

No. _____

21 - 5931

IN THE

SUPREME COURT OF THE UNITED STATES

Washington D.C. 20543

Noe Lopez Suchite
(Your Name)

PETITIONER

vs.

David Zuckerman

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FILED

SEP 30 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

New City Rockland and Appellate Division Second Judicial
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Noe Lopez Suchite
(Your Name)

Green Haven Facility P.O. Box 14600
(Address)

Stormville, New York 12582-4000
(City, State, Zip Code)

845-221-27-11
(Phone Number)

QUESTION(S) PRESENTED

NY PENAL LAW 35.15 JUSTIFICATION.

I reasonably believes to defend myself,when I am risk of peril,
whenever can be in my defense. I AM JUSTIFY.

4.CONSTITUTIONAL RIGHT TO BEAR ARMS UNDER SECOND AMENDMENT.

In time of war the army get the gunfire for the defense.
So,I was in risk of peril,I get my tool for myself defense.

MY LAWYER: JOHN R.LEWIS

In the supreme court of the state of new york.
Appellate division:second department.

My lawyer:JOHN R.LEWIS

He was "presented" justification,reversed and vacated.

The trial court not give me transcripts of the case.

So,I not have information of the trial jury.

I was submit ,motion for get my minutes,but they not give me
nothing and not give me one answer to my motion.

So, justification is reasonably in my case.

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:

RELATED CASES

REINALDO E. RIVERA, J.P.
COLLEN D. DUFFY
ANGELA G. IANNACCI
PAUL WOOTEN, JJ.

ROCKLAND COUNTY COURT.
DAVID S. ZUCKERMAN J.

218-12018
THE PEOPLE RESPONDENT
V. NOE LOPEZ SUCHITE, APPELLANT.

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Statement Pursuant to CPLR 5531

1. The indictment number of this case in the court below was 312-2016, Rockland County Court.
2. The original parties were the People of the State of New York and Noe Lopez Suchite, Defendant-Appellant ("Appellant").
3. This action commenced in the Rockland County Court.
4. This action was a criminal prosecution commenced by indictment in or about September, 2016.
5. This was a criminal action charging Appellant with one count of attempted assault first degree and one count of assault second degree. He was eventually convicted after jury trial of assault second degree, and sentenced to six years' imprisonment plus three years' post-release supervision.
6. This appeal is from a judgment dated Nov. 6, 2017 sentencing Appellant to six years imprisonment, plus three years post-release supervision, per Hon. David Zuckerman.
7. This appeal is being prosecuted on the original record, which method is authorized by Second Department Rule 670.9(d)(1)(viii).

Statement Pursuant to Rule 670.10 (d)(2)(viii)

1. There is no outstanding order pursuant to CPL 460.50.
2. There were no co-defendants.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at July 6 2021; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the July 6 2021 court appears at Appendix A to the petition and is

☒ reported at July 6 2021; 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 2/17/2021.
A copy of that decision appears at Appendix B.

☒ A timely petition for rehearing was thereafter denied on the following date: 2/17/2021, and a copy of the order denying rehearing appears at Appendix B.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TRIALCOUNSEL WAS INEFFECTIVE FOR:NOT REQUESTING AN ADVERSE INFERENCE CHARGE WITH REGARD TO THE PROSECUTION'S FAILURE TO PRESERVE AND PRODUCE VIDEO RECORDINGS THAT DID EXIST; NOT RENEWING AND PRESERVING HER INITIAL REQUEST FOR SOME SANTIION: AND NOT OBJECTING TO THE COURT'S FAILURE TO DELIVVER AN ADVERSE INFERENCE CHARGE.

A prosecution has an obligation to preserve all evidence which may be subject to. Thus when the prosecutor fails to preserve potential evidence to the court may fashion an appropriate response to eliminate any prejudice to the defendant while protecting the of society.....Here, the trial court providently exercised its discretion in giving the jury an adverse inference with respect to an unpreserved video recording.

People v. Conley, 70 A.D.3d, 961, 961(2d Dept. 2010).

people v. kelly, 62 N.Y.2d 516, 521(1984)

People v. Samuels, 185 A.D.2d 903(2d Dept. 1992).

People v. Batista, 92 A.D.3d 793(2d Dept. 1992).

people v. Gorham, 72 A.D.3d 1108(2d Dept. 2010).

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People v. Torres, 169 A.D.3d 1068(2d Dpt. 2019).

people v. Manigault, 125 A.D.3d 1480(4th Dpt. 2015).

People v. Collins, 119 A.D.3d 956(2d Dpt. 2014).

People v. Davydov, 144 A.D.3d 1170(2d Dpt. 2016).

people v. Donovan, 184 A.D.2d 654(2d Dpt. 1992).

people v. Caban, 5 N.Y.3d 143, 152(2005).

people v. Holmes, 166 A.D.3d 559(1 st Dpt. 2018).

STATEMENT OF THE CASE

APPELLATE DIVISION: SECOND DEPARTMENT
APPELLANT'S REPLY BRIEF

FIRST: THEY CONTEND THAT DEFENDANTE AND PAIZ BONILLA WERE AGGRESSORS

(ID. 16) THEY IGNORING VICTIM HERNANDEZ'S OWN TESTIMONY THAT HE ACTUALLY PUSHED APPELLANT FIRST AND THEN APPELLANT CAME TOWARD HIM (TR. 110). THEY IGNORE OWNER/MONZON'S SIGNED STATEMENT TO THE POLICE WHICH STATED THAT APPELLANT AND PAIZ BONILLA HAD BEGUN FIGHTING WITH ANOTHER GRUPO OF MEN WHEN THEY WENT OUTSIDE (ID 175).

THE PEOPLE ALSO CLAIM THAT THE TESTIMONY SHOWED THAT ONLY MONZON AND HERNANDEZ WERE INVOLVED IN THE FIGHT, AND THAT THE OTHER EMPLOYEE ONLOOKER ;

THE PEOPLE ARGUE THAT AN KEY STATEMENT: PAIZ BONILLA'S TELLING THE POLICE THAT APPELLANT HAD SAID TO HIM: THEY'S RE GOING TO BEAT US UP... PEOPLE KILL INSIDE.

HERNANDEZ ADMITTED THAT APPELLANT HAD BEEN FORCED OUTSIDE THE BAR FOLLOWING THE ARGUMENT OVER THE BILL. AND THAT HERNANDEZ INITIATED THE PHYSICAL ESCALATION BY PUSHING APPELLANT TO THE GROUND: THAT THERE WERE OTHER BAR EMPLOYEES, I.E. PRESUMABLE ALLIASES OF MONZON AND HERNANDEZ STANDING CLOSE BY; AND THAT THE ENTIRE MELEE TOOK ABOUT TEN SECONDS, I.E.

APPELLATE DIVISION: SECOND DEPARTMENT
APPELLANT'S BRIEF ON APPEAL

COPIES OF STATEMENTS SUBMITTED IN THE APPEAL BRIEF.

IN NOTIFICATION THAT THE TRANSCRIPTS ARE NOT IN MY HANDS.

Preliminary Statement

Defendant-Appellant Noe Lopez Suchite ("Appellant"), by the undersigned counsel, hereby submits Appellant's Brief on Appeal, seeking reversal of his conviction for assault second degree.

QUESTIONS PRESENTED

POINT I: DID THE TRIAL COURT ERR IN REFUSING TO CHARGE THE JURY ON JUSTIFICATION?

POINT II: WAS TRIAL COUNSEL INEFFECTIVE FOR: NOT REQUESTING AN ADVERSE INFERENCE CHARGE WITH REGARD TO THE PROSECUTION'S FAILURE TO PRESERVE AND PRODUCE VIDEO RECORDINGS THAT DID EXIST; NOT RENEWING AND PRESERVING HER INITIAL REQUEST FOR SOME SANCTION; AND NOT OBJECTING TO THE ABSENCE OF AN ADVERSE INFERENCE CHARGE?

Appellant respectfully submits that both questions should be answered in the affirmative.

STATEMENT OF FACTS

A. Overview of the Case

In their opening statement, the People alleged that on August 20, 2016 at about 4:00 AM, Appellant attempted to cause serious physical injury to the complainant Jose Hernandez, and did in fact cause physical injury to him

by means of a dangerous instrument, i.e. a knife. The alleged crimes were attempted assault first degree and assault second degree. (Tr. 28). x

The incident at issue took place at the El Pollo Grande bar in Spring Valley, NY, where Hernandez and bar owner Abel Monzon were working that night, and Appellant was drinking with his friend Angel Paiz-Bonilla. Allegedly, a dispute arose over the bill between Monzon and Hernandez on one side, and Appellant and Paiz-Bonilla on the other, resulting in the two x latter men being escorted from the bar. Outside the bar, the argument x "turned physical", leading to Hernandez's coming to Monzon's aid.

Appellant is alleged to have then stabbed Hernandez in the chest with a knife. Appellant and Paiz-Bonilla ran from the scene at that point. (Id 30)

Defense counsel's opening statement indicated that Appellant's primary defense was going to be justification (Id 42). She suggested that Monzon and Hernandez were "beating hell" out of Appellant's friend Paiz-Bonilla, who was intoxicated to the point of "stumbling-drunk", i.e. unable to defend himself (Id 40, 43), causing Appellant to come to Paiz-Bonilla's aid. Moreover, Appellant himself was very small in stature, and no match for Monzon and Hernandez (Id 40-41).

For purposes of this appeal, Appellant is not challenging his possession of the knife, his identification as one of the men in the fight, or

the extent of Hernandez's injuries. His primary argument herein is justification, i.e. defense of himself and his friend Paiz-Bonilla. For this reason, the statement of facts to follow will focus primarily on the trial evidence pertaining to the justification defense. Facts will also be presented pertaining to the failure of the People to produce a video that could have shed a great deal of light on that defense, and trial counsel's failure to move for an appropriate sanction.

B. People's Witnesses

1. P.O. Parwanta

Police Office Khalid Parwanta testified that on the night at issue he saw two men running on South Main Street in Spring Valley, NY, one of whom was Appellant (Id 56-57). He was flagged down by a bar owner at 39 S. Main St., where he saw a man bloodied and holding his chest. He held bandage up the man (Id 58-59). Soon after, he received a radio transmission that two men were being held at Johnson Street, and that a knife was recovered from one of the men, later identified as Appellant (Id 64-66). He then went to Johnson Street, observed the two men, and was given the knife that was recovered ().

On cross-examination, Parwanta was asked if he had been asked by any of the detectives to obtain video recordings of any of the local businesses. He responded that some such effort was made. He found that the cameras at the laundromat next to the restaurant had been "out". Asked whether he inquired as to recordings from El Pollo Grande, the scene of the actual stabbing, Parwanta simply answered "I know they have no cameras outside" (Id 83). (This would later be directly contradicted by Abel Monzon, the bar owner, Id 176, see below). Parwanta made no further mention of any investigations into videos from El Pollo Grande.

2. Jose Hernandez

Jose Hernandez testified he was working at the El Pollo Grande bar between 3:45 and 4:00 AM on the night in question (Tr. 107). An argument ensued when two men who had paid with a card falsely claimed that the card X had not been returned to them. The two men were "aggressive", so X Hernandez and his boss Monzon told them they had to leave because the bar X was closing. Once ejected, the two men started beating on the door. When X Monzon told them they "didn't have to do that", Hernandez testified, the two X men lunged at him (Id). X

Hernandez stated he tried to stop the two men from hitting Monzon (Id 108). One of the two men was coming towards him and he put his hands up. At that point, the man (identified as Appellant, Id 110) stabbed him (Id 108).

Hernandez testified soon afterward that he actually pushed Appellant first, and then Appellant "came toward him" (Id 110). Moments later, Hernandez stated, he realized he was cut (Id 111). Meanwhile the other man presumably Paiz-Bonilla) was fighting with Monzon. Then both men took off running (Id). Hernandez testified that he was in pain from the stabbing for 3-4 months, and could not work for a month (Id 115).

When asked whether El Pollo Grande had video surveillance cameras, Hernandez answered that there were cameras inside, but "he hadn't seen any" outside (Id 116).

On cross-examination, Hernandez stated again that he did push Hernandez to the ground, and only realized later that he had been cut. He had never seen a knife in Appellant's hand. No additional punches were thrown. The entire incident took about 10 seconds (Id 136-37).

When shown a document prepared by the police that he signed stating that the man who stabbed him was Angel Paiz-Bonilla (and not Appellant), Hernandez did not deny signing the statement, but insisted that he had never said this (Id 147).

Finally, Hernandez acknowledged that he himself had pending charges of sexual abuse first degree (Id 150).

3. Abel Monzon

Monzon confirmed he was the owner of the El Pollo Grande restaurant (Id 165). He employed Hernandez, who worked with him on weekends (Id 166).

Monzon testified that at about 4 AM, two guys became "a little aggressive at the bar" (Id 166). One (Appellant) was short, and the other "a little taller" (Id 167). He told the two men they had to leave. When they refused, he stated, "we had to make them leave" (Id). Monzon stated he followed the two men outside, and "as they were walking out", they tried hitting me...with their hands" (Id 167-68).

According to Monzon, Hernandez approached when he saw Monzon "was getting hit" (Id 168). Hernandez tried to separate Monzon from the two men, "and then one of them went against him" (Id), the one with the white shirt (i.e. Appellant, Id 169). When Hernandez put his hand up against his side, a friend told him he was bleeding. The "other man" (Paiz-Bonilla) supposedly "went towards" Hernandez as well. Then the two men ran away (Id 169).

On cross-examination, Monzon acknowledged that he had records indicating the names of his other employees working that night at El Grande Pollo, but the police never asked him for this information (Id 171). He agreed that he himself also participated in the fight outside the bar. He never observed a knife (Id 172). He claimed he was misunderstood when he signed a statement prepared by the police which stated that Appellant and Paiz-Bonilla had begun fighting with another group of men when they went outside (Id 175).

Of particular importance was Monzon's acknowledgement that there were in fact video cameras positioned *both inside and outside* of El Grande Pollo, and that he told this to the police (Id 176). Asked whether he provided the videos to the police, he answered "I can't make a video out of that. I can't access it". He told the police they could have the recordings, but did not know if they ever attempted to access them, and "couldn't remember" whether the police ever asked him for access to the video equipment after August 20, 2016. He answered a clear "no" when asked whether the D.A.'s office had ever asked for such access (Id).

Asked whether there were often incidents with drunk customers, Monzon answered no, because he doesn't allow customers to drink to excess in his bar (Id 177). Monzon stated that he himself suffered no injuries from

the eventual physical altercation (Id 178). He did claim to have been struck. When asked if he struck either of the other two men, he responded "I pushed them" (Id 179).

4. Angel Paiz-Bonilla

The People called Paiz-Bonilla to testify. He confirmed that he was at El Pollo Grande with Appellant on the night in question and that eventually there was an argument at the bar regarding the bill (Id 195). He testified that he was fighting one-on-one with the person who had brought him the bill, X and that this person pushed him outside, while Appellant was still inside the bar with a different person he was arguing with (Id 196). Paiz-Bonilla said he hit his opponent first, that they then fought, and that "they" then took him out of the bar. He stated that as a result of being pushed outside, he sustained injuries to his back and elbow (Id 197).

On cross-examination, Bonilla sharply contested Monzon's earlier X testimony that Bonilla and Appellant were not drunk "because Monzon did X not allow customers to become drunk", stating that the he and Appellant had X had each more than 15 alcoholic drinks that evening (Id 209). X

Shown photographs, Bonilla confirmed they accurately reflected multiple injuries, to his back, arm and ankle that he suffered from the fight at El Pollo Grande (Id 210).

He was shown a document in which he purportedly stated a number of things, including the statement

I took off running because *now the big guy was coming*, the security guard from there who is black and big. He tells me, and that guy tells me let's run, because here *they're going to beat us up* because they were coming and many people kill inside, you understand. (Id 214)

Asked if he recalled telling that to the detectives, he answered "Not all of it. Part of it I remember" (Id). He did recall telling the detectives "they were following us", when he and Appellant got into a taxi (Id).

C. Defense Motion to Dismiss

Following the testimony of Trooper John Caban, who responded to the scene where Appellant and Bonilla were being held, and who recovered a knife while patting down Appellant (Id 223), the People rested (Id 228).

Defense counsel then moved for dismissal on the grounds that: a) the evidence did not establish each element of the crimes charged; and b) the police and prosecution had failed to obtain the video(s) that Abel Monzon testified did exist, justifying a dismissal. Counsel stated that the video would have shown the complete crime, and whether or not either of the two men *were justified in their actions* (Id 229).

The A.D.A. first stated why he believed all the elements had been established (Id 230). As for the missing video, he argued that dismissal was

not the proper remedy "at this juncture". He also contended that Officer Parwanta testified as to an investigation into these tapes, i.e. whether they existed or not (Id). (This was in fact false; Parwanta merely stated his belief, ultimately proven *incorrect*, that there were no outside cameras at El Pollo Grande.) In any event, there was no evidence of any willful destruction of such evidence (Id).

The Court denied both motions, without further comment (Id 231). Following this denial, counsel did not ask for the lesser sanction of an adverse inference with regard to the missing videos.

D. Defense Rests; Motion to Dismiss at Close of Evidence

The defense announced it was calling no witnesses, and rested (Id 233-34). Defense counsel renewed her motion to dismiss for insufficient proof. The A.D.A. relied on his previous argument as to the sufficiency of the evidence. The court denied the motion (Id 236).

Counsel did not renew her prior motion regarding the failure of the People to produce the El Pollo Grande video recordings, and did not ask for any kind of sanction.

E.. Charge Conference: Court Refuses to Charge Justification, and Defense Counsel Does Not Renew Motion Regarding Missing Videos.

At the charge conference, defense counsel requested that the jury be charged on both intoxication and justification (Id 237). The court did agree to charge intoxication (Id).

As for justification, counsel argued that the evidence adduced from prosecution witnesses varied in terms of the involvement of both the victim Hernandez and his boss Abel Monzon, and that a jury could reasonably find justification depending on which version(s) of the facts they believed (Id 238). The People argued that there was no testimony from anyone as to fear of physical safety (Id 238-39).

Defense counsel countered that Paiz-Bonilla testified to the fact that they were physically being thrown out of the bar and that they were engaged in a physical altercation; and that both Monzon and Hernandez testified to the physical altercation, and that there was evidence that the latter two started that altercation. Therefore, there was a jury issue on justification (Id 239-40).

The court stated that there was no evidence that anyone other than Appellant had a knife or used deadly force, and denied the application (Id

240). The court's ultimate jury charge did not include justification (Tr. 279-304).

Defense counsel never renewed her application for an adverse inference instruction or other sanction against the People for failure to preserve and produce the video recordings from El Pollo Grande, and no such instructions were given. Nor did counsel object to the *absence* of such instruction after the Court's jury charge was delivered.

F. Verdict and Sentence

Following an adjournment for the weekend, on July 31, 2017, the jury returned a verdict of not guilty on attempted assault first degree, but guilty X of assault second degree (Id 355).

On November 16, 2017, Appellant was sentenced to six years imprisonment, plus three years post-release supervision,

ARGUMENT

POINT I: THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY ON JUSTIFICATION.

"In considering whether a justification charge is warranted, a court must view the record in the light most favorable to the defendant and determine whether any reasonable view of the evidence would permit the

REASONS FOR GRANTING THE PETITION

THE TESTIMONY: NOT ALL THE TESTIMONY IS TRUE?

JOSE HERNANDEZ AND ABEL MONZON BOTH LYING IN THE TESTIMONY.

THE TESTIMONY IS NOT BELIEVABLE WHEN BOTH MEN ENTER IN THE FIGHT.

BECAUSE: I NEVER PAY WITH DEBIT CARD FALSE.

I WAS GOING OUTSIDE OF RESTAURANTE ONLY, WHEN I WAS OPEN THE DOOR I SEE THE BOTH MEN HIT MY FRIENDS SO, I WAS ENTER IN PANIC. BECAUSE I DON'T KNOW HOW MANY PERSONS WERE IN THE FIGHT. SO, I TOOK OUT MY EMERGENCY TOOL FOR SAVE MY LIFE.

I WAS NEVER TO KICK THE DOOR OF GLASS.

I WAS NEVER TO HIT ABEL MONZON, NEVER TRY TO PUNCH ANYBODY

BECAUSE: JOSE HERNANDEZ FAST CAME ON ME, THERE WAS NOT TIME FOR REACTION TO AVOID THE PROBLEM.

I WAS RUNNING FROM JOSE HERNANDEZ AND ABEL MONZON FOR SAVE MY LIFE. BECAUSE: ABEL MONZON IS A BUSINESS MAN. HE HAS MORE POWER.

THE TRIAL COURT: NOT LISTEN ME, THEY NOT INCLUDED THE DEBIT CARD, THE PHONE BILL DEBIT CARD, HOW PROOF OF MY TESTIMONY.

THE JUDGE ONLY THROWN ME OFFENSE AND MENACE ME.

HE SAY ME: MADE ME IMPOSSIBLE MY LIFE IN THE COUNTY JAIL.

TOO, HE SAY ME: YOU NOT CONTRIBUTE IN NOTHING THIS COUNTRY.

NOW, THE COURT NOT GIVE ME THE TRANSCRIPT

THE TRIAL COURT AND THE SUPREME COURT VIOLATE THE LAW 11.

[EQUAL PROTECTION OF LAW, DISCRIMINATION IN CIVIL RIGHTS PROHIBIT]

FOR ALL THESE FAILS. IN MY CASE:: I WANT THAT THIS COURT FIX MY CASE
AND JUDGEMENT CORRECT. FOR ME, FOR JOSE HERNANDEZ, FOR ABEL MONZON
FOR THE TRIAL, AND FOR THE SUPREME COURT SECOND DEPARTMENT.

NOT VIOLATE MY RIGHTS. THANKYOU

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NOE LOPEZ SUCHITE

Date: SEPTEMBER 23 2021