22-6752 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

ENRIQUE NUÑES LOPEZ

Petitioner,

vs.

JOSIE GASTELO, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Enrique Nuñes Lopez
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In Propria Persona

QUESTIONS PRESENTED

Few rights were more fundamental at the time of the Founding of our Constitution and Republic than the right to defend a home against violent intruders, as well as the presumption that a person defending a home against a violent intruder was acting in defense of self or other occupants. That right is codified in California statutory law which provides a presumption that a person who shoots a violent intruder in a home was acting in defense of the occupants. Here, Petitioner Enrique Nuñes Lopez and codefendant Juan Salazar were in the home where Salazar stayed with his girlfriend with other friends. Two armed rival gang members forced their way into the house and began stabbing, assaulting and threatening everyone in the home with a firearm. Petitioner Lopez was stabbed and fled the house. But Salazar acted quickly to retrieve a firearm and stop the intruders by shooting them.

The trial court undeniably erred by not instructing on the presumption that a defendant who shoots an intruder in the home was acting in defense of self or others. The court did instruct on defense of self and others. But these instructions were negated by other instructions, concededly erroneously given, and the argument of the prosecutor who concededly wrongfully told the jury that Lopez and Salazar had forfeited their rights to defense of self and others. Although these errors denied Petitioner his federal constitutional rights, the state court improperly analyzed these federal constitutional claims as state law error only. This was contrary to settled Supreme Court law. Yet, the District

Court denied the habeas petition, and the District Court and Ninth Circuit denied a Certificate of Appealability.

Petitioner thus asks only for the modest relief of a Certificate of Appealability. This Petition presents the following questions:

I. Given the Second and Fourteenth Amendment rights to possess a firearm in the home for self-defense, and where the evidence tended to favor a verdict of justifiable homicide in defense of occupants of the home against armed intruders, has Petitioner presented a "debatable" issue meriting a Certificate of Appealability as to whether the State court unreasonably found that refusing defense of home instructions was not federal constitutional error, but only state law error?

II. Given the Second and Fourteenth Amendment rights to possess a gun in the home for self-defense, and where the evidence tended to favor a verdict of justifiable homicide in defense of self or others, has Petitioner presented a "debatable" issue meriting a Certificate of Appealability as to whether the state court was unreasonable in holding that the concedely erroneous instructions which improperly removed the state's burden to prove the element of lack of justification was not federal constitutional error, but was only state law error?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Enrique Nuñes Lopez respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeal for the Ninth Circuit denying him a Certificate of Appealabilty ("COA") for his habeas petition.

OPINION BELOW

The June 27, 2022 unpublished summary Order of the Ninth Circuit denying a COA on Petitioner's habeas petition appears at Appendix A to the petition.

The August 26, 2022 unpublished summary Order of the Ninth Circuit denying Petitioner's motion for reconsideration of the June 27, 2022 order denying Petitioner's motion for COA appears at Appendix B to the petition.

The March 3, 2021 unpublished opinion of the District Court denying Petitioner's writ of habeas corpus and denying a COA appears at Appendix C to the petition.

The May 31, 2018 unpublished order of the California Court of Appeal denying his direct appeal appears at Appendix D to the petition.

JURISDICTION

On August 26, 2022, a two judge panel of the United States Court of Appeal for the Ninth Circuit issued an order denying Petitioner's motion for reconsideration of the June 27, 2022 order denying Petitioner's motion for COA. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides:

> A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person life, liberty, or property, without due process of law . . .

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
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> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > * * *
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless

the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Introduction And Summary Of Argument

Although this case seeks review of a series of unpublished orders denying a COA to a state habeas petitioner, this case cries out for this Court's intervention. Petitioner in this case only seeks the modest relief of an issuance of a COA and appointment of counsel.

The facts were largely undisputed. By all accounts, Petitioner Lopez and his codefendant, Juan Salazar, were inside the home where Salazar lived with his girlfriend Eunice ("Nene")[1] and her family. Several other members of their gang were inside the home as well for a meeting. At that point, rival gang members, Daniel "Frosty" Fraga and Hector "Osito" Reyes burst, uninvited, into the home. Frosty was high on methamphetamine and on a violent rampage, armed with a knife or scissors. Osito brandished a gun. Before the shooting, Frosty beat and stabbed Petitioner Lopez and also co-defendant Salazar and Petitioner's brother, Eric ("Dodger"). Osito was armed with a gun and threatened to kill everyone in the house. Osito severely beat Dodger and the defendants' friend Armando ("Shadow") with the gun. Before the shooting, Petitioner ran out of the house bleeding severely.

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[1] At trial and in the opinions in this case, gang members and associates are largely referred to by monikers.

While bleeding from a stabbing in the shoulder that resulted in severe blood loss and stitches, Salazar retrieved a gun from elsewhere in the home. He returned to confront Frosty and Osito. Frosty and Osito were still beating Shadow. Seconds later Salazar shot Frosty and Osito from a distance of less than 10 feet.

According to most witnesses, Osito did not stop beating Shadow until Salazar shot him. All but one witness asserted that Frosty was advancing on Salazar with a knife–only two to three steps away from Salazar–when Salazar began firing on Frosty and Osito.

Salazar was convicted of first degree murder, and Petitioner Lopez was convicted of second degree murder under an accessory theory.

The state court erroneously refused an instruction on defense of home which would have given Salazar a presumption of acting in defense of self and others. Further, the court's other instructions and prosecutor's arguments concededly wrongly told the jury that the defense of self and others was unavailable to Salazar or Lopez. Yet, the state appellate court wrongly found state law error only and found these errors harmless using a state law harmless error standard. Given the constitutional right to possess firearms for defense of self and others in a home, and the constitutional right to proof beyond a reasonable doubt of all elements of the evidence, these errors violated Petitioner's federal constitutional rights. Thus, Petitioner has presented a "substantial showing of the denial of a constitutional right," which "reasonable jurists could debate" and which are "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

B. Statement Of The Case

In 2014, Petitioner was convicted in Monterrey Superior Court of

second degree murder and other crimes and sentenced to 22 years to life in prison. On May 31, 2018, the California Court of Appeal affirmed. (Appendix D). The California Supreme Court denied review on September 19, 2018.

Petitioner filed a timely pro per federal writ of habeas corpus. The District Court denied appointment of counsel and denied the writ on March 3, 2021. The District Court also denied a COA. (Appendix C). Petitioner filed a notice of appeal and requested the Ninth Circuit to grant a COA. The Ninth Circuit summarily denied the motion on June 27, 2022 and summarily denied a motion for rehearing on August 26, 2022. (Appendix A, B).

A Petition for Writ of Certiorari is taken from the June 27 and August 26, 2022 orders denying a COA.

REASONS FOR GRANTING THE WRIT

Standard for Granting a Certificate of Appealability

In *Miller-El v. Cockrell*, this Court recognized that 28 U.S.C. § 2253(c) authorizes issuance of a COA where a habeas petitioner can

> "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003), quoting *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Barefoot v. Estelle*, 463 U.S. 880, 892 n.4 (1983). Further, § 2253(c) permits the issuance of a COA where a petitioner has made a "substantial showing of the denial of a constitutional right." *Miller-El*, 537 U.S. at 336. "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought,

the whole premise is that the prisoner has already failed in that endeavor.'" *Miller-El*, 537 U.S. at 337, quoting *Barefoot*, 463 U.S. at 893 n.4. Thus, a petitioner need not demonstrate that "some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. Thus, a Court should not deny a COA "merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337.

Petitioner here only requests the modest relief of a COA, which is required only upon a showing that the issues he was presented "were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (internal quotation omitted). As seen below, Petitioner clearly meets the modest standard of presenting a debatable issue.

Further, Petitioner has proceeded in federal court pro per without the assistance of counsel. Petitioner has at least met this modest standard in his pro per pleadings.

This Court should grant certiorari and order that the Ninth Circuit issue a Certificate of Appealablity and appoint counsel.

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I. Where the federal constitution and California statutory law both protect the rights of all citizens to use a firearm to defend themselves and other occupants in the home, there is at least a debatable issue whether the state appellate court's decision was unreasonable or contrary to settled constitutional law in finding that the refusal to instruct on the right to defense of self and others in a home was only state law error and not federal constitutional error.

The state trial court's refusal to instruct on an occupant's right to use force to defend against an intruder in the home denied Petitioner his federal constitutional rights to present a defense and due process of law and infringed upon the constitutional rights of citizens to possession of guns in the home for defense of self and other occupants.

Here, the trial court refused co-defendant Salazar's counsel's instruction per CALCRIM 506 on defense of home. The court also had a sua sponte duty to give CALCRIM 506 and 3477 which gives home residents a presumption of acting in defense of self or others.

"In *District of Columbia v. Heller*, 554 U.S. 570 [] (2008), and *McDonald v. Chicago*, 561 U.S. 742 [] (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022) (parallel citations omitted). The right to defend a residence against an intruder is also protected by

California statutory law. Cal. Penal Code §§ 197(2), 198.5. The state court found these claims of error were preserved and reviewable because of the trial court's sua sponte duties to give these instructions.

Again, the failure to instruct on the right to defend one's home and the presumption of self-defense implicated numerous clearly established constitutional rights as held in this Court's opinions. This Court has clearly found that instructions that improperly fail to require the state to prove lack of self defense or defense of others in a homicide case violate the federal constitution. *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975); *In re Winship*, 397 U.S. 358, 364 (1970).

Also, instructions that place improper burdens on a jury's acceptance of a defense violates federal constitutional right to present a defense. *Cool v. United States*, 409 U.S. 100, 102-104 (1972) (per curiam).

Also, the constitutional right to present a defense includes the constitutional right to instructions on a defense theory. *Mathews v. United States*, 485 U.S. 58, 63 (1988).

Also, instructions that misdescribe or omit an element of an offense violate the federal constitution and, if prejudicial, require the court to issue a writ of habeas corpus. *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam); *Neder v. United States*, 527 U.S. 1, 14-15 (1999).

Here, the state court did not dispute that Salazar had a right to defend the home he was living in against intruders. The state appellate court,

however, remarkably held there was no federal constitutional error, and the district court found this holding was not unreasonable. (D.Ct.Opn. 10). But, the state court's holding that this error was only state law error and was harmless error was contrary to, and an unreasonable application of this Court's holdings as described above.

As described above, the prosecutor did not deny that Frosty and Osito posed an imminent deadly threat to Shadow (Salazar's guest in the home) who was unarmed. Frosty and Osito broke into the home and attacked the occupants with weapons. The shooting by Salazar of the armed intruders Frosty and Osito was overwhelmingly justified they had stabbed and pummeled Salazar, Petitioner Lopez, and others in house, threatened to kill everyone with a firearm, and posed a continuing imminent and reasonable danger to Shadow, Salazar, Nene and everyone else in the house.

The district court stated that the state court was not unreasonable in finding no prejudicial error because Salazar went to retrieve the gun from elsewhere in the house before returning to confront Frosty and Osito, and thus he left a place of safety. (D.Ct.Opn. 10). But, Salazar had the constitutional right to possess a gun to defend the home. *The Second Amendment right to possess a gun for defense of self and others in the home would mean nothing, if, as the state court and district court held, the right is forfeited if the defendant temporarily leaves the immediate presence of the intruders to retrieve the gun from a gun safe or closet to return to protect the rest of the home from the armed*

and violent intruders. The state and district court holdings would relegate the right to possess a gun for defense of home to the right to cower safely with a gun in a closet or basement while armed intruders violently attacked others in the home.

The requested and required instructions (CALCRIM 506 and 3477) which were refused or omitted by the trial court would have not only instructed the jury on the right to defend against intruders in the home, but would have required the jury to presume that Salazar honestly believed he needed to act to protect himself, his girlfriend, and others in the home. Even if the jury found the use of force excessive or unreasonable, the jury would have convicted Salazar and Lopez at most of manslaughter based upon imperfect defense of self and residents of the home.

At least one reasonable juror could have accepted this defense had the court not refused or otherwise failed to give these instructions.

Again, when considered correctly, this is an easy case for a COA. The state court refused to consider the constitutional errors involved in the failure to instruct, and instead viewed the error as state law error. This was contrary to Supreme Court law. But the district court rubber-stamped the state court's error.

Again, on these facts, it begs credulity to argue, as the state argued here, that a presumption of self-defense by a resident against a violent intruder would have no reasonable probable effect on the jury. It is unbelievable for the

state to argue that, with proper instructions on the presumption that a resident has the right to defend a home against intruders, no juror could have found a reasonable doubt that Salazar shot Frosty and Osito in defense of himself, his girlfriend or others in the home. Frosty and Osito had barged into the house with a firearm, grabbed a pair of scissors, and inflicted grievous bodily injury upon numerous occupants of the home, and appeared intent on killing everyone in the house. The state's insistence that Salazar had no right to retrieve his gun and then use it to defend the home seriously erodes the fundamental Second Amendment right to possess a gun in the home for defense of self and others in the home.

Finally, again, even assuming that Salazar used excessive force to defend the home and thus did not act in reasonable defense of self or others even with proper instructions, a killing in the unreasonable belief in the need to defend oneself or another, is not murder but voluntary manslaughter. (CALCRIM 571.) The instructions of defense against an intruder in the home would have instructed the jury to presume that Salazar acted with the subjective belief in the need to defend himself and Nene–which means that, at most, the killings were voluntary manslaughter. It begs credulity to argue that the error which required a presumption of acting in defense of self and other occupants, was not at least prejudicial on the charge of murder versus manslaughter.

Petitioner has at least met the modest standard of demonstrating that the issue is debatable and merits further consideration.

This Court should grant review, vacate the Ninth Circuit's order, and remand with instructions to grant a COA and appoint counsel.

II. Where the federal constitution protects the rights of all citizens to use a firearm to defend themselves and other occupants in the home, and where the federal constitutional requires proof of every element beyond a reasonable doubt, including lack of justification for homicide, there is at least a debatable issue whether the state court erred by finding only state law error from the concededly erroneous instructions which improperly removed the state's burden to prove the element of lack of justification.

All parties agree that the state trial court improperly instructed the jury per CALCRIM 3472 (self-defense may not be contrived). This was error because all parties agree that Frosty and Osito were not legally justified in bursting into Salazar's home with deadly weapons to attack Appellant and the occupants of the house. The court also erred by instructing per CALCRIM 3471 (self-defense mutual combat). This was error because codefendant Salazar did not agree to fight either victim.

All parties further agree that the prosecutor also misstated the elements of murder in closing argument by wrongly arguing that the defendants had forfeited their right of self-defense–based upon the erroneous CALCRIM 3471 and 3472 instructions. The improper instructions and arguments eliminated

the defendants' defense of self-defense and defense of home, and the state's burden to prove lack of justification.

The State conceded that these instructions should not have been given in this case. The State did not dispute that these instructions removed an element of murder–which required the prosecution to negate perfect or imperfect defense of self or defense of others. (State Opinion ["St.Opn."] 23-25; *see Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). The state court found the court erred in giving the instructions. (St.Opn. 24).

As set forth above, this Court has "recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), citing *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010).

The trial judge who saw and heard the evidence and testimony found the evidence of perfect and imperfect self defense and defense of others *sufficiently credible to convince reasonable jurors*–the threshold required to give an instruction. (14 RT 3968-71). The state appeals court, however, rejected this finding and rejected Petitioner's claim after finding erroneously that the error was a state law error, and then finding that erroneously (under the state law harmless error standard) that there was no prejudice because there was no reasonable probability of a juror accepting perfect self-defense or defense of others. (St.Opn. 25-29). The state court did not consider imperfect self-defense

or defense of others.

A. A COA should issue because the state court judges were divided on the issue, indicating that reasonable jurists could disagree.

The Fifth and Seventh Circuits and several District Courts adhere to the Seventh Circuit's holding: "'When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.'" *Rhoades v. Davis*, 852 F.3d 422, 429 (5th Cir. 2017) (quoting *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011)); *see, e.g.*, *Lee v. Warden, Georgia Diagnostic Prison*, 2019 WL 1292313, *5 (S.D. Georgia 2019); *Smith v. Winn*, 2017 WL 2351743, *10 (E.D. Mich. 2017); *Frazier v. Bell*, 2013 WL 5902480, *8 (E.D. Mich. 2013).

Indeed, three justices of this Court have previously quoted this holding of *Jones v. Basinger* with approval. *See Jordan v. Fisher*, 576 U.S. 1071, 135 S.Ct. 2647, 2651, 192 L.Ed.2d 948 (2015) (Sotomayor, Ginsburg, & Kagan, JJ., dissenting from denial of certiorari).

Here, the state trial judge found sufficient credible evidence of defense of self and others to raise a reasonable doubt, and thus the court instructed on the issue. But the state court of appeal found, to the contrary, that there was insufficient credible evidence of defense of self or others to raise a reasonable doubt. The appellate court thus found the error harmless.

Because reasonable jurists did agree, Petitioner has at least met the

modest standard of demonstrating that the issue is debatable and merits further consideration.

This Court should grant review, vacate the Ninth Circuit's order and remand with instructions to grant a COA and appoint counsel.

B. Reasonable jurists could disagree whether the district court erred in stating that state appellate court was not unreasonable to hold that there was no federal constitutional error where the trial court erroneously instructed that the defendants had no right of perfect or imperfect self-defense or defense of others if they started a fight.

Further, independently of the disagreements by state court judges, the issue is debatable. As described above, the State and state appellate court agreed that the trial court erroneously instructed that the jury per CALCRIM 3471 and 3472 that the defendants had no right of self-defense or defense of others, if the defendants started the fight. (St.Opn. 23-25).

The state court found, however, that these instructions did not implicate any federal constitutional rights, and the court reviewed for harmless error based upon state law error only.

The district court applied the wrong precedent–*Estelle v. McGuire*, 502 U.S. 62 (1991)–and asked whether the "the disputed instruction by itself so infected the entire trial that the resulting conviction violates due process."

(District Court Opinion ["D.Ct.Opn."] 5, quoting *Estelle*, 502 U.S. at 72.) But that is the wrong standard. Rather, it is clearly established that a defendant is deprived of due process if a jury instruction "ha[s] the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind." *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979); *Francis v. Franklin*, 471 U.S. 307, 326 (1985) (reaffirming "the rule of *Sandstrom* and the wellspring due process principle from which it was drawn"); *see Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (federal constitution places the burden on the state to prove every element of homicide beyond a reasonable doubt, including *lack of justification, or partial justification* such as heat of passion or imperfect self-defense or imperfect defense of others); *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Also, instructions that place improper burdens on a jury's acceptance of a defense violates federal constitutional right to present a defense. *Cool v. United States*, 409 U.S. 100, 102-104 (1972) (per curiam).

Also, the constitutional right to present a defense includes the constitutional right to instructions on a defense theory. *Mathews v. United States*, 485 U.S. 58, 63 (1988).

Also, instructions that misdescribe or omit an element of an offense violate the federal constitution and, if prejudicial, require the court to issue a

writ of habeas corpus. *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam); *Neder v. United States*, 527 U.S. 1, 14-15 (1999).

Also, instructions that are conflicting and ambiguous when describing an element of an offense violate the federal constitution and, if prejudicial, require the court to issue a writ of habeas corpus. *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

The state court's holding that this error was only state law error and was harmless error was contrary to, and an unreasonable application of, these settled Supreme Court authorities.

The district court erred by holding–contrary to the state court–that the instructions were on the whole correct, despite the finding that CALCRIM 3471 was given erroneously, and the Attorney General's concession that the trial court erroneously gave CALCRIM 3472. Reasonable jurists could at least debate whether the district court was wrong.

Further, reasonable jurists could debate whether the district court was wrong to credit the state court's finding that the jury likely disregarded these instructions. (D.Ct.Opn. 8). Here, the state court acknowledged that the prosecutor argued based upon the erroneous instructions that the defendants thereby forfeited the rights of perfect and imperfect defense of self and others. (St.Opn. 28). Indeed, the prosecutor misstated the law repeatedly, and told the jurors that Salazar and Lopez had categorically forfeited the right of defense of self or others because Salazar and Frosty had made a threat by voting on

Frosty's status at the earlier meeting. (16RT 4658 ["There was no right to self-defense because you started it."][emphasis added]; *see* 4656 [when Lopez, Salazar and friends met to declare Frosty no-good "you're starting a fight;" when Lopez accused Frosty of being no-good, "[h]e started that fight"], 4566 [Lopez called the meeting. "He started a war. He lit that fire."]; *see also* 16RT 4657 ["You threaten a gangster's life like Frosty, even worse things could happen."]). This should conclusively demonstrate prejudice and preclude a finding that the jury ignored the erroneous instructions emphasized repeatedly by the prosecutor. Nothing in the prosecutor's argument or instructions told the jury that they should ignore the repeated erroneous statements of law that Salazar and Lopez had forfeited the right to defense of self and defense of others. Nothing in the prosecutor's arguments told the jurors to only apply the correct law. Reasonable jurists could at least debate this issue.

The state appellate court and district court's holding that the trial court's instruction that not all instructions apply, resolved the error is contrary to *Francis*, 471 U.S. at 322. An instruction that tells the jury that not all instructions apply does not resolve the ambiguity and constitutional infirmity; none of the instructions resolved the constitutional infirmity. *Francis*, 471 U.S. at 322. There is at least a debatable issue.

Finally, the district court did not address prejudice under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), whether it is reasonably probable that the error "had a substantial and injurious effect or influence in determining the

jury's verdict." *Id.* at 637. Although the district court did not address that issue, there is at least a debatable issue that the error was prejudicial where the prosecutor emphasized the argument.

Here, there was testimony that Frosty was only three steps away from stabbing Salazar. Also, the prosecutor conceded that Frosty and Osito could have killed Shadow, had nothing intervened. (16RT 4664.) Further, it was undisputed that Frosty and Osito broke into the house that Salazar shared with his girlfriend, they were armed with a gun and a sharp object and threatened to kill everyone there. The prosecutor did not deny that Frosty and Osito posed a deadly threat to Shadow (Salazar's guest in the home) who was unarmed. The state conceded that Frosty was "agitated, enraged, and had methamphetamine in his system." (Answer 48.)

The shooting by Salazar of Frosty and Osito was overwhelmingly justified where these armed and violent intruders had stabbed Petitioner Lopez and others, had pummeled Shadow and others in house, had threatened everyone in the house with a firearm, and posed a continuing imminent and reasonable danger to Shadow, Salazar and others. Many people have been acquitted with less justification.

There was substantial testimony that Frosty and Osito posed a continued threat to Shadow, Salazar, Dodger and Nene. Every witness except one, testified that they believed Frosty and Osito were imminently about to kill or seriously injure multiple occupants of the house. Nene testified that Osito and

Frosty did not stop attacking Shadow until they were shot. (10RT 2718.) Based on her observations of Frosty and Osito's attack, Nene also feared for her own safety. (9RT 2716-17.) It looked like Frosty was trying to kill people with the knife. (9RT 2719.)

Shadow saw Osito moving towards Salazar. He thought Osito was still armed and firing at him when Salazar finally shot Osito and Frosty. (9RT 2419-22, 2532; 3CT 683-685.)

At the time Salazar shot Frosty and Osito, Dodger saw that Frosty was stabbing and slashing at Shadow. Dodger believed Osito still had the gun and was afraid that Frosty and Osito were going to kill Shadow and kill him, too. (10RT 2776, 2784-85, 2813, 2832-33, 2844, 2909-11.)

A reasonable juror could have accepted this testimony had the prosecutor and the court's flawed instructions not improperly told the jury that the defendants had forfeited their rights of defense of self and others.

When considered correctly, this is an easy case. The state court assumed error, but applied the wrong state-law prejudice standard, contrary to settled Supreme Court law. But, the right to possess firearms to defend oneself and others in the home is protected by the Second Amendment. Further, the right to defend oneself and others implicates the constitutional right requiring the *state to disprove* defense of self or others as an element of the offense beyond a reasonable doubt. The state court found that the prosecutor repeatedly misstated the law and wrongly told the jury that defendants' only defense-

defense of self and defense of others–had been forfeited. This misstatement of law emphasized the court's flawed instructions, exacerbating the constitutional error. Neither the prosecutor's argument nor the court's instructions corrected these misstatements of law that eliminated an element of the offense.

On these facts, moreover, it begs credulity to argue (as the district court and state appellate court held) that absent the improper prosecutorial argument, flawed instructions, no juror could have found a reasonable doubt that Salazar shot Frosty and Osito in reasonable defense of himself or Shadow. Indeed, the trial court found sufficient evidence of self-defense or defense of others to convince a reasonable juror. The issue is at least debatable, and a COA should issue.

Finally, the state appellate court and district court gloss over the issue of *imperfect defense* of self or others. Even assuming that no juror would reasonably find that Salazar shot in *reasonable* defense of self or others, a killing in the subjective but *unreasonable* belief in the need to defend oneself or another, is not murder but *voluntary manslaughter*. (CALCRIM 571.) It begs credulity to argue that the error was not at least prejudicial on the charge of murder versus manslaughter. Every witness except one subjectively believed that Frosty and Osito were about to kill or inflict great bodily injury upon Shadow, Salazar and everyone in the home. If infliction of death or great bodily injury appeared imminent to all these witnesses, one or more jurors would surely have a reasonable doubt that Salazar had at least a subjective belief

(even if unreasonable) that Frosty and Osito were an imminent deadly threat to him and others. The appellate court's harmlessness reasoning would remarkably require a gun-owning resident to cower in a bathroom or basement with a gun, and remain there while armed and violent intruders killed or maimed other guests in the house–*this would eviscerate the constitutional right to bear arms in the home.*

Even if Salazar fired unreasonably or too hastily, surely a reasonable juror could understandably find that Salazar honestly believed he needed to fetch his gun to protect Frosty and Osito from inflicting serious injury on his friends.

Petitioner has at least met the modest standard of demonstrating that the issue is debatable and merits further consideration.

This Court should grant review, vacate the Ninth Circuit's order and remand with instructions to grant a COA and appoint counsel.

Conclusion

Petitioner has at least met the low threshold of demonstrating that these issues are debatable among reasonable jurists. The Ninth Circuit was thus clearly wrong to summarily deny him a Certificate of Appealability without appointing counsel (as did the District Court). This Court should grant

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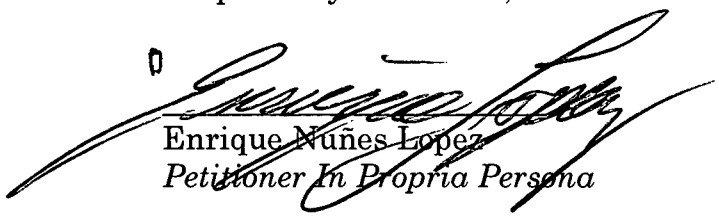
certiorari and order the Ninth Circuit to issue a COA and appoint counsel for Petitioner.

Dated: January 4, 2023

Respectfully submitted,



Enrique Nuñes Lopez
Petitioner In Propria Persona