

24,5036
No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

JUL 03 2024

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Dalvon Curry — PETITIONER
(Your Name)

vs.

2nd Circuit Court of Appeals — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United state Court of Appeals For The Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dalvon Curry #28231-055
(Your Name)

U.S.P - Hazelton P.O. Box 2000
(Address)

Bruceston Mills, Wv 26525
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1.) Was there sufficient evidence pointing to petitioner being the Initial Aggressor required by New York Penal Law 35.15(1)(b)
- 2.) Did petitioner's failure to retreat violate, the "Duty To Retreat" instruction required by New York Penal Law 35.15(2)(a)
- 3.) Was there an agreement struck on December 5, 2015 to engage in the specific combat, which is unauthorized by New York Penal Law 35.15(1)(c)
- 4.) Was the petitioner responding to the victims past use of deadly physical force or the victims present and or imminent use?

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:

United States v. Dalvon Curry, No. 17-CR-103 U.S. District Court
for the Western District of New York. Judgement, entered Dec. 22, 2021

United States v. Dalvon Curry, No. 22-0050-CR U.S. Court of Appeals
for the Second Circuit. Judgement entered

RELATED CASES

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A 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☒ is unpublished.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 B to the petition and is

☒ reported at 542 F. Supp. 3d 197; 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☐ is unpublished.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 _____ 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was Nov. 21, 2023.

☐ 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: Feb. 6, 2024, and a copy of the order denying rehearing appears at Appendix A.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including March 7, 2024 (date) on July 5, 2024 (date) in Application No. 23 A 827.

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 _____.
A copy of that decision appears at Appendix _____.

☐ 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

United States Constitution, Amendment, XIV

STATEMENT OF THE CASE

The United States Court of Appeals for the Second Circuit, denied the Petitioner's direct appeal and petition for Rehearing en banc, stating that the district court did not commit plain error instructing the Jury as to the New York Law Self-defense / Justification defense, instructs such as; (1) Initial Aggressor, (2) Duty To Retreat, and (3) Combat by Agreement. 35.15 (1)(b), (2)(a), (2)(a)

Among the panels decision, they assert that all shot's came from the Porch which is where petitioner was standing and that petitioner walked off of the porch toward the victim before the shooting began, but physical evidence and witness testimony proves the panel's assertion to be wrong. Not only does physical evidence and witness testimony debunk their assertion but their decision to deny the petitioners appeal are contradicting and misleading.

The panels assertion that petitioner walked off porch is contradicting to their position that petitioner was on the porch when the shooting began and they misuse "People v. Anderson" conflicting "Anderson" with controlling New York Supreme Court Law.

Panel's stance as to "Initial Aggressor" see Appendix A; Page 6 N.Y.P.L 35.15(1)(b)

Panel's stance as to "Duty To Retreat" see Appendix A; Page 7 N.Y.P.L 35.15(2)(a)

Panel's stance as to "Combat by Agreement" see Appendix A; Pages 8-9 N.Y.P.L 35.15(2)(b)

The panel's decision is erroneous and is against the facts of the case giving these instructions permitted the Jury from evaluating petitioners defense thus Violated petitioner's right to a fair trial.

REASONS FOR GRANTING THE PETITION

Each question presented in this petition pertains to the New York Justification Law; (New York Penal Law 35.15), and because the law Pertaining to self defense is a matter of Federal common law "it is" appropriate to look to state court decisions for guidance. see "United States v. Melhuish, 6 F. 4th 380, 396-97 (2d Cir. 2021)".

QUESTION PRESENT # 1

The district court instructed the Jury, that the petitioner would not be justified in using deadly physical force "if" he was the initial aggressor and that the first person to use (or) threatens the use of deadly physical force means initial aggressor. [see Appendix C; Page 1 Lines 17-20, As annex herewith and incorporated by this reference as if set forth fully herein]

The district court also instructed the Jury that "a person who reasonably believes that another is about to use deadly physical force upon him need not wait until he is struck or wounded. He may, in such circumstances, be the first to use deadly physical force, so long as he reasonably believed it was about to be used against him." [see Appendix C; Page 2 Lines 3-7, As annex herewith and incorporated by this reference as if set forth fully herein]

The U.S. Court of Appeals, than denied the direct appeal of the district Courts ruling. [See Appendix A; Page 6] the Court of appeals decision was thus erroneous and review is necessary for the following reasons.

First the panels assertion that all shot's came from the porch is inconsistant with physical evidence and trial testimony, testimony from Buffalo Homicide Dectective James Maroney, Confirmed that there were two People shooting at each other. [See Appendix C; Page 3 Lines 16-25 + Page 4 Lines 7-18] which shows that there was a person firing on porch and a Person firing in the street. Followed by [Appendix D; Page 1] which shows 6 spent shell casings on the porch [As annex here with and incorporated by this reference as if set forth fully herein], Also see Appendix C page 5 Lines 4-13 which is testimony that there were more spent shell casings in the street. Followed by [Appendix D; Page 2] which shows 3 spent shell casings in the street leading to where victim ran. [As annex here with and incorporated by this reference as if set forth fully herein]

The panel then contradicts it first assertion "all shot's" came from Porch by stating that petitioner "walked off porch" toward victim then the shooting begun [See Appendix A; Page 7] which has been shown is inconsistent with the panels theory and evidence at trial, but in light of this evidence the panel substained the district Courts ruling.

The importance of the Supreme Courts review of all Four Questions Presented is that the federal law has not decided on the existence of Justification, bringing the matter back to state court decisions when Justification is presented in federal court. When reviewing state appellate and lower state court decisions on the "Initial Aggressor" exception it is well settled "in evaluating a challenged Jury instructions, Courts view the charge as a whole in order to determine whether a claimed deficiency in the Jury charge requires reversal" (see People v. Walker, 26 N.Y. 3d 170, 174, 21 N.Y.S.3d 191, 47 N.E. 3d 688 (2015))

However, petitioner did not object to the exception so review is solely for plain error. see "Miller v. United States, 954 F. 3d 551, 557-58 (2d Cir. 2020)" ; Fed. R. Crim. P. 52(b), and to prevail on plain-error review, an appellant must demonstrate that the error "is clear or obvious", "affected the appellants substantial rights," and seriously affects the fairness, integrity, or public reputation of the Judicial proceedings". see "United States v. McClimon, 788 F. 3d 75, 78 (2d Cir. 2015)

The error was absolutely clear and obvious, as previously stated initial aggressor means the first person who uses (or) threatens the use of deadly physical force [see Appendix C; Page 1 Lines 17-20, As annex herewith and incorporated by this reference as if set forth fully herein] the petitioner was threaten with the attempted use of deadly physical force by the victim [see Appendix C; Page 6 Lines 15-25, As annex herewith and incorporated by this reference as if set forth fully herein] Unlike victim petitioner has never committed violence prior to shooting see Appendix C; Page 7 Lines 7-14 As annex herewith and incorporated by this reference as if set forth fully herein

Giving this testimony there was no reasonable view of the evidence that the lower courts could have reached pointing to the petitioner as the initial aggressor, the instruction was not warranted, and it violated the Petitioners substantial rights, and seriously affected the fairness of the Judicial proceeding.

The decision made by the lower courts is not only in conflict with the facts of the case, but also with state court decision and should be settled by this court. In determining whether a defendant's acts were justified the jury must consider whether the "defendant believed physical or deadly physical force was necessary to defend himself against the imminent use of physical force or deadly physical force... [and if so] whether a reasonable person would have held that belief under the circumstances which existed" see (Matter of Y.K., 87 N.Y.2d 430, 434.)

The U.S. Court of Appeals uses federal cases such as "Harris v. O'Hare, 770 F.3d 224, 238 n.9 (2d Cir. 2014)" in making their decision that "(All a party needs to do is show that there is some evidence supporting the theory behind the instruction so that a question of fact may be presented to the jury)" but going back to state court decisions "the Initial Aggressor charge to justification may not be given if a 'reasonable view of the evidence' does not warrant it".) see people v. Valentin, 29 N.Y.3d 57 (2017)

QUESTION PRESENTED #2

The Jury was also instructed that "Petitioner would not be justified if he knew that he could avoid the necessity of using deadly physical force by retreating, and that he could do so with complete safety to himself and others [See Appendix C; Page 2 Lines 18-21, As annex herewith and incorporated by this reference as if set forth fully herein]"

The lower Courts sustained the conviction asserting that "there was sufficient evidence to support a finding that petitioner walked towards, rather than away from victim. (See Appendix A; Page 7) which is not only unsupported by witness testimony and physical evidence, but is also contradicting to their conclusion in their "Initial Aggressor" stance. (See Appendix A; Page 6)

Evidence proved that petitioner was entitled to be on the westside of Buffalo, N.Y., at the home where the encounter began [See Appendix C; Page 8 Lines 25 plus, Page 9 Lines 1-16, As annex herewith and incorporated by this reference as if set forth fully herein] Evidence further proved that the Person whom lived at the home was not on the porch with petitioner [See Appendix C; Page 10 Lines 17-25, plus Page 11 Lines 1-3, As annex herewith and incorporated by this reference as if set forth fully herein] Supporting the third Person who got into the car with petitioner was hiding behind a house during shooting. Also [See Appendix C page 12 Lines 12-25, As annex herewith and incorporated by this reference as if set forth fully herein]. Store video also confirm eyewitness testimony that third person had dreadlocks, just as the owner of home where petitioner was visiting [See Appendix C; Page 13 Lines 8-19, As annex herewith and incorporated by this reference as if set forth fully herein]

Petitioner was on a porch without any choice but to defend himself, one could assume that petitioner or whomever was present on porch with him attempted to open the door [see appendix D, page 3, as annex herewith and incorporated by this reference as if set forth fully herein] which is a photo of screen door open, but second door closed.

The lower courts decision is not only in conflict with controlling New York state law, but also with a controlling case from the Second Circuit. See "Davis v. Strach, 270 F. 3d 111, 125 (2d Cir 2001) at 126-127" stating "New York law does not obligate a person to leave a place he is entitled merely because there is another person present who might represent a future threat. It is (only) when the threat becomes imminent that the actor is obligated to withdraw 'if' he can do so with (complete safety), citing matter of Y.K., 87 NY2d 430, 434 (1996)

There is nothing showing that petitioner would have been able to retreat with complete safety required by New York Penal Law 35.15(2)(a) and although evidence pointed to the exact opposite, the lower court still denied Petitioner appeal, petitioner's duty to retreat did not arise until the point at which [the victims] use of deadly physical force was actually occurring or in this case imminent.

QUESTIONS PRESENTED # 3-4

The last two questions presented will be conducted together since both have something to do with the district Courts final instruction which reads "the defendant would not be justified if the deadly physical force involved, was the product of a combat by agreement, not specifically authorized by law." (See Appendix C; Page 2 Lines 22-24)

The lower court concluded that evidence at trial showed that petitioner and victim were apart of two seperate gangs that usally engaged in unauthorized combat (see Appendix A; Page 9) and that a combat by agreement instruction can be upheld, when there is adequate proof that the defendant and his opponent had tacitly agreed to engage in a gun battle. Citing; People v. Young, 33 A.D. 3d 1120, 1124 (3d Dep't 2006) and People v. Rosario, 292 A.D. 2d 324, 325 (1st Dep't 2002)

The lower Courts decision is erroneous For the following reasons, first "Although justification may be negated by proof that the (physical force involved) is a product of combat by agreement" N.Y. Penal Law 35.15(7)(c) that exception applies and the charge may be given, only where there is evidence of an agreement to combat "at issue".

For example, in People v. Rosario, 292 A.D. 2d 324, 325 (1st Dep't. 2002), the charge was proper where, shortly before the charged shooting, the defendant accepted his opponent's challenge to a gunfight by arming himself and returning to the scene ready to engage in the agreed-upon gunfight. Similarly, in People v. Rollins, 57 A.D. 3d 1279 (3rd Dep't. 2008), the charge was appropriate where the defendant, armed with a gun, accompanied his nephew to an agreed-upon "knuckle fight," and engaged in a gun battle with the victim, who he knew would be armed.

Here, there was no evidence the shooting was a product of a tacit or explicit agreement between petitioner and the victim to engage in a combat at 347 parkdale. Unlike, Rosario, and Rollins, there is nothing in the record supporting a conclusion that petitioner and the victim agreed to meet up on December 5, 2015 to engage in a gun battle, and the record does not support a mutual approach and or a acceptance of a challenge. Petitioner was stationary on a porch he was entitled to be. [See Appendix C: Page 6 Lines 15-25, As annex and incorporated by this reference as if set forth fully herein.]

Petitioner was approached by the victim and threatened, not Challenge [see Appendix C: Page 6 Lines 24-25. As annex and incorporated by this reference as if set forth fully herein], with nowhere to seek refuge choose to defend himself and a third party like permitted by N.Y. Penal Law 35.15 (2). Eye witness testimony from Allison Mitchell whom lived two houses down boldly confirms that the shooting was NO product of a combat by agreement, but yet the opposite [See Appendix C: Page 14 Lines 10-25. plus page 15 Lines 1-15. As annex and incorporated by this reference as if set forth fully herein] supporting ("some one on porch shouted NO a few times")

In any event, such an ambiguous standard, that a combat by agreement exists if there is a general agreement to engage in some yet-to-be-determined combat no matter the circumstances of the (actual) incident - is inconsistent with the plain language of the combat by agreement exception to justification, "that the physical force involved be a product of a combat by agreement" P.L. 35.15(2)(c); see People v. ONUSO, 93 N.Y.2d 398, 407 (1999). ("starting point of statutory interpretation is, of course, plain meaning")

Even if there was evidence for the court to give the charge, the instruction was prejudicially misleading. In fact the courts instruction that petitioner would not be justified in the physical force involved was the product of a combat by agreement, (not authorized) by law, invited the jury to focus on Petitioner's membership in a gang, rather than on the circumstances of the charged shooting and petitioner's intent at the time.

The court should have tailored the charge to the facts of the case, instructing the jury that "a combat by agreement is generally limited to agreements to combat between specific individuals or small groups on discrete occasions" see People v. Anderson, 180 A.D. 3d 923, 924 (2d Dept 2020), aff'd, 36 N.Y. 3d 1109 (2021). And that combat by agreement was not simply just a rivalry, but required the jury to find that on December 5, 2015 petitioner and the victim had an explicit or tacit agreement to "do battle".

The lower court's decision to uphold the district court's ruling is in conflict with the facts of the case and New York state case law, making clear that a combat by agreement charge may only be given where there is evidence; like Rosario and Rollins AT ISSUE.

CONCLUSION

This Court has not addressed the New York Justification defense and should for the reasons stated, each instruction had no basis for the Court to give it. None of the instructions were tailored to the facts of the case see People v. Baskerville, 60 N.Y. 2d 374, 382 (1983). Petitioner was not the initial aggressor [see Pages 5-8 of this petition], and that exception should not have been given, when the reasonable view of the evidence did not warrant it. see People v. Valentin, 29 N.Y. 3d 57 (2017).

Petitioner could not retreat with complete safety to himself and another, [see Pages 9-10 of this petition] because his duty to retreat did not arise until the victims threat was actually occurring or imminent. see Matter of Y.K., 87 N.Y. 2d 430, 433 (1996) Id at 434, And petitioner on December 5, 2015 was responding to the victim's present and imminent use of deadly physical force [see Pages 11-14 of this Petition] the combat involved was not preplanned, the physical force was not a product of some preexisting combat between two rival gangs. see People v. Rolden, 222 A.D. 2d 132, 647 N.Y.S. 2d 179, 183 (App. d.v. 1996) stating "In order to avail on a Justification defense, a defendant cannot be responding to past use of deadly physical force, but only to its present or imminent use."

All three were in conflict with the facts of the Case, as well as New York Law, one namely Combat by agreement was also misleading. The situation is the same in effect as if the issue of self defense had not been submitted to the Jury at all.

"It was submitted in form, but not in substance, for the submission was coupled with an instruction that pre-determined the answer". See People v. Tomlins, 213 N.Y. 240, 245-46 (1914). (Charge that it was defendants duty to retreat "if" he could, evinced his self-defense). Under the Courts erroneous instruction, the Jury was required to Find "Petitioner would not be Justified" because the deadly physical force was not specifically authorized by law" [See Appendix C; Page 2 Lines 22-24. As annex and incorporated by this reference as if set forth fully herein]

Each instruction was not warranted and thus violated Petitioner's due process right to a fair trial. United States Constitution, Amend. XIV.

The petition for writ of certiorari should be granted

Respectfully submitted,

Dalvon Curry; Inmate # 28231-055
Prose Petitioner

Sign D. Curry

Date: 8-2-24