

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDGAR CARRILLO — PETITIONER
(Your Name)

vs.

ERIC ARNOLD, Warden, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Edgar Carrillo AP-4492
(Your Name)

CSP- Corcoran P.O.Box 8800
(Address)

Corcoran, CA 93212
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Whether Petitioner is entitled to a Certificate of Appealability ("COA) when the presecution presented false evidence to convict petitioner to first degree murder. And the evidence shows that petitioner shot the victim in self-defense and during a heat of passion.

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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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 E 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☒ is unpublished.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 F 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☒ is unpublished.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 _____ 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☐ is unpublished.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☐ is unpublished.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 October 3, 2017.

☒ 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 _____.
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).

STATEMENT OF THE CASE

On January 17, 2013, the Sacramento County District Attorney filed an information charging Edgar Carrillo ("petitioner") with murder California Penal Code § 187, and assault with a deadly weapon California Penal Code § 245, subd. (a)(1). The murder charge carried a firearm allegation under California Penal Code § 12022.53; subdivision (d); the assault charge carried a great bodily injury allegation under California Penal Code § 12022.7, subdivision (a). [CT 27-28.]

The charges were tried to a jury on April 8, 9, 15, 16, 17, and 18, 2013. [CT 30-31, 51-58, 71-73, 80-81, 103-105.] On April 18, jurors returned verdict finding Mr. Carrillo guilty of second-degree murder, finding the arming allegation true, finding him guilty of assault, and finding the great bodily injury allegation not true. [CT 117-118.]

On May 16, 2013, the trial court denied probation and sentence Mr. Carrillo to 15 years to life plus 25 years to life for the murder, plus 4 years consecutive for the assault. [CT 165-167.] Mr. Carrillo filed his timely notice of appeal on May 20, 2013. [CT 168.]

1 STATEMENT OF THE FACTS

2 Late on Christmas Eve of 2008, Lorena Torres and her brother
3 Francisco, who she called Paco, drove to 2340 North Avenue in
4 Sacramento to look for Paco's girlfriend, Ahida, so they could
5 invite her to open Christmas presents with them. Ahida's sister,
6 Airali, and Mr. Carrillo, Airali's husband, lived at the North
7 Avenue house. [1RT 42-45, 88.] It was raining heavily that night.
8 [1RT 35.]

9 Lorena drove to North Avenue ["because Paco had been drinking."]
10 She went up to the door to ask for Ahida, and Ahida's brother Ilde,
11 answered the door. [1RT 46.] Mr. Carrillo was inside also. [1RT
12 46.] Ilde invited Lorena in for a beer. Lorena went in but said
13 she just wanted to get Ahida. She and Ahida then went outside.
14 [1RT 47.]

15 Ahida and Paco talked outside for a few minutes before Ahida
16 said she would go with them. Then Ilde came outside and told Ahida
17 to go inside the house. [1RT 49.] Ilde appeared to be upset and
18 screaming at Ahida. [1RT 67.]

19 After Ilde went back inside the house, Lorena testified, Mr.
20 Carrillo went outside and confronted Paco near the truck in which
21 Lorena and Paco had arrived, pushing him. [1RT 50, 67-68.] She
22 said Mr. Carrillo asked Paco, "Why are you coming to my house?"
23 [1RT 50.] Lorena grabbed Paco and said she didn't want any problems
24 and that they were leaving. [1RT 51.]

25 Mr. Carrillo then pulled out a gun and fired it at the ground near
26 Lorena and Paco. [1RT 51.] Lorena moved to the driver's side of
27 the truck. [1RT 54.] When she got to the front of the truck, she
28

1 saw Ilde, Ahida and Airali at the front of the truck and heard a
2 second shot. [1RT 54-55.]

3 After she heard the second shot, Lorena went to the back of the
4 truck, where she saw Paco on the ground and Mr. Carrillo pointing a
5 gun at him. She testified that Mr. Carrillo grabbed her and hit her
6 in the head with the gun. Mr. Carrillo also started kicking her,
7 and she saw Mr. Carrillo and Ilde kicking Paco. [1RT 55-56.]

8 Lorena said after she was hit in the head, she saw Mr. Carrillo
9 and Ilde get into a green Xterra and drive away. [1RT 58.] The
10 Xterra belonged to Ahida. [1RT 83-84.]

11 A forensic pathologist testified that Paco was shot twice in
12 the chest and that both injuries were fatal. [1RT 134.] He also
13 had some injuries on his head that could be consistent with him
14 being kicked. [1RT 151.] His blood alcohol level was .18. [1RT 153]

15 Lorena went to the hospital and got five stitches in her head
16 where she was hit with the gun. [1RT 58-59, 85.]

17 When police searched Mr. Carrillo's house, they found six .38-
18 caliber bullets in a drawer in a downstairs bedroom. [1RT 106.]
19 They did not determine who slept in that bedroom. [1RT 108.] A
20 firearms and toolmark expert testified that a bullet collected from
21 the street that night and a bullet retrieved from Paco's body were
22 both consistent with either .38 or .357 caliber bullets. He
23 testified that .38 and .357 caliber bullets are the same diameter
24 but are different lengths. Both can be fired from a .357 magnum gun,
25 but only .38 bullets can be fired from a .38 caliber gun. [1RT 120-
26 126.]

27 The parties stipulated that if Ahida had been called to testify,
28

1 she would have said that she had been dating Paco for three months
2 at the time of the shooting and that her brother, Ildefonso Diaz,
3 was mad about that fact because Ahida was in the process of divor-
4 cing her husband but was not actually divorced. [1RT 161.]

5 Mr. Carrillo was the only defense witness. He testified that
6 he lived at 2340 North Avenue at the time of the shooting. The
7 house had four bedrooms, and his was upstairs. [1RT 163-164.]
8 His cousin was staying in the downstairs bedroom in which the bullets
9 were found. [1RT 165.]

10 Mr. Carrillo testified that he did not own a gun. He had a gun
11 on Christmas Eve 2008 because one of his friends, Luis, left the
12 gun with Mr. Carrillo after borrowing Mr. Carrillo's truck that day.
13 [1RT 166-167.]

14 Mr. Carrillo did not know Lorena or Paco Torres before the
15 night of the shooting. He first saw them after they arrived at his
16 house and Ilde went outside to talk to them. When Mr. Carrillo
17 went outside to see what was going on, he heard them arguing. Paco
18 was drunk and violent and was making threatening statements to Ilde
19 and Mr. Carrillo. [1RT 169-173.]

20 Before Mr. Carrillo pulled the gun out, Paco came at him and
21 kicked him a few times. Then Mr. Carrillo fired at the ground to
22 try to scare him off. [1RT 174.] Paco did not stop and said he
23 was going to beat the shit out of Mr. Carrillo. [1RT 174.] Paco
24 started to reach into his pants, and Mr. Carrillo then shot Paco.
25 [1RT 174-175, 180.]

26 Ilde grabbed the gun from Mr. Carrillo and kicked Paco in the
27 head before hitting Lorena with the gun. [1RT 175.]

1 Ilde told Mr. Carrillo they needed to leave and he grabbed the
2 keys to Ahida's truck. They drove to a nearby gas station, where
3 Mr. Carrillo called a friend for a ride to Mexico. [1RT 176-177.]
4 He fled because he knew he had done something wrong. [1RT 177.]

5 Authorities extradited Mr. Carrillo from Mexico to face charges
6 in this case in 2012. [1RT 87.]

1 REASON FOR GRANTING THE PETITION

2 1. Whether a trial court instruct jurors on an imperfect self-
3 defense theory of voluntary manslaughter when the defendant's
4 uncontradicted statements establish that he shot unarmed decedent
5 in the fear that the decedent would kill him but without any eviden-
6 ce the decedent was actually armed.

7 2. Whether the failure to instruct on imperfect self-defense in
8 a case in which the defendant shot and killed an unarmed man denied
9 the defendant of his right to present a defense, in violation of the
10 U.S. Constitution, and is thus measured for prejudice under Chapman?

11 3. Whether the failure to instruct on imperfect self-defense
12 was prejudicial when jurors rejected first degree murder but could
13 only reasonably find the killing further mitigated by acquitting
14 the defendant altogether?

15
16 Edgar Carrillo was convicted of second degree murder for shoo-
17 ting an unarmed man. But Carrillo and Francisco Torres pushed
18 each other immediately following the shooting. See Exhibit A p. 1.
19 through 7.

20 The evidence showed the decedent, Paco Torres, went to Mr.
21 Carrillo's house on Christmas day to try to spend time with Ahida
22 Garcia, the sister-in-law of Petitioner. Paco Torres was very
23 drunk. At the time of the autopsy, Paco has a .18% alcohol content
24 in his system. Lorena Torres sister of Paco Torres, on 12/25/08,
25 was interviewed by Detective Kirtlan, Lorena said, "Edgar (Petitio
26 ner) said to Paco, don't scream at me. And they(Paco and Petitioner)
27 started to push each other." See Exhibit A page 3.)

1 After Petitioner and Paco pushed each other, an angry argument
2 ensued, and Mr. Carrillo fired two shots into the ground near Paco
3 Torres to get him to leave. Paco stayed and according to Mr.
4 Carrillo's testimony, went to his vehicle to retrieve a weapon.
5 According to Mr. Carrillo, as Paco Torres seemed to be reaching into
6 his pants for a weapon, Mr. Carrillo shot and killed him.

7 The trial court instruct jurors on the provocation theory of
8 manslaughter but not on the imperfect self-defense theory. The
9 California Court of Appeal found this omission neither erroneous
10 nor prejudicial, holding that if jurors believed Mr. Carrillo's
11 belief in the need to defend was honest, they necessarily believed
12 it was also reasonable. The California Court of Appeal's holding
13 was based on one or more fundamental misunderstanding of the imper-
14 fect-self-defense doctrine and trial courts' duty to instruct on
15 lesser offenses.

16 First, This Court should grant the Certificate of Appealability
17 the attached pages in exhibit a, show that Lorena Torres, the sister
18 of Francisco Torres told Detective Kirtlan, that Paco and Mr. Carri-
19 llo were pushing each other, and that Lorena had to separated them.
20 This pushing was very immediately the shooting. Inter alia, this
21 attached pages in exhibit a, never were presented to the jury, or
22 to the United States District Court for the Eastern District of
23 California.

24 After the pushing between Francisco Torres and Mr. Carrillo,
25 Francisco was putting his hands in his pockets, Mr. Carrillo thought
26 that Francisco Torres was reaching for a weapon, also Francisco went
27 towards his vehicle, and Mr. Carrillo thought that Fracisco was

1 going to get a weapon from his vehicle. And Mr. Carrillo shot his
2 gun.

3 This Court should grant COA, because no case has ever held that
4 the duty to instruct on lesser offense only arises if the defend-
5 ant's evidence completely and consistently establishes the lesser
6 offense.

7 The California Supreme Court previously has held that jurors
8 are free to accept some testimony and reject other testimony. If
9 the jury in this case would have heard the contents of the pages
10 attached in exhibit a, there is not doubt that the jury would have
11 believed Mr. Carrillo's testimony. But the prosecutor, trial coun-
12 sel, and the trial court never showed to the jury that Lorena
13 Torres, had told Detective Kirtlan that Paco and Mr. Carrillo were
14 pushing each other, and that Lorena Torres intervene and separated
15 them. Even Lorena Torres refused to admit during her testimony that
16 Francisco Torres and Mr. Carrillo were pushing each other just a
17 couple of seconds from the shooting.

18 This Court should grant COA because the failure to instruct on an
19 applicable lesser offense theory violates the United States Consti-
20 tutional right to due process when it deprives the defendant of his
21 right to present the only practical defense in this case.

22 I.

23 THIS COURT SHOULD GRANT COA BECAUSE A DEFENDANT WHO
24 SHOOTS AN UNARMED MAN IN THE BELIEF HE WOULD BE
25 SERIOUSLY INJURY OR KILLED DOES NOT ESTABLISH SELF-
DEFENSE AS A MATTER OF LAW BUT DOES PRESENT EVIDENCE
SUPPORTING IMPERFECT SELF-DEFENSE.

26 The California Court of Appeal misapplied the law of imperfect
27 self-defense and misconstrued trial court's duty to instruct on

1 lesser offenses by finding that Mr. Carrillo's testimony, if belie-
2 ved by jurors, either established perfect or complete self-defense
3 or no defense at all.

4 The opinion of the California Court of Appeal fails to acknow-
5 ledge that both perfect self-defense and imperfect self-defense
6 involved two separate perceptions and two separate analysis regar-
7 dardng the reasonableness of those perceptions. Both doctrines
8 involve the defendant's perception of (1) danger and (2) the degree
9 of force necessary to repel that danger. (E.g., People v. Her
10 (2009) 181 Cal.App.4th 349, 353.) For perfect self-defense to
11 apply, both perceptions must be objectively reasonable. (People v.
12 Valencia, (2008) 43 Cal.4th 268; People v. Humphrey, (1996) 13 Cal.
13 4th 1073, 1082.) For imperfect self-defense to apply, neither
14 perception must be objectively reasonable so long as the defendant
15 actually believes both to be true. (CALCRIM 571 [The defendant
16 acted in imperfect self-defense if: 1. The defendant actually
17 believed that he was in imminent danger of being killed or suffering
18 great bodily injury; AND 2. The defendant actually believed that
19 the immediate use of deadly force was necessary to defend against
20 the danger; BUT 3. At least one of those beliefs was unreasonable].)

21 It is virtually impossible to imagine a case in which the
22 evidence would justify perfect self-defense instructions but not
23 imperfect self-defense instruction, at least in an imminent danger
24 situation. (See, e.g., Bench Notes to CALCRIM 571 ("Most courts
25 hold that an instruction on imperfect self-defense is required in
26 every case in which a court instructs on perfect self-defense. If
27 there is substantial evidence of a defendant's belief in the need
28

1 for self-defense, there will always be substantial evidence to
2 support an imperfect self-defense instruction because the reasonable-
3 ness of that belief will always be at issue".) While Mr. Carrillo
4 has not argued that imperfect self-defense instructions were requi-
5 red simply because the trial court instructed on self-defense, he
6 does ask this Court to grant COA because the California Court of
7 Appeal's disagreement with this proposition misconstrues the circum-
8 stances under which the overlap between self-defense and imperfect
9 self-defense is undeniable.

10 In support of its view, the California Court of Appeal relied
11 on People v. Valenzuela, (2011) 199 Cal.App.4th 1214, where Valen-
12 zuela testified that he was a former gang member and shot at a car
13 that had been following him, from which the occupants yelled rival
14 gang challenges, in which a passenger looked like he had a gun (both
15 by movement and by a black item in his hand), and from which
16 Valenzuela heard popping sounds (like gunfire). The trial court
17 explicitly found Valenzuela's testimony did not merit either self-
18 defense or imperfect self-defense instructions but instructed on
19 self-defense anyway.

20 Here, no evidence showed anyone but Mr. Carrillo thought Paco
21 Torres might be armed, and the trial court explicitly found the
22 facts warranted self-defense instructions. [1RT 217.] The prosecu-
23 tion explicitly asked jurors to reject self-defense by arguing Mr.
24 Carrillo's fear was not reasonable because Paco Torres was unarmed.
25 [1RT 268-269.] Valenzuela did not described evidence showing the
26 defendant reacting in response to an imminent danger; it described
27 the defendant reacting after he thought he had been attacked

1 (followed and shot at).

2 In People v. Rodriguez, (1997) 53 Cal.App.4th 1250, also cited
3 by the California Court of Appeal, the appellate court found the
4 defendant utterly failed to identify any evidence supporting an
5 imperfect self-defense instruction. (Id. at p. 1276.) Further,
6 that court explained, either the decedent attacked the defendant
7 with a knife or he did not. (Ibid.) Similar to Valenzuela, Rodriguez,
8 did not involve the defendant's reaction to an imminent attack but
9 rather his reaction to a consummated attack.

10 When a defendant is claiming a right to defend himself in the
11 face of an imminent attack not yet began, and the facts later reveal
12 the supposed attacker was unarmed, the record will usually if not
13 always establish imperfect self-defense. "If the trier of fact
14 finds the requisite belief in the need to defend against imminent
15 peril, the choice between self-defense and imperfect self-defense
16 properly turns upon the trier of fact's evaluation of the reasonable-
17 ness of appellant's belief. (People v. Ceja, (1994) 26 Cal.App.4th
18 78, 90 (conc. opn. of Johnson, J.), disapproved on another ground
19 in People v. Blakeley, (2000) 23 Cal.4th 82.)

20 The California Court of Appeal's opinion failed to recognize
21 the under the evidence presented to jurors, the jury could have
22 found Mr. Carrillo's fear being shot was actual but unreasonable,
23 since one version of events had Paco Torres going to his car to
24 retrieve a weapon and other testimony had him reaching into his
25 pants as if for a gun. The opinion also fails to recognize that
26 jurors could have found that Mr. Carrillo may have actually believed
27 he was in imminent danger of great bodily injury, either through

1 the pushing that he had with Paco Torres, as described by Lorena
2 Torre to Detective Kirtlan. See Exhibit A. Also Paco Torres was
3 yelling at Mr. Carrillo. Also Mr. Carrillo may have believed he
4 was in imminent danger of great bodily injury, either through a
5 belligerent beating or knife attack, but unreasonable responded
6 with deadly force. Neither of these scenarios was possible in
7 Valenzuela or Rodriguez; the California Court of Appeal should not
8 have relied on those cases to deny Mr. Carrillo's claim.

9 This Court should grant COA to clarify the misunderstanding of
10 imperfect self-defense law created by the opinions in Valenzuela
11 and Rodriguez and to correct their misapplication to Mr. Carrillo's
12 case.

13 This Court should also grant COA to correct the California
14 Court of Appeal's implicit holding that in assessing the credibili-
15 ty of the evidence adduced in support of Mr. Carrillo's defense,
16 the trial court needed to accept or reject Mr. Carrillos testimony
17 in toto. This reasoning contradicts the California Supreme Court's
18 holding in People v. Barton, (1995) 12 Cal.4th 186, which said a
19 trial court must instruct on unreasonable/imperfect self-defense,
20 even when the defendant objects on the basis that the instructions
21 would conflict with his theory of the defense. (Id. at pp. 194,
22 196, 201.) Indeed, Barton shot an unarmed man he thought was
23 brandishing a knife, and the California Supreme Court found that
24 imperfect self-defense was justified because Barton's perceptions
25 and judgment may have been clouded by anger.

26 The California Court of Appeal repeatedly have held that in
27 determining whether a court must instruct on a given theory, it

1 should remember that juries are entitled to accept portions of a
2 witness's testimony and to disbelieve other portions. (People v.
3 Glenn, (1991) 229 Cal.App.3d 1461, 1467, overruled on other grounds
4 by People v. Blakeley, (2000) 23 Cal.4th 82, 90 [the fact that the
5 defendant testified to different versions of how the stabbing occu-
6 rred did not undercut his request for an involuntary manslaughter
7 instruction]; People v. Lacefield, (2007) 157 Cal.App.4th 249, 260,
8 overruled on other grounds by People v. Smith, (2013) 57 Cal.4th
9 232 [conflicting versions of events supported instruction on lesser
10 included offense]; People v. Ceja, (1994) 26 Cal.App.4th 78,
11 overruled on other grounds by People v. Blakeley, supra. See also
12 Stevens v. Parke, Davis & Co., (1973) 9 Cal.3d 51, 67, 68 [agreeing
13 with principle but not in instructional context].)

14 No case in the Supreme Court of California has held that there
15 is a single, monolithic version of events that a trial court must
16 accept in deciding whether substantial evidence supports instruction
17 on a lesser offense. To the extent that the California Court of
18 Appeal's opinion so found, this Court should grant Certificate Of
19 Appealability to correct the error.

20 In Bobadilla v. Lizarraga, 2014 U.S. Dist. LEXIS 172288 (9th
21 Cir. 2014), Under California law, the crime of murder is reduced to
22 voluntary manslaughter when the unlawful killing of a human being
23 is committed without malice "upon a sudden quarrel or heat of
24 passion" California Penal Code section 192 (a) (2007).

25 The sister of the decedent, Lorena Torres told Detective Kirtlan,
26 "Lorena told Paco they should leave because Ahida's brother was not
27 happy they were there. Before they could leave, the Defendant came

1 from the house and confronted Paco. Paco said that he didn't have
2 any problems with the Defendant and there was no need to be confron-
3 tational. The Defendant became very angry, at which point he had
4 Paco started to push each other. Ilde had come out again and
5 started to take Ahida back to the house. Lorena tried to separate
6 Paco and the Defendant." SEE EXHIBIT A P. 2.

7 Lorena Torres told Detective Kirtlan, "Edgar (Petitioner) said
8 "don't scream at me" and they started to push each other. "At that
9 time, Ahida had walked back to the front of the truck where she
10 was talking to Ilde. I tried to break them up." SEE EXHIBIT A P. 5

11 Lorena Torres said, "I realized that Edgar (Petitioner) had
12 shot a gun into the ground. I saw him shoot." SEE EXHIBIT A P. 5.

13 The pushing that petitioner had with the decedent, mentioned
14 above was not mentioned to the jury. In short, the pages attached
15 in exhibit a, in which the pushing that occurred between Petitioner
16 and Paco, the jury never learned of that because Lorena Torres
17 never said that to the jury that convicted Petitioner. Thus,
18 Petitioner's request for COA should be granted.

1 II.

2 THIS COURT SHOULD GRANT COA TO HOLD THAT COURTS
3 VIOLATE THE U.S. CONSTITUTION WHEN THEY FAIL TO
4 INSTRUCT ON A LESSER OFFENSE THAT CONSTITUTES A
5 THEORY OF DEFENSE.

6 The California Court of Appeal here also held that the failure
7 to give an imperfect self-defense instruction was harmless error.
8 And it applied the state law prejudice standard as articulated in
9 People v. Watson, (1956) 46 Cal.2d 818, 836. This Court should
10 grant COA to hold that instruction on lesser offenses violates a
11 defendant's federal constitutional right to have the jury determine
12 every material issue presented by the evidence and thus requires
13 harmless error review under Chapman v. California, (1967) 386 U.S.
14 18, 24.

15 The California Supreme Court previously has agreed that "a
16 defendant has a constitutional right to have the jury determine
17 every material issue presented by the evidence [and] . . . an
18 erroneous failure to instruct on a lesser included offense consti-
19 tutes a denial of the right. . . ." (People v. Lewis, (2001) 25
20 Cal.4th 610, 645.) Since failure to instruct on imperfect self-
21 defense constitutes a failure to instruct on the lesser included
22 offense of voluntary manslaughter, this Court should find that the
23 error violated Mr. Carrillo's Sixth and Fourteenth Amendment right
24 to have the jury decide every material issue presented by the
25 evidence. (See also United States v. Gaudin, (1995) 515 U.S. 506.)
26 As such, it should assess the error under the Chapman v. California,
27 supra. 386 U.S. 18, 24. "harmless beyond a reasonable doubt"
28 standard.

1 Mr. Carrillo recognizes that in People v. Randle, (2005) 35 Cal.
2 4th 987, overruled on another ground in People v. Chun, (2009) 45
3 Cal.4th 1172, 1201, the California Supreme Court stated that failure
4 to instruct on imperfect self-defense was state law error reviewable
5 under Watson. But under federal law, due process requires that
6 criminal prosecutions "comport with prevailing notions of fundamental
7 fairness" and that "criminal defendants be afforded a meaningful
8 opportunity to present a complete defense." (California v. Trombetta,
9 (1984) 467 U.S. 479, 485.) Failure to give a defense instruction
10 violates the U.S. Constitution when it deprives the defendant of a
11 viable defense. (Bradley v. Duncan, (9th Cir. 2002) 315 F.3d 1091,
12 1098; Conde v. Henry, (9th Cir. 1999) 198 F.3d 734, 739-740.) The
13 Ninth Circuit has agreed that "a defendant's right to adequate jury
14 instructions on his or her theory of the case might, in some cases,
15 constitute an exception to the general rule" that failure to instruct
16 on lesser offenses in a non-capital case does not violate the U.S.
17 Constitution. (Solis v. Garcia, (9th Cir. 2000) 219 F.3d 922, 929;
18 Greenawalt v. Ricketts, (9th Cir. 1991) 943 F.2d 1020, 1029.)

19 Here, while it is true that defense counsel did not request an
20 imperfect self-defense instruction, it is also true that imperfect
21 self-defense is often, if not always, the most plausible defense
22 when a person shoots an unarmed man. Certainly, when an unarmed
23 man has been killed, jurors are going to be especially reluctant to
24 acquit the person who admits firing the gun. Thus, although it is
25 certainly permissible to pursue a full acquittal through a perfect
26 self-defense argument, the theory more likely to succeed would be
27 imperfect self-defense.

1 Because jurors here had no opportunity at all to consider
2 imperfect self-defense and to penalize Mr. Carrillo for killing
3 Francisco Torres while finding the killing was mitigated from murder,
4 the error reached constitutional levels.

5 This Court should grant COA to hold that the failure to instruct
6 on imperfect self-defense under these circumstances should be
7 reviewed under the Chapman standard rather than under the Watson
8 standard.

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III.

THIS COURT SHOULD GRANT COA TO HOLD THE
ERROR WAS PREJUDICIAL.

In addition to granting COA to establish the correct standard of prejudice in cases like that presented here, this Court should grant COA to hold that the facts of Mr. Carrillo's case establish prejudice.

The California Court of Appeal found no prejudice under Watson because it found much of Mr. Carrillo's testimony implausible, particularly because (it claimed) "Defendant's strongest evidence for self-defense -- the claim that Paco threatened his life, then went to get a weapon from his vehicle -- emerged only on the third time through defendant's story. after he had previously claimed that Paco merely threatened to beat him up." [Slip op. at p. 12.]

Mr. Carrillo's testimony was not so utterly implausible that no reasonable juror could have found he acted in imperfect self-defense. Jurors obviously found something credible about his explanation of events, since they rejected the prosecutor's argument that Mr. Carrillo essentially executed Francisco Torres in an act of premeditated murder. But if they didn't accept the provocation argument -- and that argument was weak, at best -- then their only other option for finding the shooting mitigated would have been a full acquittal. As Mr. Carrillo has noted through this petition, it is an exceptional case in which jurors would find the shooting of an unarmed man to be completely justified under the self-defense doctrine.

The California Court of Appeal's credibility finding was unjustified on this record and improper. Jurors, not judges, should have

1 decided whether Mr. Carrillo's defense was plausible. The failure
2 to submit his defense to the jury constituted prejudicial error.

3 This Court should grant COA.

4 Pursuant to 28 U.S.C. § 2253(c)(2); Barefoot v. Estelle, 463
5 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); Slack v.
6 McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 146 L.Ed.2d 542
7 (2000); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029,
8 154 L.Ed.2d 931 (2003); Nevius v. McDaniel, 218 F.3d 940, 946 (9th
9 Cir. 2000); Alexander v. Johnson, 211 F.3d 895, 896-97 (5th Cir.
10 2000). A reasonable jurists could debate whether (or, for that
11 matter, agree that) the petition should have been resolved in a
12 different manner or that the issues presented were 'adequate to
13 deserve encouragement to proceed futher.'''

14 Again this Court should grant the requested COA.
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1 IV.

2 THE PROSECUTOR PRESENTED FALSE EVIDENCE

3 The prosecutor during the closing argument stated, "he (petitio-
4 ner) knows Lorena Torres told the truth and he knows she is belie-
5 vable." (RT 270.) See also Exhibit B p. 1. This argument of the
6 prosecutor was false because she knew that Lorena Torres, on 12/25/
7 08 told Detective Kirtlan, "Edgar (petitioner) said to Paco "don't
8 scream at me" and they started to push each other." Lorena said,
9 "I tried to break them up." (CT 00186, See also Exhibit A p. 5.)
10 If the jury would have known what Lorena said above, the whole case
11 of the prosecutor would have fall apart. Nobody told the jury
12 what Lorena said above. The Report of Detective Kirtlan had been
13 available all the time, even the district court failed to see the
14 above.

15 It is beyond cevil that a prosecutor may not knowingly inject
16 false information into a trial. Napue v. Illinois, 360 U.S. at
17 269, 79 S.Ct. 1173 (1959); Dow v. Virga, 729 F.3d 1041, 1043, (9th
18 Cir. 2013). Even in situations where the prosecution is surprised
19 by the introduction of false evidence, a duty on the part of the
20 prosecution arises to correct the information. Id. This duty
21 applies only to the prosecution -- the defense does not have corres-
22 ponding duty. Sivak v. Hardison, 658 F.3d 899 (9th Cir. 2011).

23 Petitioner's request of COA should be granted.
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2 V.
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INSUFFICIENT EVIDENCE PROVED SECOND
DEGREE MURDER

4 Lorena Torres said during petitioner's trial, "Edgar was
5 hitting my brother, and my brother was just standing there saying,
6 "I don't want any problems," (RT 51.) But on 12/25/2008, Lorena
7 Told Detective Kirtlan, "Edgar (petitioner) said to Paco (decedent)
8 "don't scream at me" and they started to push each other." "I tried
9 to break them up." (CT 00186, See also Exhibit A p. 5.)

10 What Lorena testified during trial and what she said to Detective
11 Kirtlan is totally different. There is not doubt that if the jury
12 would have been informed with what Lorena said to Detective Kirtlan
13 on 12/25/2008, at least one juror would have decided that petitioner
14 killed Francisco Torres during a sudden quarrel or heat of passion.
15 Therefore, no reasonable jurists would have concluded that petitio-
16 ner had been convicted of second degree murder beyond a reasonable
17 doubt. The deference to the jury's verdict, and the judgment most
18 favorable to the prosecution does not apply in this issue because
19 the prosecution concealed the statements of Lorena Torres provided on
20 12/25/2008 to Detective Kirtlan, there, Lorena said, "Edgar (petitio-
21 ner) said to Paco (decedent) "don't scream up me" and they started
22 to push ["each other"] "I tried to break them up." (CT 00186, see
23 also Exhibit A p. 5.)

24 In Ashley v. Swarthout, 2014 U.S. Dist. LEXIS 79688 (9th Cir.
25 2014). The United States Court of Appeals for the Ninth Circuit
26 held: The prosecutor's formulation of the standard is incorrect.
27 The consideration that reduces a murder to a heat of passion volun-

1 tary manslaughter focuses on whether the defendant was reasonably
2 provoke, not on whether once provoked the defendant acted reasonably
3 in killing someone.

4 The testimony of Lorena Torres is in Reporter's Transcript p. 51.
5 See it in Exhibit B page 2.

6 On 12/25/2008, Detective Bales interviewed Ahida Garcia at SPD
7 headquarter. Miss Garcia said, "I assume that Edgar (petitioner)
8 shot him (decedent) I imagine that they were fighting." See (CT
9 00192, See also Exhibit A p. 9.

10 Ahida Garcia saw Francisco Torres and Petitioner fighting, she
11 was present when the fighting was going on. Lorena Told Detective
12 Kirtlan on 12/25/2008, "Ida (Ahida) saw the whole thing happen." See
13 (CT 00188, See also Exhibit A p. 8.

14 Ahida Garcia never testified in this case. She would have said
15 if she would have testified that, she saw Francisco Torres and
16 Petitioner fighting during the incident.

17 In Perry v. New Hampshire, 123 S.Ct. 716, 723, 181 L.Ed.2d 694
18 (2012) the United States Supreme Court held: The constitution
19 "protect a defendant against a conviction based on evidence of
20 questionable reliability."

21 The Supreme Court of the United States indicated that a State
22 court conviction that is not supported by sufficient evidence viola-
23 tes the Due Process Clause of the Fourteenth Amendment and is inva-
24 lid for that reason. Jackson v. Virginia, (1979) 443 U.S. 307, 312-
25 324.

26 Petitioner's request for COA should be granted. And then his
27 conviction of second degree murder should be reversed.

1 VI.

2 TRIAL COUNSEL RENDERED
3 INEFFECTIVE ASSIATANCE

4 In the present case, trial counsel rendered ineffective assis-
5 tance of counsel by failing to request the instruction of imperfect
6 self-defense. Reyes v. Uribe, 2015 U.S. Dist. LEXIS 60824 (9th
7 Cir. April 8, 2015).

8 The evidence showed the decedent Paco Torres, went to Mr.
9 Carrillo's house on Christmas day to try to spend time with Ahida
10 Garcia, the sister-in-law of petitioner. Paco Torres was very
11 drunk. At the time of the autopsy, Paco has a .18% alcohol content
12 in his system.

13 Lorena Torres, the sister of Paco Torres, on 12/25/08, was
14 interviewed by Detective Kirtlan, Lorena said, "Edgar (petitioner)
15 said to Paco, "don't scream at me" and they (Paco and Petitioner)
16 started to push each other." and "I tried to break them up." (CT
17 00186, See also Exhibit A p. 5.)

18 After Petitioner and Paco pushed each other, an angry argument
19 ensued, and Mr. Carrillo fired one shot into the ground near Paco
20 to get him to leave. Paco stayed and according to Mr. Carrillo's
21 testimony, Paco went to his vehicle to retrieve a weapon. Mr.
22 Carrillo also testified that he saw Paco reaching into his pants
23 for a weapon, then that was when Mr. Carrillo shot and killed Paco.

24 The District Court indicated, "Defense counsel, for tactical
25 reasons requested that the court not instruct on accident. The
26 court agreed not to do so. ["Neither counsel proposed any other
27 instruction."] (Memorandum Decision at page 9.)

1 There could be no reasonable tactical or strategical reason
2 for failing to request an imperfect self-defense instruction.
3 Reyes v. Uribe, supra, 2015 U.S. Dist. LEXIS 60824 (9th Cir. April
4 8, 2015).

5 Petitioner's request for COA should be granted.

6
7 A. Failure To Call Detective Kirtlan To Testify.

8 On 12/25/2008, Detective Kirtlan interviewed Lorena Torres.
9 Lorena said to Detective Kirtlan, "Edgar (petitioner) said to Paco,
10 "don't scream at me" and they (Paco and Petitioner) started to
11 push each other." and "I tried to break them up." (CT 00186, see
12 also Exhibit A page 5.)

13 The jury in the present case, never learned of the above
14 because Detective Kirtlan was not called to testify on behalf of
15 Petitioner. If Detective Kirtlan would have been called to testify,
16 Petitioner would likely conviction would have been of manslaughter.
17 Once the jury would have learned of the above, the prosecution's
18 case would have been destroyed. Because the pushing between
19 Petitioner and Paco occurred seconds from the shooting.

20 In Begay v. United States, 2015 U.S. Dist. LEXIS (9th
21 Cir. March 31, 2015). The United States Court of Appeals for the
22 Ninth Circuit held: "To determine whether counsel's errors preju-
23 diced the outcome of the trial, we must compare the evidence that
24 actually was presented to the jury with that which could have been
25 presented had counsel acted appropriately." Thomas v. Chappell,
26 678 F.3d 1086, 1102 (9th Cir. 2012) (internal quotations omitted).
27 "If the evidence could have been admitted, we must then ask whether
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1 there was a reasonable probability that it would have affected the
2 outcome of the proceedings." Cannedy v. Adams, 706 F.3d 1148 (9th
3 Cir. 2013).

4 Petitioner's request for COA should be granted.

5 VII.

6 APPELLATE COUNSEL RENDERED
7 INEFFECTIVE ASSISTANCE

8 The only ground, appellate counsel raised on direct appeal
9 was ground one. There, appellate counsel claimed that the trial
10 court failed to instruct the jury on imperfect self-defense.
11 Appellate counsel should have raised (1 the prosecutor presented
12 false evidence; 2 insufficient evidence proved second degree murder;
13 3 Ineffective assistance of trial counsel; 4 failure to call Detec-
14 tive Kirtlan to testify.)

15 If appellate counsel would have raised the mentioned grounds,
16 it is possible that the outcoming of the appeal would have been
17 different. Pursuant to Evitts v. Lucey, (1985) 469 U.S. 387, 396-
18 397; and Strickland v. Washington, (1984) 466 U.S. 668, this Court
19 should grant the requested COA.

CONCLUSION

Petitioner's request for Certificate Of Appealability should be granted based on the citing facts and cases law.

DATED: November 13, 2017

Respectfully submitted,

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Pro se