

22-7407

No. \_\_\_\_\_

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

APR 14 2023

OFFICE OF THE CLERK

Derrick D. Hayes — PETITIONER  
(Your Name)

vs.

People of the State of Illinois — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF ILLINOIS

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

PETITION FOR WRIT OF CERTIORARI

Derrick D. Hayes  
(Your Name)

P.O Box 1000  
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Menard Illinois 62259  
(City, State, Zip Code)

1 618 826 5071  
(Phone Number)

QUESTION(S) PRESENTED

- 1). Whether the petitioner's trial attorney Rendered Constitutionally ineffective assistance by pursuing a Defense - Provocation - That was patently untenable and doomed to fail.
- 2). Whether the trial Judge improperly refused to instruct petitioner's jury on Second degree murder based on provocation as a lesser-mitigated offense of first degree murder.

**LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

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

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

OPINIONS BELOW

For cases from **federal courts**:

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

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 is unpublished.

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

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 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix 9 to the petition and is

reported at Appellate Court(4th) 129071; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the State Appellate Court of Illinois court appears at Appendix A to the petition and is

reported at People v Hayes 2022 IL App (4th) 210 409; 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 is unpublished.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 Jan 25, 2023.  
A copy of that decision appears at Appendix D.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_

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

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### 1) U.S. Const. amend. VI, ¶14

The constitutional right requires effective assistance because the right to counsel is a fundamental right that ensures the fairness and, thus, the legitimacy of our adversarial process

### 2) 720 ILCS 5/9-2 (A)-(1)

under Illinois law, "Serious provocation" is a mitigating factor that reduces the offense of first-degree murder to Second degree murder

### 3) 720 ILCS 5/9-2-(B)

"Serious provocation" is conduct sufficient to excite an intense passion in a reasonable person.

### 4) Ill Pattern Jury instr. Criminal, No 3.17

A instruction explaining to the jury that they should view a witness' testimony with suspicion.

## STATEMENT OF THE CASE

on August 25 2016 petitioner, his brother Dominic Wilson went to the Handy pantry at Cook and Spring street in Springfield. Petitioner went into the store and bought a bottle of liquor. When he came out of the store his car was gone, and someone hit him in the head with a gun. He heard a loud noise and thought the gun had gone off.

Petitioner got up and charged the attacker, only to find the man pointing a gun at him. Petitioner turned and ran to his cousin's house nearby. On his way he flagged down a passing police car and was taken to the hospital and was treated for the wound which left a scar on his forehead. Petitioner made a statement/police report the next day, but police never apprehended the offender.

on May 30, 2017. Petitioner was at his girlfriend's house on 330 east laurel planning a cookout, when he got a phone call saying that the man who robbed him at the Handy pantry was down the street. Petitioner called his other girlfriend Yvette Bustamante for a ride, and she picked him and his brother up around 8 PM

STATEMENT OF CASE #2

Bustamante took petitioner and Wilson to their mothers house, and Petitioner went in briefly and returned to the car, Wilson told Bustamante where to drive. Bustamante gave a statement saying that she heard the cars passenger window go down, and asked Petitioner what he was doing, because the air conditioner was on. Then petitioner started shooting, firing two shots, pausing and firing a few more. Bustamante froze, then snapped out of it when petitioner told her to "go". She drove away and dropped petitioner and Wilson off.

Police obtained descriptions of the shooter and the car from witnesses. Dashayaa Jones told police that her boyfriends sister had a car similar to the car the shooter was in, and gave the address of where that person lived.

A video from Rafeeq's mini Mart on the corner diagonal from the house where the victim was shot captured the shooting, and another video from a nearby store showed the car leaving the area. The police later interviewed Bustamante. She lied but reversed her position, even agreeing to wear a wire-eavesdropping device.

## Statement of Case #3

Petitioner was charged with one count of felony murder predicated on aggravated discharge of a firearm, two counts of aggravated discharge of a firearm, and one count of aggravated unlawful use of a weapon. The State filed a superseding indictment adding two additional counts of first degree murder.

Before trial, defense counsel successfully sought to introduce evidence about the Handy pantry robbery the August before the shooting.

### Trial

A jury was selected on February 22, 2023. In defense counsel's opening statement, defense counsel told the jury that petitioner shot and killed the victim Malone, on May 30, 2017, and the purpose of trial was to explain why he shot, which was that he was aiming for my las Donald.

### STATE'S CASE

The State called numerous witnesses. Sandra Sullivan who was hosting the BBQ with her two daughters Dashayael Jones and Cassandra Lechner testified about the shooting, saying that they saw the shooter

## Statement of Case #4

leaning out the window of the car. Jones described the shooter as a skinny, dark-skinned black man with a fade. Jones later tentatively identified two men in a lineup as possibly looking like the shooter. Sullivan could not make any identifications.

Yvette Bustamante was the key state witness and she testified at length as a cooperating witness. She testified that she owned a "grayish" lumina in May of 2017. She testified she and petitioner was in a relationship. She testified about the evening of May 30. She stated that she did not see the petitioner with a gun when he came out of his mother's house, and that she did not know of any plan to shoot anyone, and that after the shooting she and petitioner drove the car to Maryland, Missouri, where they took tint off the windows.

Bustamante wore a wire, and the state published several conversations that she had with petitioner in which petitioner acknowledged shooting into the crowd.

### Defense Case

Petitioner also testified in trial on his own behalf

## Statement of Case #5

Stating that he was robbed at the handy Pantry on august 2016, and that on May 30, 2017 he got a phone call saying that the guy who robbed him at the handy pantry back in August 2016, was down the street. Petitioner testified that Bustamante was already on her way to Pick him up from his child's mother's house, and his brother pulled up and around the same time, so they both got into Bustamante's car and went to his mother's house to get a gun so that could confront the man who had robbed him at the handy pantry back in august 2016, but he was not planning to kill the guy who robbed him, and that he only took the gun because he expected that the guy who robbed him would have a gun since he previously attacked him with a gun.

Bustamante followed Petitioner's brother's directions and when they stopped at the light on 1st and Ash Street. Petitioner stated that he looked over, and saw the man who robbed him. Petitioner stated that his emotions just took over, and he intended to try to kill the guy who robbed him in august 2016.

## Statement of Case #6

Petitioner testified that his emotions took him back to his experience at the handy pantry where he was hit with a gun and robbed, and he started firing, and that he knew it was dangerous and that other people was around, and that he was only trying to kill the guy who robbed him.

The next day petitioner found out that he had shot the victim Malone, and that he felt terrible about killing her, and that he tried to get rid of the evidence in Bustamante's car because he was scared, and that he did not go to the scene intending to kill anyone, and that he only shot because his emotions took over and flashed back to the robbery.

### Jury Instructions

At the jury instruction conference, the defense sought to have the jury instructed on second degree murder based on provocation. After hearing the arguments the Judge refused the instruction.

### In Closing

Defense Counsel thanked the Jury and said that the question is "why" and that the petitioner testified to explain why even though he did not have to. The Jury returned verdicts finding Petitioner guilty on all counts, and found

## Statement of Case #7

that the allegation was proven that petitioner personally discharged a firearm that proximately caused death, after filing for a new trial that the Judge denied and hearing evidence and arguments in aggravation and mitigation, the Judge sentenced Petitioner to 55 years in prison.

### Appeal

Petitioner timely appealed, and the appellate court rejected both arguments finding first that trial counsel engaged in a strategy of "jury nullification," and that such a strategy was reasonable in this case. People v. Hayes 2022 IL App (un) 210409 \ 2. (Appendix A)

Petitioner filed a timely petition for rehearing which the appellate court denied the following day. Addressing the alternative argument the court found no error in refusing the second degree murder instructions, because the evidence did not support giving that instruction (Hayes at \ 210409 \ 2 ) (Appendix A )

REASONS FOR GRANTING THE PETITION #1

(Issue 1)

This Petition Should be granted because when reviewing the entire circumstances and evidence and what occurred in this case, trial attorney rendered Constitutionally ineffective assistance by pursuing a Defense - Provocation - This was Patently untenable and doomed to fail.

The Appellate court of Illinois fourth Judicial District erroneously ruled that trial counsels defense was not objectively unreasonable.

Facts of the case supports the evidence that Petitioner was robbed and injured in August 11/6/2016 and that some 9 months later, on May 30, 2017 after learning the whereabouts of the guy who robbed and hit him with a gun. Defendant went to go get a gun and because of his emotional flash back of the robbery he fired his gun trying to kill the person who robbed him, but instead Malone was killed.

## REASONS FOR GRANTING THE PETITION #2

That counsel's decision to present a provocation defense knowing that the facts clearly doesn't support that specific defense is objectively unreasonable.

Both federal and Illinois constitutions guarantee criminal defendants the right to effective assistance of counsel U.S. Const. Art VI ¶ 14. Ill. Const. 1970 § 9. (1984) Strickland v. Washington 460 U.S 668; 687

In petitioners case, counsels strategy in pursuing a "provocation" defense was doomed from the start. Counsel deprived petitioner of effective assistance of counsel. This ineffectiveness was shown when counsel chose a trial strategy by conceding that petitioner shot and killed Sheena Malone on May 30, 2017, hoping to show the trier of fact that petitioner was acting under serious provocation when he shot at Mylas Donald.

The provocation was based on petitioners belief that Donald was the person who previously pistol whipped and robbed him at the Handy pantry.

## REASON FOR GRANTING THE PETITION #3

Trial Counsel was also ineffective when he elicited testimony about the robbery from States witnesses and also by calling a police officer to testify about investigating the robbery. Then having petitioner to testify to it all. Then trial counsel had petitioner testify that when he received a call telling him that the offender who robbed him was a few blocks away. then he went to go get a gun then went to confront Donald, and then upon seeing Donald, and trying to shot Donald Shot and killed Malone.

This incident of the robbery at the Hanley Pantry happened nine Month before the shooting. Nine Months is way longer than any authority recognizes as an acceptable amount of time to support any theory based on provocation. See *People v Gurbrough*, 2009 Ill App. 3d 96, 101 (1st Dist 1994)

Whether trial counsel misunderstood the law or hoped the Jury would exercise sympathy towards petitioner, counselor ineffectively pursued a course which only allowed the Jury to return a favorable verdict if it chose to disregard not only the Jury instruction, but petitioners own testimony.

## REASON FOR GRANTING THE PETITION #4

Trial counsels deficient performance undermined confidence in the trial's outcome, that is, counsels Pursuit of an unavailable strategy prejudiced the petitioner. The Prejudice component of Strickland v. Washington, is not an outcome-determinative test." Rather, the question is whether counsels performance rendered the proceeding fundamentally unfair or undermined confidence in the outcome of the trial. People v Richardson 129 Ill 2d 401, 411 (2000) Kyle v Whitley 514 U.S 419, 434 (1995). Prejudice may be found even when the chance that minimally competent counsel would have won an acquittal is significantly less than 50 percent.

Here Counsel clearly presented a theory of defense that proved petitioner guilty. Practically using a defense that's based on provocation which basically made the State's case for them. Considered against the State's weak evidence, Counsel's ill-fated strategy and actions amounted to no real defense at all, and deprived petitioner a fair trial. See Chandler 129 Ill 2d at 249.

Petitioners trial attorney left the jury with no choice but to convict petitioner. Trial counsel failed to Pursue a viable strategy in the face of the States case that depended on the testimony of an Accomplice.

## REASON FOR GRANTING THE PETITION #5

Regardless of trial counsel's pursued strategy that was doomed from the inception, counsel's performance undermined confidence in the outcome of the trial and deprived petitioner of a fair trial, and of his constitutional right to the effective assistance of counsel.

This is the REASONS FOR GRANTING THE PETITION.

### ISSUE TWO

THE TRIAL JUDGE IMPROPERLY REFUSED TO INSTRUCT PETITIONER'S JURY ON SECOND DEGREE MURDER BASED ON PROVOCATION AS A LESSER-MITIGATED OFFENSE OF FIRST DEGREE MURDER.

In the alternative, if this court rejects petitioner's first argument and finds that counsel did not provide constitutionally ineffective assistance, it should find that the trial Judge committed reversible error when it refused to instruct Petitioner's Jury on Second Degree murder based on provocation.

Defense counsel sought the instruction based on evidence that Petitioner was robbed and pistol whipped by someone he believed was Myles Donald,

## REASON FOR GRANTING THE PETITION #6

and when he later saw Donald, he was emotionally transported back to the pistol whipping and robbery, and tried to shoot Donald. Assuming that this Court finds that this was a reasonable strategy to pursue, then at least some evidence supported the provocation defense, and the trial Judge's refusal to instruct the jury on a lesser offense deprived petitioner of his ability to present a defense and usurped the jury's constitutional role as a fact finder, depriving petitioner of a fair trial.

The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 329 (2006) U.S. Const. Amendments V, VI, XIV  
III Constitution 1970. art I § 2, 8. Part of presenting a complete defense includes the right to have the jury fully and properly instructed on the law. U.S. Const. Amend VI, XIV, III Const 1970. art I §§ 2, 8. *Beck v. Alabama*, 447 U.S. 625, 634-36 (1980)

The purpose of jury instructions is to guide the jury in its deliberations, to help it reach a proper

## REASON FOR GRANTING THE PETITION #7

Verdict through the application of legal principles to the evidence. People v Novak 163 Ill 2d 93. 115-16 (1994)

Giving a lesser offense instruction provides an important "third option" to the jury because "if the jury believes that a defendant is guilty of something, but uncertain whether the charged offense has been proved, the jury might convict the defendant of the lesser offense rather than convict or acquit the defendant of the greater offense."

When based on serious provocation, Second degree murder is an intentional homicide committed in a sudden rage of passion engendered by adequate provocation, and not the result of malice conceived before the provocation People v Leonard 83 Ill. 2d 411 420 (1980). "Serious provocation" is a "conduct" sufficient to excite an intense passion in a reasonable person. 720 ILCS 5/9-2 (B) (2015).

In this case, the facts supports "some evidence" of a Second Degree Murder instruction based on serious provocation. Specifically evidence that Petitioner had been provoked by Donalds previous substantial physical assault on him.

Evidence did show that petitioner was physically accosted by an attacker outside the Handy pantry on August 2016. Counsel also presented evidence and argument supporting the theory that Petitioner was guilty of Second Degree murder based on provocation. Petitioner testified to these accounts, but testified that his intentions was to kill Donald not Malone.

Never the less, the trial judges refused to instruct the Jury on Second degree Murder. To the extent the Judge may have based her ruling on the gap in time between the Handy pantry attack and robbery to the time of the shooting,

the Judge was mistaken as a gap in the time does not automatically negate the strong provocation required for Second degree murder. See e.g. People v. floffer 106 Ill.2d 186, 196 (1985)

The trial Judges refusal to instruct the Jury on provocation deprived petitioner a fair trial because his testimony that he intentionally shot at Donald. The Jury was left with no option but to convict petitioner of the greater charge of first degree murder. Willet 2015 Ill App (4th) 130702  
9191 90-93

REASON FOR GRANTING PETITION #4

Where evidence supported Second degree murder theory, refusal to give proper instruction was not harmless "it took the factual determination from the Jury") People v Blan, 392 Ill.App.3d 453, 460 (2d Dist) 2009.

There was at least some evidence that supported instructing Petitioners Jury on the theory the defense put forward; Second Degree Murder based on a Serious provocation,

The trial Judge erred in denying the lesser included provocation offense instructions, and in doing so deprived petitioner of a fair trial by invading the province of the Jury will at 1191 90-93.

For this Reason this Court Should Grant the petition.

Thus, if this Court does not grant relief based on argument I above, this Court should reverse petitioners conviction for first degree murder and remand for a new trial at which the Jury has the option of considering whether petitioner is guilty of Second degree Murder.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Derrick J Hayes

Date: APRIL 14-2023

Subscribed and sworn to before me on the

14th day of April, 2023

Shelley A. Shevlin  
Notary Public

~~Stevie~~  
~~NOTARY~~

