

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BURCIAGA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error in declining to instruct the jury that, for petitioner to be found guilty of first-degree murder, the government must prove the absence of a sudden quarrel or heat of passion beyond a reasonable doubt.

ADDITIONAL RELATED PROCEEDING

United States District Court (D. Nev.):

United States v. Burciaga, No. 20-cr-60 (Sept. 28, 2023)

IN THE SUPREME COURT OF THE UNITED STATES

No. 25-7543

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OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 1a-4a) is available at 2025 WL 3187361. The orders of the district court are available at 2023 WL 3505514 and 2023 WL 6197335.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2025. A petition for rehearing was denied on March 3, 2026 (Pet. App. 5a). The petition for a writ of certiorari was filed on May 29, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of first-degree murder in Indian country, in violation of 18 U.S.C. 1111, 1151, and 1152; causing the death of an unborn child in Indian country, in violation of 18 U.S.C. 1841(a)(1), 1111, 1151, and 1152; and domestic assault by a habitual offender in Indian country, in violation of 18 U.S.C. 117(a)(1), 1151, and 1152. Am. Judgment 1-2. The district court sentenced petitioner to life plus an additional 240 months of imprisonment, to be followed by five years of supervised release. Id. at 3-4. The court of appeals affirmed. Pet. App. 1a-4a.

1. Shortly after midnight on December 15, 2020, petitioner stabbed his pregnant girlfriend, Amanda Davis, and her unborn child to death in front of her three minor children. C.A. E.R. 92-93; Gov't C.A. Br. 4-5. After Davis had become pregnant with petitioner's child, the baby was diagnosed with the Trisomy-18 chromosomal defect. Gov't C.A. Br. 3. While the diagnosis made it likely that the child would die within days of delivery, Davis informed her doctor that she wished to continue the pregnancy. Ibid. She had not yet decided whether to seek medical intervention, or instead seek postnatal palliative care. Ibid. Petitioner favored medical intervention. C.A. E.R. 1388-1389.

On the night of the murder, petitioner came home from a day of drinking and asked to cuddle with Davis in bed. Gov't C.A. Br.

3. Davis declined. Ibid. After briefly leaving the room, petitioner returned and asked, "what the fuck is up," to which Davis responded that nothing was going on. Ibid. (citation omitted). Petitioner and Davis then had an argument, in which Davis called petitioner "a motherfucker" and stated she did not want his baby. Id. at 4 (citation omitted).

Petitioner then grabbed a knife near the bed and stabbed Davis with such force that the knife broke. Gov't C.A. Br. 4. Petitioner left the room to retrieve another knife from the kitchen. Ibid. The assault awakened Davis's three minor children, who retreated to Davis's bedroom. Ibid. Davis locked the door and attempted to barricade it with a dresser. Ibid. She grabbed a softball bat to defend herself and gave one of her children a wooden dowel. Ibid. That child called 911 and informed the dispatcher that petitioner had stabbed Davis and was trying to reenter the bedroom. Ibid.

Petitioner returned from the kitchen with another knife and broke through the barricaded door. Gov't C.A. Br. 5. He cornered Davis in the bathroom and began stabbing her again. Ibid. At one point, petitioner dropped the knife and again left to retrieve another. Ibid. He then returned to the room and continued stabbing Davis. Ibid. In all, petitioner stabbed Davis 18 times and inflicted over 20 additional incision wounds. Ibid.

Petitioner then left the house. Gov't C.A. Br. 5. After the police arrived, petitioner returned and police arrested him. Ibid. Paramedics transported him to the hospital to treat a laceration

on his hand. Id. at 5-6. At the hospital, petitioner presented with alcohol intoxication and reported that he had used methamphetamine three days earlier. Id. at 6.

After learning that Davis had died, petitioner confessed to police that he had stabbed her. Gov't C.A. Br. 7-8. He explained: "I didn't snap. I did it because I couldn't take her shit anymore." Id. at 8 (citation and ellipsis omitted).

2. A grand jury in the District of Nevada charged petitioner with first-degree murder in Indian country, in violation of 18 U.S.C. 1111, 1151, and 1152; causing the death of an unborn child in Indian country, in violation of 18 U.S.C. 1841(a)(1), 1111, 1151, and 1152; and domestic assault by a habitual offender in Indian country, in violation of 18 U.S.C. 117(a)(1), 1151, and 1152. Superseding Indictment 2-3.

Before trial, petitioner requested various jury instructions. C.A. E.R. 342-343. Among the instructions that he requested were instructions that "[i]t is not first degree murder if [petitioner] acted upon a sudden quarrel or heat of passion, or otherwise acted without malice aforethought"; that "[h]eat of passion may be provoked by fear, rage, anger or terror"; that "[p]rovocation, in order to be adequate, must be such as might arouse a reasonable and ordinary person to kill someone"; and that "the government must prove the absence of a sudden quarrel or heat of passion * * * beyond a reasonable doubt." Id. at 344. The district court

declined to give those instructions as part of the first-degree murder instructions. See Pet. App. 2a.

The district court instructed the jury that, for petitioner to be found guilty of first-degree murder, the government had to prove beyond a reasonable doubt the killing was "premeditated" and committed "with malice aforethought." Pet. App. 7a. The court also separately instructed the jury that, for petitioner to be found guilty of the lesser included offense of voluntary manslaughter, the government had to prove beyond a reasonable doubt that petitioner killed Davis "while in a sudden quarrel or heat of passion, caused by adequate provocation." Id. at 9a. And it added, in the voluntary-manslaughter instructions, that "[h]eat of passion may be provoked by fear, rage, anger, or terror," and that "[p]rovocation, in order to be adequate, must be such as might arouse a reasonable and ordinary person to kill someone." Ibid.

The jury found petitioner guilty on all counts. Pet. App. 1a. The district court sentenced him to life plus an additional 240 months of imprisonment, to be followed by five years of supervised release. Am. Judgment 3-4.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1a-4a. The court found no error in the district court's jury instructions. Id. at 2a. It recognized that a defendant "is entitled to an instruction upon his theory of the case if the record contains evidentiary support for the theory and the theory is supported by law." Ibid. (quoting United States

v. Lesina, 833 F.2d 156, 160 (9th Cir. 1987)). But it observed that in this case, petitioner had "presented only three statements by Davis that he alleges constitute sufficient evidence of provocation." Ibid.; see Pet. C.A. Br. 5-6 (highlighting Davis having "declined" petitioner's request to cuddle, having "cursed" at him, and having "said she did not want his baby"). The court then noted that "[w]ords alone * * * generally do not make for adequate provocation." Pet. App. 2a. "Therefore," the court continued, "we find that the statements in this case are insufficient evidence of provocation to warrant a defense theory instruction on heat of passion." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 12-31) that he was entitled to a jury instruction stating that, for him to be found guilty of first-degree murder, the government had to prove beyond a reasonable doubt that he did not act in the heat of passion or upon a sudden quarrel. The court of appeals correctly rejected that contention, and its unpublished decision does not conflict with any decision of this Court, another court of appeals, or a state supreme court. In addition, this case would be an unsuitable vehicle for resolving the question presented because any error was harmless. No further review is warranted.

1. The court of appeals correctly found no error in the district court's jury instructions on first-degree murder.

a. "Murder is the unlawful killing of a human being with malice aforethought." 18 U.S.C. 1111(a). Voluntary manslaughter, by contrast, is "the unlawful killing of a human being * * * [u]pon a sudden quarrel or heat of passion." 18 U.S.C. 1112(a). Accordingly, "evidence of a sudden quarrel or heat of passion can serve as a defense to the murder charge because a heat of passion and adequate provocation finding 'negates the malice that would otherwise attach.'" United States v. Begay, 33 F.4th 1081, 1088 (9th Cir.) (en banc) (citations omitted), cert. denied, 143 S. Ct. 340 (2022). "A defendant who acts in the heat of passion is guilty of voluntary manslaughter rather than murder." Ibid. This Court has held only that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented." Mullaney v. Wilbur, 421 U.S. 684, 704 (1975).

At common law, "mere words alone" could "not reduce the grade of the killing from murder to manslaughter." Allen v. United States, 164 U.S. 492, 497 (1896). More recently, courts have allowed that "[t]here may be some situations in which words alone can be sufficient to negate malice aforethought -- for example, 'a reasonable man may be provoked upon suddenly being told of his wife's infidelity.'" United States v. Sockey, 157 F.4th 1282, 1287 (10th Cir. 2025) (ultimately quoting 2 Wayne R. LaFave, Substantive Criminal Law § 15.2(b)(5) (3d ed. 2025)). Under that "modern development in heat of passion law, * * * although mere

'insults' or 'abusive' words are never sufficient on their own to provoke heat of passion, words that convey information of an actual fact or injury may be sufficient." Ibid. (quoting 2 LaFave § 15.2(b)(6)). But courts nonetheless continue to recognize the overarching rule that "[m]ere words' generally provide inadequate provocation to negate a finding of malice." E.g., United States v. Slager, 912 F.3d 224, 236 (4th Cir.) (quoting Allen, 164 U.S. at 497), cert. denied, 587 U.S. 1045 (2019).¹

b. The decision below properly applied that framework. It correctly recognized that although "[a] defendant is entitled to an instruction upon his theory of the case if the record contains evidentiary support for the theory and the theory is supported by law," mere "[w]ords alone * * * generally do not make for adequate provocation." Pet. App. 2a (emphasis added; citation

¹ Accord, e.g., Rountree v. State, 889 S.E.2d 803, 806 (Ga. 2023) ("[W]ords alone generally are not sufficient provocation to excite the passion necessary to give rise to voluntary manslaughter.") (citation omitted); People v. Yarbrough, 645 N.E.2d 423, 426 (Ill. App. Ct. 1994) ("Generally, mere words are not considered serious provocation regardless of how aggravated, abusive, opprobrious or indecent the language."), appeal denied, 657 N.E.2d 637 (Ill. 1995) (Tbl.); Commonwealth v. Anderson, 486 N.E.2d 19, 24 (Mass. 1985) ("[M]ere words alone generally do not constitute sufficient provocation to warrant a manslaughter charge."); People v. Mitchell, 835 N.W.2d 615, 619 n.2 (Mich. Ct. App. 2013) ("[M]ere words will not generally constitute adequate provocation."); State v. Funderburg, 137 A.3d 441, 449 (N.J. 2016) ("The generally accepted rule is that words alone, no matter how offensive or insulting, do not constitute adequate provocation to reduce murder to manslaughter.") (citation omitted); 40 C.J.S. Homicide § 126 (2014) ("[M]ere words or gestures, whether offensive, insulting, abusive, or threatening, are generally not sufficient provocation to reduce a homicide, committed in a passion provoked thereby, to manslaughter.").

omitted). And it found that the "three statements by Davis" on which petitioner relied constituted "insufficient evidence of provocation to warrant a defense theory instruction on heat of passion." Ibid.

Although petitioner reads the court of appeals' decision to have "considered only the general rule" disallowing words as provocation, "not [the] exception" to that rule, Pet. 29, the court found that "the statements in this case are insufficient evidence of provocation," Pet. App. 2a (emphasis added). That finding, while informed by the general rule, is a case-specific determination about "the statements in this case." Ibid. Although petitioner had argued that Davis's statement about not wanting to have petitioner's baby "is at least equally provocative" as "one spouse telling the other spouse about the former's infidelity," Pet. C.A. Reply Br. 17, the court did not agree.

Petitioner's suggestion (Pet. 29) that the court of appeals' decision is not grounded in the facts of this case is a factbound assertion that does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Petitioner objects (Pet. 28) that the decision below did not specifically "identif[y] Ms. Davis's words to [petitioner] or the circumstances

surrounding them." But the court of appeals began its unpublished memorandum opinion by noting that the opinion "presume[d] the parties' familiarity with the facts and discuss[ed] them only as necessary for context." Pet. App. 1a.

Contrary to petitioner's contention, the decision below does not categorically preclude any heat-of-passion defense based on "words alone." Pet. 27 (citation omitted). The decision below is unpublished and nonprecedential. See Pet. App. 1a n.*. Nor do the prior circuit decisions that it cites categorically foreclose consideration of provocation through words. See id. at 2a (citing United States v. Roston, 986 F.2d 1287, 1291 (9th Cir.), cert. denied, 510 U.S. 874 (1993); United States v. Wagner, 834 F.2d 1474, 1487 (9th Cir. 1987)). And in a relatively recent en banc decision, the court of appeals considered, but ultimately rejected on plain-error review, the defendant's argument that specific statements made in his case warranted a jury instruction that the government bore the burden of proving beyond a reasonable doubt that he did not act upon a sudden quarrel or in the heat of passion based on a heated argument about infidelity. Begay, 33 F.4th at 1088-1089.

2. Petitioner identifies no conflict in the lower courts warranting further review. As an initial matter, because the unpublished memorandum opinion below "is not precedent," Pet. App. 1a n.*, it cannot establish binding law in the court below that would conflict with another circuit's. Nor would it conflict with

any of the circuit or state supreme court decisions that petitioner cites (Pet. 17-23) in any event.

Seven of the decisions cited by petitioner accord with the decision below in that they similarly rejected a defendant's claim that the record evidence required the trial court to instruct the jury on the government's burden to disprove his heat-of-passion or sudden-quarrel provocation defense to a murder charge.² Similarly, two decisions rejected defendants' heat-of-passion or sudden-quarrel contentions on the facts in the posture of ascertaining whether an underlying offense is murder for sentencing-guidelines purposes.³ None of those decisions rejecting jury-instructions claims could conclusively illustrate that the deciding court would be bound to grant relief on the facts of this case.

Petitioner's other cited decisions -- some of which are now more than a century old -- also do not conflict with the decision below. They variously concluded that (1) a jury instruction on a heat-of-passion defense was warranted on other case-specific

² United States v. McRae, 593 F.2d 700, 705 (5th Cir.), cert. denied, 444 U.S. 862 (1979); Sockey, 157 F.4th at 1287; State v. Thompson, 836 N.W.2d 470, 478 (Iowa 2013); State v. Thille, 570 P.3d 18, 25 (Kan. 2025); Commonwealth v. Bermudez, 348 N.E.2d 802, 804-805 (Mass. 1976); People v. Pouncey, 471 N.W.2d 346, 351 (Mich. 1991); Washington v. State, 989 P.2d 960, 968-969 (Okla. Crim. App. 1999).

³ United States v. Velazquez, 246 F.3d 204, 212-215 (2d Cir. 2001) (vacating district court's "finding that the assailants acted in the heat of passion," id. at 213, and remanding for further proceedings); Slager, 912 F.3d at 232-237 (district "court did not reversibly err by determining that Defendant's malice was not negated by 'sudden quarrel or heat of passion,'" id. at 237).

facts⁴; (2) the specific facts of the case warranted the admission of additional evidence regarding a heat-of-passion claim⁵; or (3) the trial evidence was insufficient to support the malice element of the charged murder offense, rather than a killing in the heat-of-passion as a matter of law.⁶ Those factbound decisions all rested on the specific circumstances of the victim's death and

⁴ People v. Berry, 556 P.2d 777, 780 (Cal. 1976) (en banc) (victim "continually provoked defendant with sexual taunts and incitements, alternating acceptance and rejection of him, * * * accompanied by repeated references to her involvement with another man"); People v. Valentine, 169 P.2d 1, 4 (Cal. 1946) (victim accused defendant of trespassing and "peering into" victim's "bathroom window"); Raines v. State, 277 S.E.2d 47, 49 (Ga. 1981) (per curiam) (victim "wife was carrying a letter she had written to her boyfriend and upon her husband's discovery of it not only admitted her adultery but taunted him with it as well as with degrading comments about his disability"); Commonwealth v. Ronchi, 202 N.E.3d 499, 508-509, 511-512 (Mass. 2023) (victim girlfriend told defendant, "It's not your child" after couple had decided to have child together, and defendant presented evidence of his "numerous neurological impairments" and additional stressors; but court prospectively eliminated "adultery" exception to common-law rule in favor of more circumstance-specific approach); Haley v. State, 85 So. 129, 130 (Miss. 1920) (defendant's wife confessed that victim committed adultery with her and had "boasted of having illicit relations with [defendant's] adult daughter"); State v. Erazo, 594 A.2d 232, 236 (N.J. 1991) (victim "purposely cut her hand" and "threatened to call the police, with the intention of telling them that defendant had inflicted the wound," so that "the State would again revoke defendant's parole and return him to prison"); Sells v. State, 653 P.2d 162, 163 (N.M. 1982) (victim wife told defendant that she had committed adultery and "enjoyed her sexual relationship with her boyfriend"); Commonwealth v. Berry, 336 A.2d 262, 265 (Pa. 1975) (victim had just physically assaulted defendant's mother).

⁵ State v. Flory, 276 P. 458, 459-460, 463-464 (Wyo. 1929) (defendant had just learned his wife's father raped her).

⁶ Toler v. State, 260 S.W. 134, 137 (Tenn. 1924) (defendant had just learned victim sexually assaulted his young daughter).

the evidence of provocation in each case, none of which is on all fours with Davis's statements here.⁷

3. At all events, this case would be an unsuitable vehicle to address the question presented because any instructional error was harmless, as the government argued below. See Gov't C.A. Br. 25-28; Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970) (a prevailing party may rely on any ground to support the judgment, even if not considered below).

Like "most constitutional errors," a jury instruction that misstates an element of the offense "can be harmless" and must be disregarded where it is "harmless 'beyond a reasonable doubt.'" Neder v. United States, 527 U.S. 1, 7-8 (1999) (citations omitted). Here, the jury found petitioner guilty of first-degree murder, which necessarily entailed a finding that his killing of Davis was "premeditated." Pet. App 7a (jury instructions); see 18 U.S.C. 1111(a) (first-degree murder includes "premeditated killing"). As this Court has observed, a "rational jury" that finds a defendant guilty of premeditated murder "could not also have believed that

⁷ Petitioner's remaining cited decisions from other jurisdictions do not address the distinction between murder and voluntary manslaughter and so do not implicate the question presented. See Wakaksan v. United States, 367 F.2d 639, 641-642 (8th Cir. 1966) (rejecting defendant's challenges to admission of evidence and government's closing argument in affirming voluntary manslaughter conviction), cert. denied, 386 U.S. 994 (1967); Black v. Workman, 682 F.3d 880, 889 (10th Cir. 2012) (certifying state-law procedural question to Oklahoma Court of Criminal Appeals); Nolan v. State, 61 So. 3d 887, 893-895 (Miss. 2011) (rejecting sufficiency challenge to manslaughter conviction).

he acted in 'sudden passion aroused by adequate provocation.'" United States v. Frady, 456 U.S. 152, 174 (1982) (ellipsis omitted). Accordingly, the verdict here establishes that the jury "would not have found passion and provocation" even if the district court had offered petitioner's proposed heat-of-passion jury instruction. Ibid.; cf. Demetrulias v. Davis, 14 F.4th 898, 911 (9th Cir. 2021) ("An additional voluntary manslaughter instruction based on heat of passion would not have changed this result, 'as the jury necessarily determined the killing was first degree murder, not manslaughter, under other properly given instructions.'" (citation omitted), cert. denied, 143 S. Ct. 132 (2022); Lannon v. Hogan, 719 F.2d 518, 523 (1st Cir. 1983) ("[B]y convicting Lannon of first-degree murder, the jury necessarily found beyond a reasonable doubt that he had acted with premeditation and without adequate provocation."), cert. denied, 465 U.S. 1105 (1984).

For that additional reason, further review is unwarranted in this case. See Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties). While petitioner disputes (Pet. 25-26) the application of the harmless-error standard to the record evidence here, that additional dispute shows at minimum that this case is not an "ideal vehicle," Pet. 27, to consider the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2026