the floor. (1 RT 95-96, 122-123, 147, 167, 195.)

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[1] In this brief, the persons at the party, other than Guzman and Alvarado, are sometimes referred to by their first names, because that is the way they were referred to in the testimony, and some of the persons have the same family name. No disrespect or lack of formality is intended.

Alvarado intervened to protect Lisa. He raised his fist against Yesenia. He pushed her to the floor. He drew a knife. (1 RT 96, 144, 167-168, 195, 206-207.) This made everyone angry with him. (1 RT 123.) He waved his knife to hold everyone at bay while he and Lisa backed towards the entry door. (1 RT 100, 168.) When they went out the door, Erika slammed it shut behind them. (1 RT 147-148, 195.) The door had small glass panes at the top. Alvarado broke them with his knife. (1 RT 17, 26, 102, 148, 195, 208.)

Erika opened the door and went outside while Alvarado and Lisa were between the door and the entry gate at the sidewalk. Guzman and Yesenia also went outside. (1 RT 148, 169-170, 208.) Alvarado told them, "Get away from me. You don't know who you're messing with." (1 CT 285; 1 RT 151; 2 RT 271.) Guzman and Alvarado spoke for a few minutes. Alvarado offered Guzman his hand, but he kept his knife in his other hand. Guzman did not take Alvarado's hand. (1 RT 200, 211-212.)

Alvarado's truck was parked on the street outside Apartment 213B. Alvarado and Lisa had walked to the truck and were seated inside when Erika tried to take a photograph of the rear license plate with her cell phone. (1 CT 264-265; 1 RT 35, 41, 103-104, 152, 198, 224, 231, 234.) Alvarado got out of the truck and tried to get between Erika and the license plate. Erika moved to the front of the truck. Alvarado pursued her and swiped at her with his knife. (1 RT 152-155, 170-171, 199-200, 208, 210, 224-225, 235.) He demanded that she give him her phone. She threw it at him. He caught it, dismantled it, and threw the pieces into the grass. (1 RT 155, 173, 224-225.)

Guzman was at the entry gate when he saw Alvarado take Erika's phone. (1 RT 156, 203.) He ran into the apartment, grabbed a butcher knife, and came out again. (1 RT 156, 174.) While he was getting the knife, David and Gustavo Robles (Tavo) were fighting with Alvarado in the street (1 RT 133, 157-160, 174-175, 201-202, 226, 236), and Yesenia was banging on the passenger window of the truck and screaming at Lisa to get out (1 RT 105, 158-159, 202-203, 230).

The only direct evidence of what happened next is in Guzman's recorded interview with Detective Quinonez on December 5, 2010. (See 1 RT 240-241; 1 CT 212-281[transcript].) The prosecutor played the recording for the jury as virtually the concluding piece of evidence in his case. (1 RT 244.) Guzman's statements to Quinonez included the following: "David and Tavo they grabbed him, calmed him down. .... And then that's when I, when I hit him there.... Yes and then from there I don't know. ... [W]hat happened was they were holding him. ... I just went like this and well then fuck INAUDIBLE. ... I just gave him one. ... And the guy comes back here. ... And I go up to tell him to just go, right. ... And he tells me, 'Did you see you fucked me up?' ... INAUDIBLE, how long had I told him to go." (1 CT 265-267, paragraphing omitted.)

After Alvarado was stabbed, he was able to walk to the corner of North Spruce Avenue and West Second Street, which is about 100 feet from Apartment 213B. (1 RT 63, 161-162, 204, 226-227, 231.) He left a trail of blood, which, Officer Candias testified, showed that he was bleeding faster the farther he went. (1 RT 64.) Guzman, David, and Tavo followed Alvarado. Guzman, David, and Tavo came back to the truck, but not Alvarado. (1 RT 109, 161-162, 227-228, 236-237.) When Guzman

came back, Erika saw that he had a bloody knife in his left hand and blood on his hand and shirt. (1 RT 161-162.) Karina Valle and Miriam Tapia, however, saw blood on Guzman's hand and arm but did not see a knife. (1 RT 205, 228, 237.) Erika overheard Guzman tell Yesenia, "I got him." (1 RT 163, 176.) Miriam heard Guzman yelling that he had "poked him twice." (1 RT 231.)

All of the guests except Lisa departed. (1 RT 231.) Erika departed with her children. (1 RT 113, 212.) Guzman took Yesenia inside the apartment and locked the door. (1 RT 114.)

Lisa went to the corner. (1 RT 114.) She reached it at the same time as police officers responding to a neighbor's call. (1 RT 115, 176-177.) The time was 2:45 AM. (1 RT 13.) They found Alvarado lying in the street with no breath or pulse. (1 RT 14-15, 114-115.) He was taken to a hospital, where he was pronounced dead. (1 CT 208.)

Police officers entered Guzman's apartment by force. They found Guzman in bed in an upstairs bedroom. He leaped out of bed and tried to fight with them, but they overcame his resistance and arrested him. (1 RT 17-31.)

An autopsy revealed that the cause of Alvarado's death was a stab wound to his left armpit. (1 RT 75; see 1 RT 54-55.) His left arm must have been raised to at least shoulder level when the wound was inflicted. The attacker held the knife horizontally. (1 RT 77-78.) Alvarado's blood alcohol content at time of death was 0.08-0.12%. (1 CT 282.)

Defense case:

The defense did not present any evidence. (1 RT 262-263.) Arguing

to the jury, defense counsel asked for acquittal on grounds of lack of intent to kill and lawful defense of self and others. (2 RT 327-329.)

ARGUMENT

I. DEFENSE COUNSEL'S FAILURE TO REQUEST INSTRUCTION ON VOLUNTARY INTOXICATION WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Introduction.

The only theory of first degree murder on which the jury was instructed, and the only theory the prosecutor advanced in closing argument, was that the murder was premeditated. (CALCRIM No. 521, 1 CT 125; 2 RT 306-313.) There was substantial evidence that Guzman was intoxicated during the events that culminated in the stabbing, however. The jury could have considered such evidence in deciding whether Guzman premeditated. (CALCRIM No. 625.) Nevertheless, defense counsel expressly declined instruction on intoxication, and none was given. (1 CT 106-138; 1 RT 163.) The jury convicted Guzman of first degree murder. (1 CT 140.)

Defense counsel's failure to request instruction on intoxication was ineffective assistance of counsel. The instruction could have helped Guzman, could not have hurt him, and would not have conflicted with defense counsel's argument that Guzman should be acquitted on grounds of perfect and imperfect defense of self and others. There is a reasonable probability that, had the instruction been given, the jury would have convicted Guzman of implied malice second degree murder instead of premeditated first degree murder.

B. Cognizable issue.

Guzman is entitled to assert this claim of ineffective assistance on direct appeal. As discussed below, defense counsel could not have had a

rational tactical reason for failing to request instruction on intoxication. Where the record reveals there could not be a rational tactical reason for counsel's decision, the issue of counsel's unprofessional performance can be resolved on appeal. (*People v. Stewart* (2004) 33 Cal.4th 425, 459; *In re Fosselman* (1983) 33 Cal.3d 572, 581-582; *People v. Pope* (1979) 23 Cal.3d 412, 426; *People* v. *McCary* (1985) 166 Cal.App.3d 1, 12.)

C. There was substantial evidence of intoxication.

The record contains substantial evidence that Guzman was under the influence of alcohol when he stabbed the victim. Guzman's own statement to Detective Quinonez includes such evidence. Guzman admitted that he started drinking around 8:00 or 9:00 PM. (1 CT 231-232.) He admitted to consuming eight beers. (1 CT 239.) He said that he was drunk at some point, "because it hits you later." (1 CT 239.) He said that he stabbed the victim, because he "had had the beers." (1 CT 269.) He said, "I was pissed – well I let myself go because of the beers, you follow me?" (1 CT 270.) Explaining why he did not call the police, he said, "We were, we were drunk and you don't think[,] you understand me?" (1 CT 278.) "[W]e were all drunk." (1 CT 279.)

Witnesses provided further evidence that Guzman was intoxicated. Erika testified, "They were all drinking." (1 RT 141.) Karina Valle said "everybody" looked intoxicated. (1 RT 193.) Miriam Tapia said, "Everybody was drinking." (1 RT 233.) The parties stipulated that, at the time of his death, the victim's blood alcohol content (BAC) was between .08 and .12 percent. (1 CT 283.)

D. Given the evidence, Guzman was entitled to instruction on intoxication upon request.

Since there was substantial evidence that he was intoxicated, Guzman was entitled to an instruction that intoxication may negate premeditation, but he had to request it. "An instruction on the significance of voluntary intoxication is a 'pinpoint' instruction that the trial court is not required to give unless requested by the defendant." (*People v. Verdugo* (2010) 50 Cal.4th 263, 295.) Instructions on intoxication "are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Saille* (1991) 54 Cal.3d 1103, 1118.)

E. Defense counsel declined instruction on intoxication.

When the defense surprised the court by resting before the court anticipated it would, the court excused the jury and discussed instructions with counsel. (1 RT 263-264.) There was the following exchange between the court and defense counsel, Mr. Faulhaber:

> THE COURT: The jurors have left the courtroom and I need to get input from counsel. I take it there's not any intoxication defense that's being asserted?
>
> MR. FAULHABER: No. The indication was that the defendant, throughout the course of the evening, had consumed somewhere about eight beers. That was on the tape. And that commenced, according to the defendant, between --beginning, like, 9:00 p.m., give or take a little bit, and continued through 2:00 a.m., so I don't think --
>
> THE COURT: So it's not being asserted. It just occurred to me when I was putting instructions

> together it might come in at trial. That's why I included it, but it's not now." (1 RT 264.)

Thus, the subject was raised, and defense counsel declined instruction on voluntary intoxication.

F. Elements of ineffective assistance of counsel.

"In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was deficient because his representation fell below an objective standard of reasonableness ... under prevailing professional norms. (Citations.) Second, he must also show prejudice flowing from counsel's performance or lack thereof. (Citation.) Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (Citation.)" (*People v. Vines* (2011) 51 Cal.4th 830, 875-876, interior quotation marks omitted; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-695.)

In examining a claim of ineffective assistance of counsel, a reviewing court defers to counsel's reasonable tactical decisions, and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (Citation.)" (*People v. Vines, supra,* 51 Cal.4th at 876, interior quotation marks omitted.) A reviewing court will reverse a conviction on direct appeal, however, if the record on appeal affirmatively discloses that counsel could not have had a rational tactical purpose for his act or omission. (*Ibid.*; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267; *People v. Lucas* (1995) 12 Cal.4th 415, 436–437.)

G. Competent counsel would have requested instruction on intoxication, which could have helped Guzman and would not have conflicted with defense counsel's arguments.

As applicable here, the CALCRIM pattern instruction on voluntary intoxication is as follows:

> "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation.
>
> "A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.
>
> "You may not consider evidence of voluntary intoxication for any other purpose." (CALCRIM No. 625, italics in original.)

The instruction's explanation that evidence of intoxication may be considered "in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation" could have worked to Guzman's benefit. As discussed above, the evidence supported a finding that Guzman was intoxicated when he acted. Premeditation was the only theory of first degree murder on which the jury was instructed. (1 CT 125.) The instruction would have given the jury a reasoned basis for using its awareness of Guzman's intoxication in deciding whether he premeditated the killing. "[E]vidence of voluntary intoxication [can be] relevant on the issue of whether the defendant actually formed any required specific intent." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243.) In

combination with the instruction that "[p]rovocation may reduce a murder from first degree to second degree" (CALCRIM No. 522, 1 CT 125), the intoxication instruction would have given the jury analytical support for finding that Guzman acted out of alcohol-fueled rage and affront to honor caused by the victim's very substantial provocations against Guzman's family, friends, and home and, while Guzman may have premeditated stabbing the victim, the stabbing was not intended to be fatal. If the jury so found, it would have convicted Guzman of implied malice second degree murder instead of premeditated first degree murder..

Instruction on intoxication would not have conflicted with defense counsel's strategy. Defense counsel argued that Guzman's actions showed that he acted without intent to kill. Defense counsel pointed out that Guzman did not arm himself until the victim got out of his truck and began to threaten Erika with his knife. (2 RT 319-320.) He stabbed the victim only once, not multiple times as one who wanted to kill would have done. After the stabbing, Guzman and his friends followed the victim down the street but did not further attack him. (2 RT 322-323.) Defense counsel said that Guzman's reaction in the recorded interview when Quinonez told him the victim was dead showed that he did not intend to kill. (2 RT 324.) Finally, defense counsel questioned whether the victim was actually as calm and unresisting at the moment of the stabbing as he was described in Guzman's statement and the prosecutor's argument. Defense counsel said there was reason to believe that the victim was still struggling and still trying to use his knife. (2 RT 321-323, 328.) He argued that Guzman reasonably believed that he was in imminent danger of being killed or suffering great bodily injury, because the victim had brandished his knife and used it against Erika and Tavo, and the victim had already committed a felony. (2 RT 327.) Defense counsel asked the jury to find that Guzman

acted without intent to kill and in lawful defense of himself and others. (2 RT 329.)

Instruction on intoxication, and a finding that Guzman was intoxicated when he acted, would not have been inconsistent with these arguments. Guzman could have believed that he or someone else was in imminent danger and use of deadly force was necessary, as required for both perfect and imperfect defense of self or others (CALCRIM No. 505, 1 CT 121; CALCRIM No. 571, 1 CT 127), whether he was sober or intoxicated. He could have lacked intent to kill whether he was sober or intoxicated. Indeed, a finding of intoxication would have bolstered a finding of lack of intent to kill. (CALCRIM No. 625.) The other findings required for perfect and imperfect defense of self and others are objective findings not affected by the defendant's intoxication. (1 CT 121, 127.) Had the intoxication instruction been given, it would not have interfered with the jury's findings on perfect and imperfect defense of self and others, but, if the jury rejected the claim of lawful defense, the instruction would have provided additional support for a finding of second degree murder instead of first.

No reason appears why instruction on intoxication should not have been requested. Defense counsel did not shy away from the subject of alcohol consumption. He asked the jury to keep in mind that "everyone had been drinking," and even the victim had a BAC of .08-.12. (2 RT 324-325.) Defense counsel told the jury that it was unfortunate that, in finding the facts, they had to rely on "the perception of a number of people that had something to drink that evening and might be more or less in the bag." (2 RT 325.)

Defense counsel told the court he was not requesting the instruction, because Guzman admitted drinking eight beers over a period of about five

hours. (1 RT 264.) Defense counsel apparently thought there was insufficient evidence that Guzman was intoxicated. But, as discussed above, Guzman's own statements supported the conclusion he was intoxicated. He told Detective Quinonez he was drunk. (1 CT 239, 278, 279.) He said he let himself go "because of the beers." (1 CT 270.) Other witnesses described heavy drinking. (1 RT 141, 193, 233.) Given the presence of alcohol, the conduct of the people at the party was itself a strong indication that they were intoxicated. Thus, there was evidence that Guzman was intoxicated. Also, counsel appeared to assume that the eight beers were consumed at a steady rate over five hours, but there is no evidence of that; there is no way of knowing that a disproportionate number of beers were not consumed in the later hours, with greater intoxicating effect. And, the jury's experience and common sense surely included awareness that drinkers notoriously understate their consumption, particularly to law enforcement. For all these reasons, defense counsel's explanation for not requesting the instruction does not hold up. Defense counsel should have requested the instruction and let the jury decide whether Guzman was intoxicated and, if so, its effect on his mental state in the stabbing.

Instruction on intoxication was not inconsistent with defense counsel's strategy, but, if a choice had to be made, arguing that Guzman did not premeditate because he was intoxicated was more likely to succeed than arguing that Guzman acted in lawful defense of self and others. It is true that a claim of lawful defense would lead to acquittal if accepted, while a claim of lack of intent or premeditation would lead to conviction of second degree murder or an included or related offense if accepted, but the difference in outcomes does not overcome the weakness of the claim of lawful defense. Guzman's own statement to Detective Quinonez described

the victim as calm at the moment of the stabbing. He said, "David and Tavo they grabbed him, calmed him down. .... And then that's when I ... hit him there .... [W]hat happened was they were holding him." (1 CT 265.) Other witnesses were unable to provide any good description of the altercation. Given the evidence, it is difficult to understand defense counsel's reliance on the notion that the victim was struggling when he was stabbed.

Defense counsel's refusal to request instruction on intoxication deprived the jury of a route to second degree murder instead of first degree murder, without any benefit to counsel's other arguments. Thus, defense counsel's performance fell below a reasonable standard of competence. (*Woodard v. Sargent* (8th Cir. 1986) 806 F.2d 153, 157 [defense counsel's failure to request instruction that could only benefit his client was defective performance].)

H. Guzman was prejudiced by lack of instruction on intoxication.

To demonstrate prejudice from deficient performance of defense counsel, Guzman "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at 693-694; accord, *People v. Vines, supra,* 51 Cal.4th at 875-876.)

There is a reasonable probability that, if defense counsel had requested instruction on intoxication and it had been given, the jury would have convicted Guzman of second degree murder instead of first degree

murder. The probability arises out the ample direct and circumstantial evidence that Guzman, along with nearly everyone else at the party, was intoxicated. Awareness of intoxication is needed to understand the events of the evening. If intoxication were not present, several of the participants would seem like mere savages. But the instructions given to the jury did not mention intoxication. The instructions given did not articulate a way the jury could use intoxication in its analysis.

Had the intoxication instruction been given at defense counsel's request, the jury would have understood that it could consider evidence of intoxication in deciding whether Guzman acted with intent to kill or with deliberation and premeditation. That understanding, in combination with the instruction that "[p]rovocation may reduce a murder from first degree to second degree" (CALCRIM No. 522, 1 CT 125), could have informed the jury's perception of Guzman's eventual response to the victim's prolonged course of extremely offensive conduct. The victim had pushed Guzman's wife to the floor in her own home. (1 RT 144.) He had brandished a knife at Guzman's family and friends. (1 RT 96, 100, 168.) He had broken windows. (1 RT 102, 148-149.) Outside the apartment by his truck, he had assaulted Erika with a knife and robbed her of her cell phone (1 RT 155), and he had fought with Tavo and David (1 RT 174-175, 201-202). Thus, the victim had grievously offended Guzman's family, friends, and home. A jury that was properly instructed about the way it could consider intoxication could have found that, due to his intoxication, Guzman's rage was fanned to the point that he had to strike a blow. He did not intend to strike a fatal blow, but he acted with conscious disregard of the risk to life caused by his act. Thus, he committed murder, but it was second degree,

implied malice murder, not first degree murder. The trial court may have had this scenario in mind when it stated that it would not have been surprised by a second degree verdict. (2 RT 349-350.)

I. The judgment should be reduced to second degree murder.

Because there was substantial evidence of intoxication, and intoxication may negate premeditation, defense counsel's failure to request instruction on intoxication undermines confidence in the jury's implicit finding of premeditation. (See *Strickland v. Washington, supra,* 466 U.S. at 687-695; *People v. Vines, supra,* 51 Cal.4th at 875-876.) The judgment should be reduced to second degree murder.

CONCLUSION

BASED ON THE FOREGOING, THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI AND ORDER FULL BRIEFING.

DATED: OCTOBER 24, 2019

RESPECTFULLY SUBMITTED

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