IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **JASON CARL SCHULLER,** Defendant and Appellant.	S272237

Third Appellate District No. C087191
Nevada County Superior Court No. F16000111
The Honorable Candace S. Heidelberger, Judge

OPENING BRIEF ON THE MERITS

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Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

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ISSUES PRESENTED

Pursuant to this court's order of January 19, 2022, the issues to be briefed and argued are as follows:

1. What standard of prejudice applies to a trial court's error in refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense?
2. Was the trial court's error in refusing that instruction in this case harmless?

INTRODUCTION

In the instant case, the jury found Mr. Schuller guilty of first-degree willful, deliberate and premeditated murder in the

shooting death of W.T.[1] On appeal, the Court of Appeal found that the trial court erred by denying Mr. Schuller's requested instruction on the lesser included offense of voluntary manslaughter based on imperfect self-defense. (*People v. Schuller* (2021) 72 Cal.App.5th 221, 231-236.) However, it found the error harmless. (*Id.* at pp. 231, 237-240.)

The reviewing court rejected Mr. Schuller's contention that the failure to instruct on imperfect self-defense was an error of federal constitutional dimension that must be assessed for prejudice under the harmless beyond a reasonable doubt standard from *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Schuller, supra,* 72 Cal.App.5th at pp. 237-238.) Instead, it held that the instructional omission was only an error of state law and thus must be assessed for prejudice under the more forgiving reasonable probability standard announced in *People v. Watson* (1956) 46 Cal.2d 818. (*Ibid*.)

The *Schuller* court further held that the standard did not matter. (*Schuller, supra,* 72 Cal.App.5th at p. 238.) Focusing exclusively on isolated pieces of evidence favorable to the prosecution, the court concluded the evidence that Mr. Schuller was guilty of murder was overwhelming and thus the failure to instruct was harmless under either standard. (*Id.* at pp. 238-240.)

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[1] Rule 8.90(b) of the California Rules of Court provides that, in all opinions, reviewing courts should consider referring to victims of crimes by their first name and last initial or initials only. Mr. Schuller follows that procedure as well, referring to the victim in this case by his initials (and omitting any reference to the last name of any related witnesses).

Mr. Schuller contends that the *Chapman* standard of prejudice governs the failure to instruct on imperfect self-defense, which modifies the definition of malice, an essential element of the greater offense of murder. Moreover, he submits that, by failing to consider the totality of the evidence before the jury, the Court of Appeal misapplied both the *Chapman* and *Watson* standards and that, under either standard, the instructional error in this case was prejudicial.

STATEMENT OF THE CASE

The sole count of an information charged Mr. Schuller with malice murder (Pen. Code,[2] § 187, subd. (a) and alleged he personally discharged a firearm, which caused the victim's death (§ 12022.53, subds. (b), (c), (d)). (1CT 58-61.) Mr. Schuller pled not guilty by reason of insanity. (2RT 281-287.)

During the guilt phase of his trial, the jury found Mr. Schuller guilty of first-degree murder and found the firearm allegation true. (2RT 405, 535-536.) At the close of the sanity phase, the jury was deadlocked. The trial court dismissed the jury, and a new sanity phase ensued before a different jury. (2RT 428-429.) Following the second sanity phase trial, the jury found Mr. Schuller to have been legally sane at the time of the offense. (3CT 660-661, 664.)

Thereafter, the trial court sentenced Mr. Schuller to state prison for 50 years to life, consisting of 25 years to life for the

[2] Hereafter, all statutory references are to the Penal Code unless otherwise indicated.

offense plus 25 years to life for the firearm enhancement. (3CT 818-819.)

Mr. Schuller appealed. On appeal, he argued that the trial court prejudicially erred by denying his request for an instruction on voluntary manslaughter based on imperfect self-defense. In its published opinion, the Court of Appeal agreed that the trial court erred because there was substantial evidence supporting the instruction but held that the error was harmless under either *Chapman* or *Watson*. (*Schuller, supra,* 72 Cal.App.5th 221.) This court granted Mr. Schuller's petition for review.

STATEMENT OF FACTS[3]

A. Prosecution

In 2016, W.T. lived on Banner View Drive in Grass Valley in the bottom of a two unit residence; his adult daughter, Heather, lived above him. (2RT 518, 521-522; 3RT 561-562.) During the evening of March 20, 2016, a neighbor, Jesse McKenna, noticed Mr. Schuller's white Chrysler sedan parked by W.T.'s unit. (2RT 525-526, 530.) Mr. Schuller had been a friend of W.T. and had lived with him the previous summer, but Mr. McKenna had not seen his car there for "at least a month." (2RT 522-526; 3RT 553, 562-563.) At some point, W.T. mentioned to

[3] Because the instant appeal concerns only an instructional error that occurred during the guilt phase, Mr. Schuller limits his discussion of the facts to the evidence presented during that phase. He addresses the sanity phase in the arguments below only to the extent it is relevant to his instructional claim.

Mr. McKenna that he told Mr. Schuller he was not welcome there anymore.[4] (2RT 542; 3RT 553.)

At about 9:00 p.m. on March 20, Mr. McKenna and Heather heard gunshots coming from W.T.'s unit followed by a loud sound that physically shook the building. (2RT 526, 528; 3RT 567, 569-570.) Mr. McKenna heard upwards of 10 shots followed by a brief pause long enough to reload and then 3 additional shots. (2RT 528-529.) Heather called down to her father repeatedly, but he did not answer. (3RT 570.) Then Mr. Schuller's Chrysler sped away. (2RT 528, 530-531; 3RT 569, 571.)

Mr. McKenna went to W.T.'s unit. (2RT 536.) Upon his arrival, he observed a fire inside. He opened the exterior doors leading to the kitchen and dining area and found W.T. lying on the floor and engulfed in flames, and the room was filled with smoke. (2RT 537-538.) A 911 call was made, and Mr. McKenna used a fire extinguisher to put out the flames. (2RT 537-538; 3RT 572-573.) Mr. McKenna also found the stove's four gas burners lit and gas emanating from the open oven. He turned off the burners and gas and left the residence. (2RT 539; 3RT 574.)

Law enforcement and fire personnel arrived at the scene shortly thereafter. (2RT 479-483, 485, 500-505; 3RT 650.) W.T.'s

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[4] Around late December 2015, Mr. Schuller told Mr. McKenna that he was gay, (2RT 544-546.) Mr. McKenna believed W.T. was not gay. (2RT 545.) He wondered whether the killing might have been the result of a fight that arose after W.T. rebuffed advances by Mr. Schuller. (2RT 551.) But he said nothing during his testimony suggesting W.T. ever told him the reason why he did not want Mr. Schuller around let alone that it

charred and deceased body was on the floor between the kitchen and dining room areas and surrounded by a large pool of blood. (2RT 488, 507; 3RT 658.) He had sustained nine gunshot wounds to the left side of his head, which caused his death. (4RT 845-847.) The burns to his body were post mortem. (4RT 834-835.) The fire damage was consistent with pouring gasoline on the body and igniting it, and a small red gasoline can was on the dining room table and an acetylene torch was in the living room. (2RT 492; 3RT 655, 658-659, 690.) The loud sound that rattled the structure could have resulted from igniting the gasoline's vapors. (3RT 660.) And the gas from the open oven and lit burners were capable of accelerating the fire and resulting in a serious explosion within the residence. (3RT 656-657.)

Also on the dining room table was a "large kitchen knife," a handgun case, and an empty handgun magazine. (3RT 583-584, 710, 736, 751-752.) Thirteen expended bullet cases from a semiautomatic handgun were on the floor around W.T.'s body. (2RT 488-490, 508; 3RT 684; 4RT 845-847.) Blood splatter was found on the floors and walls but not on the knife. (3RT 710; 5RT 1332.) W.T.'s cell phone was found at the scene too, and it had a bullet hole in it. (3RT 710, 736, 752.)

In a bathroom, officers discovered that the shower was running, and there were dark smudges around the bottom of the shower. (2RT 514.) A towel was found there too and collected. (4RT 889.)

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had anything to do with Mr. Schuller's sexuality. (2RT 542; 3RT 553.)

Meanwhile, Nevada County Sheriff's Deputy Brian Condon located Mr. Schuller driving his Chrysler away from W.T.'s home. (3RT 621-623.) After a high-speed pursuit that covered 38 miles and lasted an hour, law enforcement personnel were able to force the car to stop. (3RT 593-594, 624-634.) Mr. Schuller did not initially comply with efforts to get him to exit the vehicle but eventually did and was taken into custody. (3RT 597-598, 635.)

In the car, police found the semiautomatic handgun that discharged the expended cases found at the scene and the bullets that killed W.T.; the gun belonged to Mr. Schuller. (3RT 606-608, 720, 729-733.) A live round was in the chamber, and six bullets were in the magazine. The magazine was capable of holding 10 rounds, and the gun could hold an additional round in the chamber. (3RT 721, 750.)

Mr. Schuller's palm print was found on the gas can. One of his fingerprints was also found on a beer bottle located on the dining room table of W.T.'s unit. (3RT 784-786.) The bath towel in the unit had Mr. Schuller's blood on it. (3RT 805-806.) His DNA was also found on the handgun and acetylene torch. (3RT 807-812.) Additionally, W.T.'s blood was found on Mr. Schuller's pants. (3RT 813-816.)

B. Defense

1. Background Information

In 2013, when he was 32 years old, Mr. Schuller moved from Nebraska to Grass Valley for a short-term job. (4RT 1036, 1039-1040, 1043.) Once there, he met and befriended W.T. (4RT

1040-1042.) W.T. was a marijuana farmer, and Mr. Schuller began selling marijuana for him. (4RT 1041, 1044.) Over the next couple of years, Mr. Schuller lived with W.T. or stayed at his place sporadically and, when not staying with W.T., would still hang out with him there. (4RT 1044-1045, 1046-1050.)

At some point in early 2016, Mr. Schuller was involved in a vehicle accident and suffered a head injury. (4RT 1061; 5RT 1354.) In the aftermath of the accident, he began seeing and speaking to dead people. (4RT 1062-1063.) He already had a long history of hallucinatory experiences and delusional thoughts that began as a child. (4RT 1063, 1065-1072.) After the accident, Mr. Schuller also began seeing what he referred to as "the light." He believed it was a gift from God that protected him and, when shared with others, could change people for the better. He told W.T. about it. (4RT 1084-1088.)

Stephen Smith worked at a bar that Mr. Schuller frequented. He noticed that Mr. Schuller's demeanor changed after the accident. Mr. Schuller had been quite jovial before the event but subsequent to it was not getting along with other patrons, to the point Mr. Smith would have to ask him to leave. Mr. Smith also observed him talking to people who were not there. (5RT 1350-1351.)

2. Trip to Nebraska

In March 2016, Mr. Schuller drove to Nebraska in response to voices in his head directing him to perform an operation there. (4RT 1077-1078.) The voices directed him in everything, including making music selections, setting the radio volume,

whether to smoke, and when to stop and get out of the car. (4RT 1080, 1082.) He believed the voices were real, and they stressed him out and scared him. (4RT 1081-1083.)

While in Nebraska, Mr. Schuller visited with his sister, Jennifer Schuller, several times between March 6 and 13. (5RT 1292-1294.) Jennifer was concerned about her brother's behavior. He was not tracking conversations properly and seemed to be experiencing auditory and visual hallucinations. For example, in the middle of a conversation, he would pause and say, "They are telling me to shut the fuck up." When she would ask him who, he would respond the government or the "people following me." That happened several times during the week, and she had never seen that behavior in him before. (5RT 1295.)

Mr. Schuller claimed to see and talk to snipers. (5RT 1296.) He said that, when he had his vehicle accident, "they placed a chip" in his head to track him via satellite. (5RT 1296-1297.) He also believed "they" could track him by other items, such as his car, clothes, money, phone, debit card, and anything else he carried on his person. (5RT 1297.) At some point during the trip, Mr. Schuller discarded his identification cards, debit and credit cards, and cellular telephone. (4RT 1098-1099.) Mr. Schuller told his sister that the accident was a set up and that even the police in Omaha were trying to set him up. (5RT 1297.)

To Jennifer, 90 percent of her brother's behavior was irrational; only about 10 percent of it reflected clarity. (5RT 1298.) He seemed to be in fear for his life and was not sleeping

much. (5RT 1296-1298.) He was also uncharacteristically aggressive. (5RT 1299.)

Jennifer last saw her brother on Sunday, March 13. (5RT 1293.) Over the next several days, she heard from friends that Mr. Schuller was getting worse. She tried to contact him on March 19 and 20 but to no avail. Because he seemed like he was losing touch with reality, she filed a missing person's report with the local police. (5RT 1299-1300.)

During the trip, Mr. Schuller began seeing and hearing people that he believed were trying to kill him, but he also believed that the "light" protected him. (4RT 1089-1098, 1100-1101.) Among those targeting him were police officers, who he believed were working for Satan. (4RT 1102-1107.) Mr. Schuller also began to see dark shadows coming out of the ground to grab people. (4RT 1097, 1100.) These experiences prompted him to want to return to California. (4RT 1100.) As he stopped at gas stations in Nebraska, Wyoming, Utah, and Nevada upon his return, he believed that people were shooting at him but also that he was protected. (5RT 1111-1126.) He did not sleep at all on the drive west and also did not use drugs, though he had a history of extensive drug use that he claimed reduced his hallucinations. (4RT 1067-1069; 5RT 1123.)

3. Winnemucca Interaction

On Saturday, March 19, 2016, Officers Daniel Klassen and Joel Martin of the Winnemucca Police Department in Winnemucca, Nevada were on patrol when dispatched to a gas station. They had received reports of a suspicious person and

reckless driver. (5RT 1268-1270, 1279-1281.) The gas station was adjacent to and shared a parking lot with a hotel. Mr. Schuller's Chrysler fit the description of the one reported to police and was parked in the lot. (5RT 1269.) The officers' body cameras recorded the events that followed. (5RT 1270-1272.)

Because nobody was in the car, the officers proceeded into the hotel lobby, where they found Mr. Schuller on the telephone. They asked to speak with him outside. (1SCT 1.) On the way outside, Officer Martin stepped on an aluminum strip at the bottom of the lobby doorway, producing a loud popping sound. (5RT 1273, 1281; 1SCT 1-2.) Mr. Schuller responded that that was the sound of a "gunshot right behind my head" and accused the officers of trying to "hurt" and "attack" him. (1SCT 3.) The officers denied that. (1SCT 4.)

The officers said they had received a report that Mr. Schuller had been driving recklessly, and Mr. Schuller denied the accusation. They asked for his identification, but he could not produce any, although he gave them his name. (1SCT 3-4.) The officers indicated they thought he was refusing to produce identification because he was afraid of an outstanding warrant. Mr. Schuller denied that as well and said, "I'm worried about you guys weakening my army to kill me." (5RT 5.) He again claimed the sound in the doorway was a gunshot and demanded to see the body camera footage. (5RT 6.)

Mr. Schuller explained he did not have any identification because he went through a "cleanse moment," which prompted him to get rid of his cell phone, wallet, identification and other

items. (1SCT 19; 5RT 1285.) He gave the officers his date of birth and driver's license number, and the officers were able to confirm his identity. (1SCT 7.)

During the interaction, Mr. Schuller kept moving around, which made the officers nervous. (1SCT 5, 15; 5RT 1274-1275.) He was also talking a little slow and could not recall his last stop. (1SCT 8-9.) The officers did not smell alcohol or marijuana on him and did not observe any signs warranting a field sobriety test. (5RT 1274-1275, 1281, 1284.)

Mr. Schuller told the officers it felt like they were attacking him and said something about the "police and agencies of the world . . . letting Satan" do something, but the thought was unintelligible. He asked the officers if they were Christian and believed in and had a relationship with Jesus. (1SCT 11; 5RT 1273-1275.) At some point later, Mr. Schuller mentioned the antichrist, who he said had been "painted" as a "fake miracle performer and a fake light." He also talked about the second coming. (1SCT 17; 5RT 1274.) In addition, Mr. Schuller claimed that three men "in there" had been trying to attack him in the throat with needles. (1SCT 12.)

The officers informed Mr. Schuller that his car matched the description of one involved in an incident and that they were going to search it. (1SCT 13-14.) Mr. Schuller suggested they might be planting something. (1SCT 14.) Officer Klassen said the search would be on video, but Mr. Schuller pointed out they would not give him the video of the gunshot so why should he believe they would give him the video of the search. (1SCT 14-15.)

The search of the car produced nothing. The officers subsequently searched Mr. Schuller, which also produced nothing. (1SCT 19-20; 5RT 1283-1284.) The encounter lasted about 55 minutes. (5RT 1283.) After the encounter, the officers let Mr. Schuller go. (5RT 1275.)

4. Incident

Mr. Schuller returned to California on Sunday, March 20, 2016. (5RT 1124, 1127.) He believed that, to end all the threats against him, he had to go to Monterey Bay, put one foot in the sea, and say a prayer. (5RT 1125.) However, upon his return, he went first to W.T.'s residence, arriving at about 5:30 p.m. (5RT 1124, 1127.) Mr. Schuller told W.T. about the trip. The two men also drank beers and ingested marijuana. (5RT 1129-1130.)

With W.T.'s permission, Mr. Schuller took a shower. (5RT 1129, 1131.) While showering, he heard five subtle gunshots, looked out of the shower, and saw a misty figure. He asked if W.T. had shot at him, and W.T. seemed confused. (5RT 1132.)

After the shower, W.T. asked Mr. Schuller to get rid of a gun that Mr. Schuller had been storing at the residence. Mr. Schuller agreed and put it on the kitchen table so he could take it with him when he left. (5RT 1133-1135.)

Before Mr. Schuller could leave, W.T. asked him to "share the light," and Mr. Schuller did. (5RT 1135.) W.T. mentioned something about having a fondness for children, and Mr. Schuller thought sharing the light with him would cleanse him of his evilness. (5RT 1139.) However, this time, something unusual happened. (5RT 1135.)

Normally "the light" returns to Mr. Schuller after he shares it. On this occasion, W.T. kept it, smiled, looked outside, and said to someone, "See, I told you I could take it from him." (5RT 1135-1136.) Then W.T. got a knife from the kitchen, pursued Mr. Schuller, and tried to stab him. (5RT 1136-1137.) Mr. Schuller attempted to flee through the exterior doors, but they would not open. (5RT 1137.) Mr. Schuller asked W.T. if he was Lucifer, and W.T. nodded yes. W.T. then went for the gun on the table while raising the knife, but Mr. Schuller grabbed the gun first and pulled the trigger, shooting W.T. in the head. (5RT 1138.) W.T. fell to the ground and dropped the knife but then began to get back up. In response, Mr. Schuller fired at him repeatedly. (5RT 1138-1139.)

W.T. had tried to stab Mr. Schuller on a previous occasion, but Mr. Schuller did not take it seriously at the time. On this occasion, though, he was afraid for his life. (5RT 1140-1141.) He also thought that, if W.T. was Lucifer, the end of the world might be coming. (5RT 1142-1143.) Then, W.T.'s teeth flew out at Mr. Schuller, causing him more fear. Mr. Schuller shot W.T. again, emptying the gun. (5RT 1144.) He then reloaded the weapon with a fresh magazine. (5RT 1144-1145.) Meanwhile, W.T.'s telephone kept ringing and would not stop, so Mr. Schuller shot at it repeatedly. (5RT 1145.)

Mr. Schuller was about to leave when he saw W.T.'s body convulsing and demons swirling around and leaving and going back into the body. He noticed a gas can nearby and decided to send the demons back to hell by lighting them on fire. He poured

the gasoline on the body, lit a cigarette, and used the lit cigarette to ignite the fuel. (5RT 1145-1147.) The stove's burners were already on; W.T. used them to warm the house. Before leaving, Mr. Schuller attempted to turn them off, including by turning the center dial, which was for baking. However, he was in a panic and may not have done it correctly. (5RT 1150.)

Mr. Schuller then decided to drive to Monterey. (5RT 1148.) He had hoped to get there by sunrise. (5RT 1148.) While en route, police tried to stop him. (5RT 1151-1152.) Eventually, the police were successful and took him into custody. (5RT 1153-1156.)

During the subsequent investigation, police spoke to Mr. McKenna. Mr. McKenna said that W.T. had told him he did not want Mr. Schuller around anymore because Mr. Schuller was "crazy." Mr. McKenna told the police that he thought Mr. Schuller was a nice guy but "definitely [had] a screw loose." (5RT 1334-1337.)

C. Prosecution's Rebuttal

Dr. Kevin Dugan, a forensic psychologist, was appointed by the court to evaluate Mr. Schuller. (6RT 1387-1402.) Dr. Dugan believed there was data suggesting Mr. Schuller was "exaggerating or feigning psychiatric distress." (6RT 1407-1415.) However, witness reports from Nebraska and the Winnemucca incident, all of which predated the killing, were cause for "some concern" and showed Mr. Schuller was "not functioning very well," was "impaired," and was demonstrating "bizarre" and "disturbed behavior." (6RT 1410-1418.) On the other hand, the

doctor believed the destruction of the body and effort to evade capture showed he "knew what he did was wrong." (6RT 1418.) Dr. Dugan did not believe Mr. Schuller suffered from "a qualifying mental health disorder" and believed that his extensive drug use could cause hallucinations. (6RT 1419-1420.) The doctor also noted Mr. Schuller had a history of "aggressive violent substance abusing and criminal conduct" and the killing was consistent with that history. (6RT 1421.)

Dr. Deborah Schmidt, also a forensic psychologist appointed to evaluate Mr. Schuller, believed he was malingering or exaggerating his mental health condition and symptoms. (6RT 1449-1452, 1462.) She also believed his effort to destroy the body and evade police showed he knew what he did was wrong or illegal. (6RT 1462-1463.) His extensive history of substance abuse could have caused him to hallucinate. (6RT 1455-1456, 1460.) However, Dr. Schmidt also concluded that, despite Mr. Schuller's claims of hallucinations, he described the shooting as a response to the victim attacking him with a knife, suggesting he acted to protect himself rather than because of any hallucinations. (6RT 1459-1460.)

ARGUMENTS

I.

THE COURT OF APPEAL ERRED BY CONCLUDING THE FAILURE TO INSTRUCT ON IMPERFECT SELF-DEFENSE WAS AN ERROR OF STATE LAW ONLY THAT REQUIRED PREJUDICE TO BE ASSESSED UNDER *WATSON*

During the guilt phase of Mr. Schuller's trial, the trial court refused to give the jury an instruction on voluntary manslaughter as a lesser-included offense of murder based on the theory that the killing was a product of imperfect self-defense. (6RT 1510.) The court reasoned that Mr. Schuller was not entitled to the instruction because his asserted belief in the need to defend himself from W.T. was purely delusional. (6RT 1505-1507; see *People v. Elmore* (2014) 59 Cal.4th 121, 130 [imperfect self-defense not available to a defendant "when belief in the need to defend oneself is entirely delusional" because the lesser offense must be premised upon "a mistake of *fact*"].) Mr. Schuller challenged that conclusion on appeal.

Citing Mr. Schuller's claim that W.T. attacked him with a knife while reaching for the gun, the Court of Appeal held the trial court erred because Mr. Schuller's "account pertaining to the actual shooting was not *entirely* delusional and thus provided substantial evidence of an actual but unreasonable belief in the need for self-defense." (*Schuller, supra,* 72 Cal.App.5th at pp. 233-236, emphasis in original; see *Elmore, supra,* 59 Cal.4th at p.

146 ["defendants who mistakenly believed that actual circumstances required their defensive act may argue they are guilty only of voluntary manslaughter, even if their reaction was distorted by mental illness"]; *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1409 [a defendant's uncorroborated statement that he needed to defend himself from what he thought was a weapon, even if his perception was affected by a mental disability, provides the "'objective correlate'" necessary to support a claim of imperfect self-defense].)

However, the Court of Appeal found the error harmless. (*Schuller, supra*, 72 Cal.App.5th at pp. 237-240.) Relying on this court's decisions in *People v. Gonzalez* (2018) 5 Cal.5th 186, 185-186 and *People v. Breverman* (1998) 19 Cal.4th 142, 149, the court held that the failure to instruct on *any lesser included offense* is an error of state law only and that prejudice is therefore to be analyzed in this case under the test announced in *Watson, supra,* 45 Cal.2d at page 836. (*Schuller*, at pp. 237-238.)

Mr. Schuller contends that the Court of Appeal's application of the *Watson* test, while understandable, is wrong. It has long been held in California that there is no federal constitutional right to lesser included offense instructions in non-capital cases and that the right is purely a creature of state law. Even if that is true, that does not resolve the question posed by this case because, while voluntary manslaughter is a lesser-included offense of murder, imperfect self-defense is not. It is neither a kind of or element of voluntary manslaughter. Along

with heat of passion,[5] imperfect self-defense is a circumstance that determines whether malice—the mental state of murder—exists in the first place. Thus, even if the erroneous failure to instruct on voluntary manslaughter violates state law only (an issue that need not be resolved here), the failure to instruct on imperfect self-defense or heat of passion where supported by the evidence is tantamount to failing to define malice completely or accurately, which is a violation of federal constitutional law.

Accordingly, properly characterized, the trial court committed two instructional errors in this case. First, it failed to inform the jury that, to establish malice for purposes of murder, the prosecutor bore the burden of proving the absence of imperfect self-defense beyond a reasonable doubt. Second, it failed to give the jury the option of finding Mr. Schuller guilty of voluntary manslaughter should it find the prosecutor did not satisfy that burden. To the extent the second error was only a violation of state law, the first error still implicated Mr. Schuller's federal constitutional rights and must be assessed for prejudice under *Chapman*.

Whether *Chapman* or *Watson* applies is no small matter. It can have a profound impact on the outcome of a case because the former is significantly stricter than the latter, as the following discussion reveals.

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[5] Throughout the brief, Mr. Schuller uses both "heat of passion" and "provocation" as shorthands for the same circumstance—statutorily described as "upon a sudden quarrel or heat of passion" (§ 192, subd. (a))—that negates malice and

A. Watson and Chapman Tests

Since the Legislature's adoption of the Penal Code in 1872, it has been a settled principle of California *statutory* law that judgments would not be reversed because of "technical errors or defects . . . which do not affect the substantial rights" of the defendant. (§ 1258; see also § 1404 [proceeding is not "invalid" due to "error or mistake . . . unless it has actually prejudiced the defendant . . . in respect to a substantial right"].) However, early in the Penal Code's history, the state constitution limited appellate court jurisdiction "'to questions of law alone,'" precluding reviewing courts "from weighing the evidence for the purpose of forming an opinion whether the error had or had not in fact worked injury." (*People v. O'Bryan* (1913) 165 Cal. 55, 64; see Cal. Const., former art. VI, § 4.)

> Having no jurisdiction in matters of fact, the court in which the appeal was pending was bound to apply the doctrine that prejudice was presumed to follow from substantial error.

(Ibid.)

The jurisdictional limitation on appellate courts "produced results which were unsatisfactory," requiring the reversal of judgments for "technical errors" even where "the guilt of the accused had been established beyond question and by means of a procedure which was substantially fair and just." (*O'Bryan, supra,* 165 Cal. at p. 64.) To avoid such results, the California

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makes an unlawful killing no greater than voluntary manslaughter, as described in more detail below.

Constitution was amended in 1911 to prohibit the reversal of a criminal judgment

> "unless after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

(*Id.* at pp. 63-64; Cal. Const., former art. VI, § 4 1/2, now art. VI, § 13.)

Early on, this court recognized the challenge in arriving at "an all-embracing test or definition for determining just what will constitute a miscarriage of justice," observing that that task is as difficult as defining the phrase "due process of law" in the federal constitutional context. (*O'Bryan, supra,* 165 Cal. at pp. 64-65.) However, it was clear to this court that the amendment abrogated the presumption of prejudice and imposed on reviewing courts a duty to weigh the evidence and form *its own opinion* regarding the error's effect on the verdict. (*Id.* at pp. 65-66.)

Thereafter, California courts used varying language to define a "miscarriage of justice." (*Watson, supra,* 46 Cal.2d at p. 835; see, e.g., *People v. Kelso* (1945) 25 Cal.2d 848, 853 [judgment will not be reversed for error where "it appears that a different verdict would not otherwise have been probable"]; *People v. Putnam* (1942) 20 Cal.2d 885, 892 [error was prejudicial where "a different verdict would not have been improbable had the error not occurred"]; *People v. Watts* (1926) 198 Cal. 776, 793 ["miscarriage of justice" occurs only where "the accused may well have been substantially injured by the error"].) In *Watson*, this

court found that courts generally applied one test, though, which it restated as follows:

> A "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

(*Watson,* at p. 836.) In the several years thereafter, the reasonable probability test was used by California courts to assess most types of errors, including those that violate the United States Constitution. (See, e.g., *People v. Roberts* (1965) 63 Cal.2d 84, 93 [applying *Watson* to *Griffin* error]; *People v. Bostick* (1965) 62 Cal.2d 820, 823 [same].)

But in 1963, the United States Supreme Court announced a different prejudice test for federal constitutional errors. In *Fahy v. Connecticut* (1963) 375 U.S. 85 [84 S.Ct. 229, 11 L.Ed.2d 171], the defendant was convicted of violating a state law that made it a crime to deface a public building. The state appellate court had found that incriminating evidence adduced at trial was obtained by means of an illegal search and seizure in violation of the Fourth Amendment. (*Id.* at p. 86.) However, the state court found the error harmless under its own statutory harmless error rule, which provided that the reviewing court "need not reverse a judgment below if it finds the errors complained of 'have not materially injured the appellant.'" (*Id.* at p. 86 & fn. 2.) On certiorari, the Supreme Court reversed, finding the error prejudicial. (*Id.* at p. 86.) In doing so, it rejected application of the state's harmless error rule and announced a new one, which it

stated as follows: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Id.* at pp. 86-87.)

The next year, the United States Supreme Court directly addressed California's "miscarriage of justice" standard in *Chapman*. At issue in *Chapman* was how to assess the prejudicial impact of commenting on a defendant's silence at trial, which was held to violate the Fifth and Fourteenth Amendments in *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106]. (*Chapman, supra,* 386 U.S. at pp. 19-20.) The Supreme Court first held that violations of federal constitutional law must be assessed for prejudice under a standard that *it* creates rather than one fashioned by the states:

> The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the "independent" federal courts would be the "guardians of those rights." [Fn.] Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, *we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights*. We have no hesitation in saying that the right of these

> petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, *it is our responsibility to protect by fashioning the necessary rule*.

(*Id.* at p. 21, emphasis added.)

Chapman expressed concern regarding California courts' application of the "miscarriage of justice" rule, finding they "have neutralized [the standard] to some extent by emphasis, and perhaps overemphasis, upon the court's view of 'over-whelming evidence.'" (*Chapman, supra,* 386 U.S. at p. 23; see, e.g., *People v. Potter* (1966) 240 Cal.App.2d 621, 631 [*Griffin* error harmless where "evidence of guilt in this case is overwhelming"].) It therefore found preferable the "reasonable possibility" test it announced in *Fahy*. (*Ibid.*) The court observed that the *Fahy* test was consistent with the "original common-law harmless-error rule," which put the burden on the beneficiary of the error "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid.*) It then summarized the rule as follows:

> [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

(*Id.* at p. 24.)

What emerged from the aforementioned history was a clear distinction between the circumstances under which *Watson* and *Chapman* apply, with the former reserved for issues of state law only and the latter reserved for federal constitutional errors.

(*People v. Cain* (1995) 10 Cal.4th 1, 44; *People v. Blakley* (1992) 6 Cal.App.4th 1019, 1023; see *People v. Krug* (1967) 256 Cal.App.2d 219, 221 [*Watson* applies where the error does not involve a "question of federal practice" but of "state law" only].) The question presented in this case is whether the trial court violated state law or the federal Constitution. To answer that question, it is necessary to understand the relationship between murder and voluntary manslaughter, the offenses at issue.

B. Murder and Voluntary Manslaughter in California

California defines murder as the "unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a); accord, *People v. Bryant* (2013) 56 Cal.4th 959, 964.) The killing is unlawful in the sense that it is "neither justified nor excused" (*People v. Rios* (2000) 23 Cal.4th 450, 453), such as when committed in self-defense (see, e.g., § 197) or by accident (see, e.g., § 195). A justifiable or excusable homicide—one that is lawful—is not criminal and thus not punishable at all. (§ 199.)

Manslaughter is the "unlawful killing of a human being *without malice*." (§ 192, emphasis added; accord, *Rios, supra,* 23 Cal.4th at p. 460.) It is of three kinds, with one being voluntary manslaughter.[6] (§ 192, subd. (a).) Manslaughter is considered to be a lesser-included offense of murder. (*Rios*, at p. 460.) As statutorily defined, manslaughter like murder requires an unlawful killing—one that is not justified or excused. What

[6] The other two forms are involuntary and vehicular. (§ 192.)

distinguishes it from murder, though, is the absence of malice. (*Ibid.*)

Notably, with respect to voluntary manslaughter, the absence of malice that distinguishes the killing from murder is not a factual absence but rather a legal one. Factually, malice is an element of voluntary manslaughter. (*Bryant, supra,* 56 Cal.4th at p. 968.) Voluntary manslaughter requires proof that the defendant acted either with express malice (i.e., "an intent to kill") or implied malice (i.e., "a conscious disregard for life"). (*Id.* at pp. 964, 968-970.) In that sense, the killing "would normally constitute murder." (*Id.* at p. 968; see *Rios, supra,* 23 Cal.4th at p. 467 [for voluntary manslaughter, "the lethal act was committed with a mental state, such as intent to kill, which would otherwise justify a finding of malice"].) However, the malice is deemed "negated" by the presence of certain circumstances that have been found to be legally incompatible with a finding of that mental state. (*Id.* at p. 968; *Rios, supra,* at pp. 460-461.) Thus, voluntary manslaughter could be accurately defined as *an unlawful killing with malice negated*, distinguishing it from other forms of manslaughter.

One circumstance that negates malice for purposes of voluntary manslaughter is expressed in the statutory scheme as a killing committed "upon a sudden quarrel or heat of passion." (§ 192, subd. (a); accord, *Bryant, supra,* 56 Cal.4th at p. 969; *Rios, supra,* 23 Cal.4th at p. 465.) Heat of passion arises where the accused kills in response to a provocation that was capable of rendering "an ordinary person of average disposition 'liable to act

rashly or without due deliberation and reflection, and from this passion rather than from judgment'" and caused him to act likewise. (*People v. Beltran* (2013) 56 Cal.4th 935, 942, 957.) The other circumstance, known as imperfect or unreasonable self-defense, is not delineated by statute but was "judicially developed." (*Rios, supra*, 23 Cal.4th at p. 465.) It is defined as the "actual but unreasonable belief in the need for self-defense." (*Id.* at p. 454.)

Underlying the reduction of such killings to voluntary manslaughter is the principle that malice requires a defendant to be aware of "'the obligation to act within the general body of laws regulating society.'" (*Bryant, supra,* 56 Cal.4th at p. 969.) Regarding imperfect self-defense, "'an individual cannot genuinely perceive the need to repel imminent peril or bodily injury and simultaneously be aware that society expects conformity to a different standard.'" (*Ibid.*) "[M]alice, that most culpable mental state which distinguishes murder, simply 'cannot coexist' with the defendant's actual belief that the lethal act was necessary for self-protection." (*Rios, supra,* 23 Cal.4th at p. 465.) The same logic applies equally to a killing committed in the heat of passion. (*Ibid.*)

Thus, in California, voluntary manslaughter is not a crime separate and distinct from murder that is defined by "the additional elements of provocation or imperfect self-defense." (*Rios, supra,* 23 Cal.4th at p. 464.) Provocation and imperfect self-defense are not elements of voluntary manslaughter at all. (*Id.* at pp. 462-463.) Where murder liability is at issue,

> evidence of heat of passion, or of an actual, though unreasonable, belief in the need for self-defense, is relevant only to determine whether *malice has been established*, thus allowing a conviction *of murder*, or *has not been established*, thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter.

(*Id.* at p. 461, emphasis in original.)

On the other hand, where the defendant is not charged with murder and voluntary manslaughter is the greater offense charged, heat of passion and imperfect self-defense are irrelevant. (*Rios, supra,* 23 Cal.4th at p. 463.) They preclude "a finding of malice *where malice is an element of the charge*, but *malice is not at issue* upon a charge of manslaughter." (*Ibid.*, emphasis in original.) To prove voluntary manslaughter in the absence of a murder charge, the People need not establish malice's absence, and a conviction for voluntary manslaughter is still permissible even where the defendant killed with malice and thus committed the crime of murder. (*Ibid.*) "[A] conviction of voluntary manslaughter can be sustained under instructions which require, and evidence which shows, that *the defendant killed intentionally and unlawfully*." (*Ibid.*) "The People need not further prove beyond reasonable doubt, as an element of the manslaughter offense, that the defendant was provoked or unreasonably sought to defend himself." (*Ibid.*)

C. Federal Constitutional Implications

Significantly, this court has been clear that, where "provocation or imperfect self-defense is . . . 'properly presented'

in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice." (*Rios, supra,* 23 Cal.4th at p. 462, emphasis in original.) Stated another way, to prove the crime of murder, "the People must establish malice, including, in appropriate cases, the *absence* of provocation [or imperfect self-defense], as an essential element of *murder*." (*Id.* at p. 469, emphasis in original.) This principle derives from the United States Supreme Court's decision in *Mullaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508]. (See *Rios*, at p. 462, citing *Mullaney*, at pp. 703-704.)

At issue in *Mullaney* was the constitutionality of Maine's felonious homicide law. (*Mullaney, supra,* 421 U.S. at pp. 684-685.) The law provided that, absent justification or excuse, all intentional or criminally reckless killings would be punished as murder unless the defendant proved by a preponderance of the evidence that his killing was committed in the heat of passion, thereby reducing the crime to manslaughter. (*Id.* at pp. 691-692.) The court sought to decide whether the law comported with its recent pronouncement that the due process clause of the Fourteenth Amendment required the prosecution to prove "beyond a reasonable doubt every fact necessary to constitute the crime charged." (*Id.* at p. 685, citing *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) It held that the law did not. The court concluded that the "absence of heat of passion" is a fact necessary to establish murder that the prosecution must therefore prove "beyond a reasonable doubt . . .

when the issue is properly presented in a homicide case." (*Mullaney,* at p. 704.)

Accordingly, the *absence of provocation or imperfect self-defense*, when properly presented in a murder case, do not define the lesser crime of voluntary manslaughter. Rather, they are key parts of the *definition of malice*, an essential element of the greater crime of murder and facts that the due process clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt. In other words, in such cases, a jury does *not* consider provocation or imperfect self-defense to determine whether the prosecution has proven the defendant's unlawful killing *is voluntary manslaughter*. Instead, it considers those issues to determine whether the prosecution has met its burden of *proving murder*. It is only upon failing to prove the absence of provocation or imperfect self-defense, thereby precluding a finding of malice, that an unlawful killing with express or implied malice becomes voluntary manslaughter.

It is well settled that a trial court has a *sua sponte* duty to instruct on "the general principles of law relevant to and governing the case," including on "all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Specifically, that duty includes providing the jury "*complete and accurate* instructions on the mental state element of the charged offense." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 873, emphasis added; *People v. Anderson* (2011) 51 Cal.4th 989, 998.) "An instructional error that improperly describes or omits an element of an offense," and thus "relieves the prosecution of the

burden of proving beyond a reasonable doubt each element of the charged offense," violates "the defendant's due process rights under the federal Constitution." (*People v. Flood* (1998) 18 Cal.4th 491, 502-503.) It also "implicates Sixth Amendment principles preserving the exclusive domain of the trier of fact." (*Id.* at p. 491.)

In a murder case, the erroneous failure to instruct the jury that the prosecution must prove beyond a reasonable doubt the absence of heat of passion or imperfect self-defense, where that burden exists, constitutes a failure to completely, accurately and properly define malice. And it relieves the prosecution of its burden to prove all of the facts necessary to establish the requisite mental state for murder and thus all of the facts necessary to constitute the crime of murder. Accordingly, it is a violation of the federal Constitution. (See *Winship, supra,* 397 U.S. at p. 364 [due process requires proof beyond a reasonable doubt of "every fact necessary to constitute the crime"].) As such, it falls within the class of trial court errors that is assessed for prejudice under *Chapman*. (See *Flood, supra,* 18 Cal.4th at p. 504 [erroneous instruction directing jury that element of crime was established assessed for prejudice under *Chapman*].)

Nearly a decade ago, in *People v. Thomas* (2013) 218 Cal.App.4th 630, Division Three of the First Appellate District reached the same conclusion. At issue in *Thomas* was the failure to give a requested instruction on provocation sufficient to reduce murder to voluntary manslaughter. (*Id.* at pp. 641-642.) The court likened the instructional omission to a "mistaken

instruction on malice as an element of murder." (*Id.* at p. 641.) The court noted that, when heat of passion is put in issue, "the federal due process clause requires the prosecution to prove its absence beyond a reasonable doubt." (*Id.* at p. 643, citing *Mullaney, supra,* 421 U.S. at p. 704.) It observed as well that this court has held the absence of "sufficient provocation" for heat of passion becomes an element of malice that the prosecution must prove. (*Ibid.*, citing *Rios, supra,* 23 Cal.4th at pp. 461-462.) It then relied on the settled principle that "'[j]ury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution.'" (*Id.* at p. 644, quoting *Flood, supra,* 18 Cal.4th at p. 491.) Accordingly, it held that it must "apply the test articulated in *Chapman*" to determine whether the instructional omission was prejudicial. (*Id.* at pp. 633, 641, 644.)

More recently, in *People v. Dominguez* (2021) 66 Cal.App.5th 163, Division One of the Fourth Appellate District followed the *Thomas* court's lead. As in *Thomas*, the court in *Dominguez* held there was substantial evidence of provocation to support an instruction on heat of passion. (*Id.* at pp. 175-183.) Regarding the standard for assessing prejudice, it found *Thomas*'s reasoning "straightforward" and "persuasive" and held too that *Chapman* governed. (*Id.* at pp. 183-184.)

In sum, the absence of heat of passion or imperfect self-defense, depending upon the circumstances of the particular case, are elements of the crime of murder. The erroneous failure to

instruct on them constitutes a violation of federal constitutional law. Accordingly, that error must be assessed for prejudice under *Chapman*.

D. Schuller Decision

In this case, the Court of Appeal rejected application of the *Chapman* test, citing *Gonzalez* and *Breverman* for the proposition that "the failure to instruct on a lesser included homicide offense" is always an error of state law only that is assessed for prejudice under *Watson*. (*Schuller, supra,* 72 Cal.App.5th at p. 237.) It rejected the decisions in *Thomas* and *Dominguez*, not because it found their reasoning unpersuasive but rather because it believed their holdings were incompatible with this court's pronouncements, which it was bound to follow. (*Id.* at p. 238.)

Respectfully, the Court of Appeal was wrong that *Gonzalez* and *Breverman* dictated its holding. To date, this court has not answered the question raised by this case—i.e., whether the erroneous failure to instruct on heat of passion or imperfect self-defense where required in a malice-murder case is a violation of state or federal law.

1. Breverman

In *Breverman*, the defendant was charged with murder, and the instructions limited the jury to a finding of second-degree malice murder. (*Breverman, supra,* 19 Cal.4th at p. 152.) The jury was also instructed on voluntary manslaughter based on imperfect self-defense as a lesser included offense but not on heat of passion. (*Id.* at pp. 148, 152.) The jury found him guilty of the

greater crime. (*Id.* at p. 152.) On appeal, he contended "the trial court erred by failing to instruct, sua sponte, on a 'heat of passion' theory of voluntary manslaughter." (*Id.* at p. 148.)

The court reiterated the long settled principle that "the trial court must instruct on the general principles of law relevant to the issues raised by the evidence," including "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present." (*Breverman, supra,* 19 Cal.4th at p. 154.) It further concluded that voluntary manslaughter is a lesser included offense of "intentional murder" because "heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that *otherwise inheres* in such a homicide." (*Ibid*., emphasis in original.) While acknowledging that heat of passion and imperfect self-defense may "resemble traditional affirmative defenses," it repeated a prior holding that "voluntary manslaughter is itself an offense, i.e., an unlawful killing distinguished from murder only because it is 'without malice'" and that heat of passion and imperfect self-defense "merely establish the 'lack[] [of] malice' that distinguishes the one offense from the other." (*Id*. at p. 159, citing *People v. Barton* (1995) 12 Cal.4th 186, 199.) The court concluded therefrom,

> heat of passion and unreasonable self-defense, as forms of a lesser offense included in murder, thus come within the broadest version of the California duty to provide sua sponte instructions on *all the material issues presented by the evidence*.

(*Id.* at pp. 159-160, emphasis in original.) It wrote,

> In a murder case, this means that both heat of passion and unreasonable self-defense, *as forms of voluntary manslaughter*, must be presented to the jury if both have substantial evidentiary support.

(*Id.* at p. 160, emphasis added.) The court found that there was evidence supporting the omitted instruction and thus that the trial court erred. (*Id.* at p. 164.)

Regarding the issue of prejudice, *Breverman* then held that "the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility." (*Breverman, supra,* 19 Cal.4th 165.) It rejected "any implication" that "the failure to instruct sua sponte on an uncharged lesser included offense, or any aspect thereof," violates the federal Constitution. (*Id.* at p. 165.) Its rationale was based on a void of authority. It first observed that in no other case had *it* relied on "federal constitutional principles" is assessing the right to an instruction on lesser included offenses. (*Ibid.*) It further observed that "the United States Supreme Court has expressly refrained from recognizing a federal constitutional right to instructions on lesser included offenses in noncapital cases." (*Ibid.*) The *Breverman* majority declined "to do what the high court has expressly not done—to hold that such an instructional rule is required in noncapital cases by the federal Constitution." (*Id.* at p. 169.)

The *Breverman* decision is not without its flaws. The court accurately described the operational effect of heat of passion and

imperfect self-defense—that they negate malice and thus render what would otherwise be murder no greater than voluntary manslaughter. (*Breverman, supra,* 19 Cal.4th at pp. 154, 159.) However, the court incorrectly viewed "heat of passion and unreasonable self-defense" as "forms of voluntary manslaughter," which led it to treat those circumstances as, themselves, lesser included offenses. (*Id.* at pp. 159-160.) They are not. Rather, this court's later authorities discussed above made clear their absence defines the element of malice when murder is the greater offense charged. No doubt *voluntary manslaughter*—an unlawful killing where malice is negated—is a lesser included offense of malice murder that is subject to the same rules that govern all lesser included offenses. But heat of passion and imperfect self-defense are not elements of that lesser crime.[7] (*Rios, supra,* 23 Cal.4th at pp. 462-463.) They are only relevant in a murder case in determining whether the prosecution has met its burden of proving malice. (*Id.* at p. 461.)

Because of how it viewed heat of passion and imperfect self-defense, *Breverman* does not answer the question at the heart of

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[7] Further revealing its flawed view of voluntary manslaughter, the *Breverman* majority at one point couched the issue before it as "not that an element of the charged offense of murder was removed from the jury's consideration" but rather "that the omission of an 'element' of voluntary manslaughter denied [the defendant] full jury consideration of that *lesser alternative* to murder." (*Breverman, supra,* 19 Cal.4th at p. 169-170, italics in original.) Of course, as discussed repeatedly above, heat of passion, the "element" at issue in *Breverman*, is *not* an element of voluntary manslaughter at all. (*Rios, supra,* 23 Cal.4th at pp. 462-463.)

this case. Significantly, the majority expressly recognized as much. In a footnote, it declined to decide whether the erroneous omission of the heat of passion instruction was of federal constitutional dimension on the ground it resulted in an incomplete definition of malice. (*Breverman, supra,* 19 Cal.4th at p. 170, fn. 19.) The court wrote that footnote in response to Justice Kennard's dissent, in which she concluded the omission was federal constitutional error for that very reason. (*Ibid.*; see also *id.*, at pp. 187-195 (dis. opn. of Kennard, J.).) Significantly, the majority did not disagree with "the merits of this hypothesis" but simply did not believe the argument had been sufficiently "developed" by the parties and thus a decision on the issue would have to "await a case" in which it could be "fully briefed."[8] (*Ibid.*)

Justice Kennard's dissent is noteworthy because it lays bare Mr. Schuller's core contention. She wrote,

> Given the manner in which California has structured the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger *plus the absence of* both heat of passion and unreasonable self-defense. Where, as here, there is sufficient evidence of heat of passion to support a voluntary manslaughter verdict, murder instructions that fail to inform the jury it

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[8] Following *Breverman*, this court repeatedly observed it had yet to answer that precise question. (*People v. Moye* (2009) 47 Cal.4th 537, 558, fn. 5 [declining to decide the issue because the defendant did not raise it]; *People v. Lasko* (2000) 23 Cal.4th 101, 113 [explaining that *Breverman* "declined to consider whether [the] error violated the federal Constitution by giving the jury an incomplete definition of malice"].)

> may not find the defendant guilty of murder if heat of passion is present are incomplete instructions on the element of malice.

(*Breverman, supra,* 19 Cal.4th at pp. 189-190, emphasis in original (dis. opn. of Kennard, J.).) Relying on *Mullaney* and other United States Supreme Court authorities, she explained the federal constitutional due process implications of presenting such incomplete instructions on an element of murder to the jury. (*Id.* at pp. 190-191.) And relying on *Flood*, she concluded that the error is "subject to harmless error analysis under the test of *Chapman*." (*Id.* at p. 194.)

Mr. Schuller disagrees with Justice Kennard in one respect, however. She wrote,

> The relationship between murder and voluntary manslaughter is unlike the relationship between the typical greater offense and lesser included offense, in which the elemental facts of the greater offense encompass all of the elemental facts of the lesser offense. Here, the relationship is reversed, and the elemental facts of the *lesser* crime of voluntary manslaughter encompass the elemental facts of the greater crime of murder.

(*Breverman, supra,* 19 Cal.4th at p. 189 (dis. opn. of Kennard, J.).) She explained as follows:

> [A]s a functional matter, the elemental facts proving the crime with the greater punishment—murder—are a subset of the elemental facts of the crime with the lesser punishment—voluntary manslaughter. Proof of the elemental facts of the crime of murder plus proof of an additional elemental fact (heat of passion) establishes the crime of voluntary manslaughter.

(*Id.* at pp. 188-189 (dis. opn. of Kennard, J.).) She even crafted a new label for the lesser crime of voluntary manslaughter—"a lesser *including* offense of murder, for although it carries a lesser penalty than murder, it includes all of the elemental facts of murder." (*Id.* at p. 189, fn. 4, emphasis in original (dis. opn. of Kennard, J.).)

Justice Kennard is only correct regarding the atypical nature of voluntary manslaughter as a lesser included offense if heat of passion—and concomitantly, imperfect self-defense—is one of its elements. Again, neither one is. Voluntary manslaughter (an unlawful killing with malice negated) is a lesser included offense of murder (an unlawful killing with malice) in the same way as any other "typical greater offense and lesser included offense." Murder encompasses all of the elements of voluntary manslaughter with the additional element of malice. As discussed above, heat of passion and imperfect self-defense are only relevant in determining whether that additional element exists to make the crime murder.

Thus, like the *Breverman* majority, the flaw in Justice Kennard's logic was in viewing the circumstances that serve to negate malice as *forms of voluntary manslaughter* when they are not. Justice Kennard was correct that, in a murder case, it is a violation of due process not to inform a jury, when required, that malice is absent where the defendant kills in the heat of passion or under the unreasonable belief in the need to defend himself. That error is separate and distinct from the failure also to inform the jury that, in the absence of malice, an unlawful killing can be

no greater than voluntary manslaughter, murder's lesser included offense. While the latter error may only violate state law, as the *Breverman* majority holds, that does not mean the former one only does so too.

2. Gonzalez

Like *Breverman*, this court's 2018 decision in *Gonzalez, supra,* 5 Cal.5th 186 did not answer the precise question raised by this case. In *Gonzalez*, the defendants were found guilty of first-degree felony murder, the only murder theory presented to the jury, and the jury also found true the special circumstance allegation that the murder was committed during a robbery. (*Gonzalez,* at p. 191.) The defendants argued they were entitled to instructions on second-degree malice murder and *its* lesser-included offenses as well as the defenses of self-defense and accident. (*Id.* at p. 195.)

This court held that, by *alleging* malice murder, the information triggered the trial court's duty to instruct on it and its lesser included offenses if supported by the evidence. (*Gonzalez, supra,* 5 Cal.5th at pp. 191, 198.) The court also assumed without deciding that there was substantial evidence supporting the requested instructions. (*Id.* at pp. 197-198.) The question before the court was thus whether the special circumstance finding rendered harmless any error in failing to give those instructions. (*Id.* at p. 195.) Applying *Watson*, it held that finding did. (*Id.* at p. 200.)

Gonzalez observed that "[w]hether an error proves harmless or not depends on the kind of error at issue" and relied

on *Breverman* when repeating the general principle that the failure to instruct on a lesser included offense is "state law error." (*Gonzalez, supra,* 5 Cal.5th at pp. 195-196.) But characterizing the erroneous failure to give a lesser included offense instruction is not the fundamental question *in this case*. That question is whether it was a violation of state or federal law not to instruct Mr. Schuller's jury that imperfect self-defense negates the murder element of malice. *Gonzalez* does not speak to that issue. In fact, nothing in *Gonzalez* suggests that issue was ever presented, and as *Breverman* held, the resolution of that question would have to "await a case" in which the claim was "clearly raised and fully briefed." (*Breverman, supra,* 19 Cal.4th at p. 170, fn. 19.) And given the procedural posture in *Gonzalez*, there was no reason to raise or to consider that issue.

Malice murder, the omitted theory in *Gonzalez*, does not modify the definition of an element of *felony murder*, the theory on which the jury based its guilty verdict, such that the instructional omission relieved the prosecutor of its burden of proving all the elements of the crime. The court appeared to recognize as much. Seemingly unclear of precisely what the defendant was arguing, the court addressed the question whether the failure to instruct on *first-degree* malice murder raised federal constitutional concerns. (*Gonzalez, supra,* 5 Cal.5th at p. 198.) The court held it did not, reasoning that omission is "categorically different" from "the failure to instruct on the elements of an offense." (*Id.* at p. 198.) The court explained,

> When a court fails to instruct the jury on an element of an offense, the error violates the federal

> Constitution because a jury must find the defendant guilty of every element of the crime of conviction beyond a reasonable doubt. By contrast, the trial court's failure to instruct the jury on an alternative theory that would have allowed it to convict defendants of the *same crime* does not deprive defendants of their right to a jury determination of the elements of the crime of conviction, and is not federal constitutional error.

(*Id.* at pp. 198-199, emphasis in original.)

But in a case in which the defendant is convicted of *malice murder*, the omission of a required instruction telling the jury that malice is negated by either heat of passion or imperfect self-defense is *categorically the same* as failing to instruct on an element of an offense. It deprives the defendant of his "right to a jury determination of the elements of the crime" and thus *is* "federal constitutional error."

Perhaps most significantly, this court observed in *Gonzalez* that it had yet to decide whether the failure to instruct on a requested affirmative defense, such as self-defense, was federal constitutional error and observed it "need not decide that issue here." (*Gonzalez, supra,* 5 Cal.5th at p. 199.) The court reasoned that, because they are not defenses to felony murder but only malice murder, if the failure to instruct on malice murder was harmless, then the failure to instruct on its defenses was as well. (*Ibid.*) Under that same logic, the failure to instruct on any offenses necessarily included in malice murder, such as voluntary manslaughter, was necessarily harmless too. That is likely why the court never directly addressed the constitutional implications of failing to instruct on voluntary manslaughter or the

circumstances that can negate malice and reduce a malice murder to that lesser crime. Simply put, those issues were not before it because once it determined that the omission of a malice murder instruction was harmless, there was no need to address its lesser crimes at all. "It is axiomatic that a case is not authority for an issue that was not considered." (*People v. Brooks* (2017) 3 Cal.5th 1, 110.)

E. State of Confusion

The Court of Appeal's mistaken reliance on *Breverman* and *Gonzalez* to conclude that the failure to instruct on imperfect self-defense *in this case* was an error of state law only is understandable. Both decisions from this court and the standard instructions on voluntary manslaughter have been sources of confusion on the matter.

The confusion stemming from this court's jurisprudence seems to be rooted in repeated declarations that heat of passion and imperfect self-defense are *forms or kinds* of voluntary manslaughter. But characterizing them as forms of voluntary manslaughter implies they define and thus serve as elements of that crime. When directly addressing that issue, though, this court has held, as noted, that they do not. (*Rios, supra,* 23 Cal.4th at pp. 462-463; accord, *People v. Wright* (2005) 35 Cal.4th 964, 981 ["imperfect self-defense and heat of passion are not *elements* of voluntary manslaughter"].)

Breverman was not the first decision from this court to characterize heat of passion and imperfect self-defense as forms

of voluntary manslaughter. (See, e.g., *Barton, supra,* 12 Cal.4th at pp. 199-200; *People v. Wickersham* (1982) 32 Cal.3d 307, 326.) It was also not the last. (See, e.g., *People v. Beck and Cruz* (2019) 8 Cal.5th 548, 649; *People v. Simon* (2016) 1 Cal.5th 98, 132; *Lasko, supra,* 23 Cal.4th at p. 108; *People v. Blakeley* (2000) 23 Cal.4th 82, 88.) Even in cases in which it has repeated the principle that heat of passion and imperfect self-defense are not elements of voluntary manslaughter, the court has still referred to them as forms of the lesser crime. (See, e.g., *Moye, supra,* 47 Cal.4th at p. 549.) In *Rios* itself, the court used a similar label to describe the circumstances. (*Rios, supra,* 23 Cal.4th at p. 465 [referring to imperfect self-defense as a "theory of voluntary manslaughter"].)

Viewing heat of passion and imperfect self-defense as "forms of voluntary manslaughter" leads to the inaccurate perception that they are themselves lesser included offenses of murder that are subject to the same rules that govern all lesser included offenses. They are not.

> [This court has] established two tests for whether a crime is a lesser included offense of a greater offense: the elements test and the accusatory pleading test. [Citation.] Either of these tests triggers the trial court's duty to instruct on lesser included offenses. Under the elements test, one offense is another's "lesser included" counterpart if all the elements of the lesser offense are *also* elements of the greater offense. [Citation.] Under the accusatory pleading test, a crime is another's "lesser included" offense if all of the elements of the lesser offense are also found in the *facts alleged* to support the greater offense in the accusatory pleading. [Citation.]

(*Gonzalez, supra,* 5 Cal.5th at p. 197.)

Under the elements test, if heat of passion is a kind of voluntary manslaughter, then its elements, including sufficient provocation, must also be elements of murder, but they are not. Murder does not require proof of such provocation. Likewise, if imperfect self-defense is a form of voluntary manslaughter, then its elements, like an actual belief in the need to defend oneself, must be elements of murder too. Its elements are not either. The same result would obtain under the accusatory pleading test where malice murder was charged. Heat of passion and imperfect self-defense are thus not lesser included offenses of murder. Rather they are merely circumstances that negate malice and thus prohibit a conviction of murder—i.e., a conviction for anything greater than voluntary manslaughter.

On the other hand, voluntary manslaughter defined simply and generally as an unlawful killing without malice (because that mental state has been negated) satisfies both the elements and accusatory pleading tests for malice murder. Therefore *it is* a lesser included offense of murder.

That subdivision (a) of section 192 uses the phrase "upon a sudden quarrel or heat of passion" in describing voluntary manslaughter does make heat of passion a form of or element of the lesser crime. This court has addressed that very issue:

> The obvious inference is that this mitigating circumstance renders such a homicide an "unlawful killing . . . without malice" (§ 192), and thus reduces the offense to the "[v]oluntary" form of manslaughter (*id.*, subd. (a)), *even though* the lethal act was committed with a mental state, such as intent to kill,

> which would otherwise justify a finding of malice. In other words, as California law has long specified, where a killing was intentional and unlawful, provocation justifies a voluntary manslaughter conviction not because provocation is an additional element of that crime, but because it *negates* the *malice* element of the greater offense of murder.

(*Rios, supra,* 23 Cal.4th at pp. 466-467, emphasis in original.)

This flawed notion that heat of passion and imperfect self-defense are forms of voluntary manslaughter is reflected in the standard jury instructions. The Judicial Council of California Criminal Jury Instructions include three instructions defining voluntary manslaughter, including one for heat of passion (CALCRIM 570) and one for imperfect self-defense (CALCRIM 571).

CALCRIM 570 provides that a "killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." It defines what such a killing entails and makes clear it is the People's burden to disprove heat of passion beyond a reasonable doubt. (CALCRIM 570.) CALCRIM 571 takes a similar approach, stating, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because [he] acted in []imperfect self-defense…" It also defines such a killing and the People's burden with respect to it. (CALCRIM 571.)

All of that information, especially that defining the prosecutor's burden of proof, is necessary for the jury to understand whether it can properly find malice based on the

evidence presented and thus find that a murder has occurred in the first place. But it is not presented as part of the murder instructions, instead existing in separate instructions carrying the banners "Voluntary Manslaughter" and "Lesser Included Offense." Moreover, neither instruction tells the jury that the reason murder is reduced to voluntary manslaughter is because those circumstances negate the element of malice that is required for a finding of murder. Neither instruction mentions malice at all.

Presenting heat of passion and imperfect self-defense in separate voluntary manslaughter instructions and failing to clarify the role they play in proving malice does not necessarily constitute error. But it does divorce those circumstances from the role they actually play in a murder case, thereby perpetuating the false narrative that *they* are lesser included offenses of murder subject to the same rules governing such offenses rather than circumstances that determine the existence of murder's mental state subject to rules governing elements of the charged offense. Where those circumstances are relevant in a case, it would be less confusing and more accurate to modify CALCRIM 520, the instruction that defines malice murder, to say that (1) if the defendant killed in the heat of passion or under the unreasonable belief in the need to defend himself, a finding of malice is precluded, and (2) to prove malice, the prosecutor bears the burden of proving beyond a reasonable doubt that the defendant did not kill under such circumstances.

The distinction between, and the distinct constitutional implications of, instructions on voluntary manslaughter and the circumstances that can serve to reduce a murder to that crime is apparent from the following hypotheticals.

Where a trial court instructs the jury that a finding of malice is precluded if the killing is committed in the heat of passion or in imperfect self-defense and also instructs on the prosecution's burden to disprove those circumstances, a jury can and should find that the killing was *not murder* if it believes the prosecutor failed to satisfy that burden. However, in the absence of an additional instruction that, where malice is precluded, the jury may find the defendant guilty of voluntary manslaughter in the event all other elements of murder are proven, that finding cannot lead to it returning a guilty verdict for the lesser crime. A jury following the instructions should acquit the defendant entirely, even if his conduct would constitute voluntary manslaughter, because voluntary manslaughter was not an option given to it. Admittedly, that does not lead to "the most accurate possible verdict encompassed by the charge and supported by the evidence" (*Breverman, supra,* 19 Cal.4th at p. 161), but it does not raise any due process issues. And if, in the alternative, the jury finds the defendant guilty of murder, it also does not raise any federal constitutional concerns. The jury was fully informed of *all* the requirements for proving the crime and was able to make an informed and accurate decision regarding whether the evidence presented supported that finding. Due process requires no more.

On the other hand, imagine a murder case in which the defendant may have killed in the heat of passion or in imperfect self-defense but the trial court defines for the jury malice only in terms of its implied and express forms without any reference to those two circumstances or the prosecutor's burden to disprove them. Where the prosecution proves malice as defined but fails to disprove heat of passion or imperfect self-defense, a jury following the instructions will find the defendant guilty of murder even though such a finding should be precluded by law. The prosecutor has been able to obtain a murder conviction without satisfying the due process requirement of proving malice beyond a reasonable doubt. That will be the case even if the jury is given the option of finding voluntary manslaughter where express or implied malice are proven but where the law precludes a finding of malice. That is an accurate description of the lesser-included offense of voluntary manslaughter. However, because the jury is not told that heat of passion or imperfect self-defense are the circumstances that preclude a malice finding, the jury will not return a verdict for the lesser crime even though that is the only finding supported by the evidence.

F. Conclusion

To comport with the requirements of due process, a jury in a malice murder case must be instructed that, even where implied or express malice exists, a finding of malice for purposes of murder is precluded if the prosecution fails to disprove heat of passion or imperfect self-defense, assuming the evidence

warrants it. That is a separate and distinct requirement from giving the jury the option of finding the defendant guilty of the lesser included offense of voluntary manslaughter. Even if the failure to do the latter is only a violation of state law, the failure to do the former is necessarily a violation of federal constitutional law and must be assessed for prejudice under *Chapman*.

In this case, there was evidence supporting a finding that Mr. Schuller killed under the unreasonable belief in the need to defend himself. Even the Court of Appeal held accordingly. The trial court was therefore required to instruct the jury on imperfect self-defense's potential role in negating malice. It was also required to instruct the jury that, if a finding of malice is legally precluded, the killing could be voluntary manslaughter. It failed to give either instruction. The former omission is a violation of due process under the federal Constitution. As discussed next, the instructional omission regarding malice was not harmless and reversal of Mr. Schuller's murder conviction is required.

II.

WHEN THE RECORD IS PROPERLY EVALUATED, THE INSTRUCTIONAL ERROR WAS NOT HARMLESS UNDER EITHER *CHAPMAN* OR *WATSON*

In this case, the Court of Appeal found that, even under *Chapman*, the failure to instruct on imperfect self-defense was harmless because it believed the evidence was "overwhelming that defendant was not acting in any form of self-defense." (*Schuller, supra,* 72 Cal.App.5th at p. 238.) As support, it cited the following evidence and inferences that it drew from that evidence: (1) Mr. Schuller failed to assert self-defense shortly after he was apprehended; (2) two psychologists believed that he "appeared to be malingering;" (3) a detective believed that he seemed lucid in jail calls; (4) he attempted to destroy the body and fled the scene without summoning help, which the Court of Appeal believed was inconsistent with his self-defense claim; (5) he provided internally inconsistent testimony regarding the gun and W.T.'s attempt to take it; (6) the knife was found on the table rather than the floor and did not have blood splatter on it; and (7) he shot W.T. in the head nine times, which the court believed was "indicative of a personal motive, rather than panicked self-defense." (*Id.* at pp. 238-240.)

Mr. Schuller submits that the Court of Appeal misapplied the *Chapman* test. It improperly focused on isolated pieces of evidence favorable to the prosecution, drew its own inferences from that evidence to find Mr. Schuller's self-defense claim

incredible, and ignored other evidence that supported the defense. Proper application of the *Chapman* test demonstrates that the instructional omission was not harmless. Alternatively, even under *Watson*, the error was prejudicial.

A. Chapman Test

Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman, supra*, 386 U.S. at p. 24; accord, *People v. Aledamat* (2019) 8 Cal.5th 1, 9; *People v. Aranda* (2012) 55 Cal.4th 342, 367.) Reversal is required if "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." (*Fahy, supra,* 375 U.S. at pp. 86-87; accord, *Chapman*, at p. 24; *Aranda*, at p. 367.) The burden "to prove beyond a reasonable doubt" that the error "did not contribute to the verdict" falls on "the beneficiary" of the error—in this case, the People. (*Chapman*, at p. 24; *In re Christopher L.* (2022) 12 Cal.5th 1063, 1073.)

"[T]he harmless error inquiry for the erroneous omission of instruction on one or more elements of a crime focuses *primarily* on the weight of the evidence adduced at trial." (*Aranda, supra,* 55 Cal.4th at p. 367, emphasis in original.) Such a focus requires consideration of "'the whole record'" before the jury. (*Rose v. Clark* (1986) 478 U.S. 570, 583 [106 S.Ct. 3101, 92 L.Ed.2d 460]; *Aranda*, at p. 367; *People v. Lara* (1994) 30 Cal.App.4th 658, 669, fn. 6.) That, of course, makes sense. This court has repeatedly held that, in assessing the sufficiency of the evidence of guilt

under the lenient *substantial evidence test*, a reviewing court must not focus on "isolated bits of evidence" favorable to the prosecution but must view "the *whole record*—i.e., the entire picture of the defendant put before the jury." (*People v. Bassett* (1968) 69 Cal.2d 122, 138; accord, *People v. Dominguez* (2006) 39 Cal.4th 1141, 1153; *People v. Johnson* (1980) 26 Cal.3d 557, 577.) The *Watson* test too requires "'an examination of the entire cause.'" (*Watson, supra,* 46 Cal.2d at p. 836.) Logic dictates that a narrower focus would not be acceptable under a test, like the *Chapman* test, that demands stricter scrutiny of the evidence of guilt. The broad focus of the inquiry under *Chapman* is reflected in the following statement by the high court:

> To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to *everything else the jury considered* on the issue in question, as revealed in the record.

(*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432], emphasis added.)

But when evaluating the evidence, caution is warranted. As discussed above (Argument I.A., *ante*), the *Chapman* test was crafted in response to the United States Supreme Court's concern that California courts were overemphasizing *their own view* of overwhelming evidence in finding errors harmless. (*Chapman, supra,* 386 U.S. at p. 23.) That is not to say that *objectively* overwhelming evidence of guilt, based on the *whole record*, is irrelevant. The United States Supreme Court has held that, where the trial court's error involves an instruction on an element of the crime, it is harmless if the element "was

uncontested and supported by overwhelming evidence." (*Neder v. United States* (1999) 527 U.S. 1, 17 [119 S.Ct. 1827, 144 L.Ed.2d 35], emphasis added; accord, *Aranda, supra,* 55 Cal.4th at p. 367; see *People v. Mil* (2012) 53 Cal.4th 400, 414 [same standard applies to instructional error affecting more than one element of offense]; see also *Johnson v. United States* (1997) 520 U.S. 461, 470 [117 S.Ct. 1544, 137 L.Ed.2d 718] [concluding that the trial court's failure to submit the question of materiality to the jury in a perjury case was harmless in light of the *overwhelming and uncontroverted* evidence supporting that element].) In that case, the error could not have possibly "'contribute[d] to the verdict obtained.'" (*Neder,* at p. 17.) On the other hand, "where the defendant contested the [effected] element and raised evidence sufficient to support a contrary finding," the reviewing court "should not find the error harmless." (*Id.* at p. 19.)

1. Application of Chapman

Two version of events were presented to the jury in this case. Under the prosecution's version, Mr. Schuller killed W.T. willfully, deliberately and with premeditation (see 2CT 483), and his claim that he killed W.T. in self-defense while in the throes of a delusional state was feigned. This was the version the Court of Appeal found overwhelmingly believable. But the omitted element—the absence of imperfect self-defense—*was* contested. It was the basis for the other version of events presented to the jury—that, while in a delusional state, Mr. Schuller believed W.T. was attacking him with a knife and attempted to take the gun, prompting Mr. Schuller to shoot him repeatedly in self-

defense. (5RT 1136-1144, 1159, 1162-1164, 1189-1190.) Despite there being some evidence, as cited by the Court of Appeal, that arguably supported the prosecution's version, there was also ample evidence supporting Mr. Schuller's version that the Court of Appeal ignored entirely.

Perhaps the most significant evidence supporting Mr. Schuller's defense was the overwhelming independent evidence that he was suffering from delusions that made him aggressive and afraid for his life prior to and leading up to the killing of W.T. Mr. Schuller claimed that, while his delusions started in childhood, they became more significant after his 2016 motor vehicle accident. (4RT 1061.) Stephen Smith, who worked at the bar Mr. Schuller frequented, corroborated that claim, testifying about the accident and about seeing Mr. Schuller with "his head taped up" afterwards. (5RT 1354.) According to Mr. Smith, after the accident and shortly before the shooting, he noticed Mr. Schuller's demeanor change such that he was more aggressive with others and would talk to people who were not there. (5RT 1350-1351, 1353.)

Mr. Schuller's sister testified that he visited her several times between March 6 and 13 and was noticeably irrational and aggressive, was experiencing hallucinations, and was acting afraid for his life. (5RT 1292-1299.) She was so concerned that he was losing his grip on reality that, when she could not contact him on March 19 and 20, she filed a missing person's report with local police in Nebraska. (5RT 1299-1300.)

The March 19 encounter with the two Winnemucca police officers was perhaps the most significant evidence. It occurred just one day before the shooting. It was also highly credible evidence of his mental state at that time because the event was captured on video by both officers' body cameras, the recordings were played for the jury, and the officers who experienced the event testified about it. (5RT 1270-1273, 1281.) The evidence of the incident showed that, at the time, Mr. Schuller believed the police were in league with Satan, interpreted a popping sound from a doorway as an attempt by police to shoot him, and asserted that three men in the hotel tried to attack him with needles. (1SCT 1-6, 11-12; 5RT 1273, 1281.) This was strong evidence that Mr. Schuller's mental state could lead him to misinterpret actual innocuous events—e.g., the loud popping sound of the metal doorway threshold—as life threatening.

The Court of Appeal ignored all of this independent and credible evidence of his mental condition. But in light of that evidence, a conclusion that Mr. Schuller was faking his condition would require believing that he had been doing so for weeks or months leading up to the shooting and so convincingly that he fooled Mr. Smith, his sister, and two police officers.

A significant flaw in that logic is that it is unclear why he would do so. His motive for committing a willful, deliberate and premeditated shooting was unclear. At trial, there were some vague and speculative suggestions that it may have had something to do with Mr. Schuller's or W.T.'s sexuality. For example, Mr. McKenna testified that several weeks or months

before the shooting, Mr. Schuller admitted being gay, that W.T. was not gay, and that shortly before the shooting, W.T. had told Mr. McKenna that Mr. Schuller was no longer welcome at his house. (2RT 542, 544-546; 3RT 553.) He wondered whether the killing resulted from a fight after Mr. Schuller "hit on" W.T. (2RT 551), but that was just speculation. And even if that was the case, it would not explain why Mr. Schuller might have been faking his condition for weeks or months before the shooting. Notably it does not appear to have been the case in any event. Mr. McKenna's police interview revealed that W.T. told him Mr. Schuller was unwelcome there not because of his sexuality but because he was "crazy" and had a "screw loose." (5RT 1334-1336.) That is consistent with Mr. Schuller's testimony that, at about the time of the accident, he told W.T. about the "light" (4RT 1084) and supports the view that he was actually delusional.

In addition, Mr. Schuller admitted during his testimony that he lied to police immediately after his arrest about the reason for the shooting, claiming it was because W.T. "came on to" him. (5RT 1188-1189.) He said he lied because he did not think the police would believe him if he told them about the attack and because he thought "the gay thing" would be "more acceptable" or "justifiable." (5RT 1246-1247.) However, Mr. Schuller also repeatedly denied the killing had anything to do with either of their sexuality. (5RT 1156-1157, 1160, 1174, 1176, 1180.) The discrepancy sheds no light on the actual motivation for the killing. As for its impact on Mr. Schuller's credibility, that was up to each individual juror to decide for himself or herself.

There was nothing on this record clearly establishing which version was the truth or if some other motivation existed. A juror could choose to disbelieve Mr. Schuller's trial testimony, as the Court of Appeal did (*Schuller, supra,* 72 Cal.App.5th at pp. 238-239). But such disbelief was not required or a foregone conclusion from the evidence.

That Mr. Schuller shot W.T. nine times may have been consistent with a personal motive, as the Court of Appeal believed (*Schuller, supra,* 72 Cal.App.5th at p. 240). But as just noted, no evidence of such a motive was presented. Moreover, that act was also consistent with Mr. Schuller's claim that he fired repeatedly when W.T. began to get up after being shot in the head and that he shot at W.T. some more when frightened by the man's teeth flying out of his mouth. (5RT 1138-1139, 1144.)

Next, the psychologist testimony that the Court of Appeal believed undermined Mr. Schuller's version of events was not as "overwhelming" as the court suggested. It is true that Dr. Schmidt believed Mr. Schuller was malingering or exaggerating his mental health condition and symptoms. (6RT 1449-1452, 1462.) However, she also concluded that his description of the event suggested he in fact acted to protect himself and was not motivated by hallucinations. (6RT 1459-1460.) That is consistent with imperfect self-defense.

The other psychologist, Dr. Dugan, declined to conclude definitively that Mr. Schuller was feigning his condition. He said that there was data supporting that conclusion but also that the witness reports from Nebraska and the Winnemucca incident,

which predated the killing, were cause for "some concern" and showed Mr. Schuller was "impaired" and demonstrating "disturbed behavior." (6RT 1410-1418.)

The physical evidence, to an extent, also corroborated Mr. Schuller's version of events. As noted, Mr. Schuller claimed W.T. attacked him with a kitchen knife and went for the gun on the dining room table, prompting Mr. Schuller to shoot him. (5RT 1136-1138.) Consistent with that story, police found a large kitchen knife and a handgun case on the table. (3RT 583-584, 710, 736.)

The Court of Appeal found "the physical evidence did not *entirely align* with his story" because the knife was not on the floor and covered in blood. (*Schuller, supra,* 72 Cal.App.5th at p. 240, emphasis added.) However, that fact is still consistent with imperfect self-defense. Had the knife been on the floor and splattered with blood, it would have been evidence that in fact W.T. did threaten Mr. Schuller with the knife just before being shot, that Mr. Schuller's stated fear was thus reasonable, and that the shooting was justified as the product of perfect self-defense. But perfect self-defense is not the issue here. The issue is whether Mr. Schuller believed, although *unreasonably*, that his life was in danger based on any objective correlate. The knife and gun case on the dining room table constitute objective correlates of that fear.

Notably, under *Chapman*, a reviewing court is not asked to determine "what effect the constitutional error might generally be expected to have upon a reasonable jury." (*Sullivan v.*

Louisiana (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182].) Instead, the fundamental question is "what effect it had upon the guilty verdict in the case at hand." (*Ibid*.)

> Harmless-error review looks . . . to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

(*Id.* at pp. 279-280, emphasis in original.)

The Court of Appeal believed that a reasonable jury would have still found Mr. Schuller guilty of murder under proper instructions. (*Schuller, supra,* 72 Cal.App.5th at pp. 237-238.) But it appears at least some of the jurors "in the case at hand" actually believed Mr. Schuller. At his first sanity phase trial, the jury that decided his guilt was also tasked with deciding whether he was legally insane at the time of the crime and was told it could consider "the evidence introduced during the guilt phase" along with any "evidence introduced during the sanity phase." (2CT 495, 498.) The parties relied mostly on the guilt phase evidence. Mr. Schuller supplemented his case with the testimony of Dr. Jason Roof, an expert in forensic psychiatry, who merely concluded what the defense evidence at the guilt phase showed—that Mr. Schuller was suffering from delusional beliefs and was not malingering and that he believed W.T. was going to kill him

and shot W.T. to protect himself. (6RT 1615-1616, 1630-1636, 1643-1644.) The jury deadlocked. (2CT 428-429.) Six of the 12 jurors believed the prosecution failed to prove Mr. Schuller's delusional thoughts were feigned and failed to disprove his story that he acted out of fear for his life. (2CT 429; 7RT 1774A-1775.) The Court of Appeal ignored that fact too, but it showed that not only was it reasonably possible jurors could believe Mr. Schuller but that some of the jurors in his case did. And if only one juror might have been swayed to vote to acquit if instructed on imperfect self-defense, the error was necessarily prejudicial. (See *People v. Walker* (2015) 237 Cal.App.4th 111, 118 [prejudice established where at least one juror would cast a different vote]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [hung jury is more favorable result than guilty verdict].)

The Court of Appeal focused on isolated bits of evidence favorable to the prosecution that it believed "undercut the credibility of the claim [Mr. Schuller] acted in self-defense" (*Schuller, supra,* 72 Cal.App.5th at p. 221) while ignoring evidence that bolstered it. Based thereon, it found the evidence of Mr. Schuller's guilt overwhelming. But therein lies the problem. The Court of Appeal engaged in precisely the kind of evaluation that *Chapman* was designed to curtail. It found the error harmless based on *its own* conclusion about the credibility of the defense and Mr. Schuller's guilt. "A reviewing court making this harmless-error inquiry does not . . . 'become in effect a second jury to determine whether the defendant is guilty.'" (*Neder,*

supra, 527 U.S. at p. 19.) But the Court of Appeal in this case assumed that role and, in doing so, misapplied the *Chapman* test.

On the whole record, it cannot be said beyond a reasonable doubt that the trial court's failure to instruct the jury on imperfect self-defense did not contribute to the murder verdict. The issue of imperfect self-defense was contested and there was not objectively overwhelming evidence that Mr. Schuller's reliance on it was feigned. In fact, as noted, some of the jurors appear to have accepted that it was not. Accordingly, under *Chapman*, the instructional error was prejudicial.

B. Watson Test

Mr. Schuller submits as well that, even under the *Watson* harmless-error test, the instructional omission in this case was prejudicial. *Watson* provides that a state law error is prejudicial if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, supra,* 46 Cal.2d at p. 836.)

A reasonable probability in this context "does not mean more likely than not." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) In fact, even where there is "an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result," the error is prejudicial. (*Watson, supra,* 46 Cal.2d at p. 837; accord, *People v. Mower* (2002) 28 Cal.4th 457, 484; *People v. Dewberry* (1959) 51 Cal.2d 548, 558.) A reasonable probability simply means "a

reasonable chance, more than an *abstract possibility*." (*College Hospital,* at p. 715, emphasis in original.)

Notably, where the evidence is sufficient to support the verdict but is "extremely close," "any substantial error" that undermines the defense or bolsters the prosecution must be deemed prejudicial under this test. (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494; accord, *People v. Babbitt* (1988) 45 Cal.3d 660, 689.) The failure to instruct the jury on imperfect self-defense during the guilt phase undermined Mr. Schuller's defense and made it easier for the prosecutor to prove malice. And on the issue of whether Mr. Schuller actually believed he needed to shoot W.T. to protect himself, this was a close case.

As discussed above, there was considerable uncontroverted and highly credible evidence presented that, before the killing and especially in the days leading up to it, Mr. Schuller was suffering from delusional thoughts that made him aggressive and fearful and led him to interpret innocuous events as life-threatening. His self-defense claim was consistent with that history. Additionally, as also noted above, it appears that half of the jury that found him guilty doubted he was sane at the time and accepted the countervailing explanation for the killing put forth by Mr. Schuller—that he killed W.T. because he believed his life was in danger. If an imperfect self-defense instruction would have led even one juror to vote against the murder verdict, the error was necessarily prejudicial. Mr. Schuller submits that it is reasonable probable—more than an abstract possibility—that

such a result would have obtained had the trial court instructed the jury properly.

CONCLUSION

For the reasons stated above, Mr. Schuller asks this court to reverse the judgment.

Dated: June 6, 2022.

Respectfully submitted,

/s/ David L. Polsky

David L. Polsky
Attorney for Mr. Schuller

CERTIFICATE OF WORD COUNT

I, David L. Polsky, counsel for appellant, hereby certify pursuant to rule 8.520, subdivision (c), of the California Rules of Court that appellant's opening brief on the merits in the above-referenced case consists of 16,192 words, excluding tables, as indicated by the software program used to prepare the document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 6, 2022, at Ashford, Connecticut.

/s/ David L. Polsky
David L. Polsky

PROOF OF SERVICE

I declare that:

I am employed in Windham County, Connecticut; I am over the age of 18 years and not a party to the within entitled cause; my business address is P.O. Box 118, Ashford, Connecticut 06278. On June 6, 2022, I served a copy of the attached **OPENING BRIEF ON THE MERITS** in said cause on all parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Ashford, Connecticut, addressed as follows:

Jason Carl Schuller, BG3734
Avenal State Prison, E-550
P.O. Box 905
Avenal, CA 93204

Christopher Walsh, Deputy D.A.
Jesse Wilson, Deputy D.A.
Office of the District Attorney
201 Commercial Street
Nevada City, CA 95959

Hon. Candace Heidelberger, Judge
Nevada City Courthouse
201 Church Street, Dept. 4
Nevada City, CA 95959

In addition, I electronically served the attached brief to the following parties via the TrueFiling electronic service system:

Office of the Attorney General

California Court of Appeal
Third Appellate District

Central Calif. Appellate Program

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 6, 2022, at Ashford, Connecticut.

/s/ David L. Polsky
David L. Polsky

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. SCHULLER**
Case Number: **S272237**
Lower Court Case Number: **C087191**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **polsky183235@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S272237_OBM_Schuller
APPLICATION TO FILE OVER-LENGTH BRIEF	S272237_APP(Oversized)_Schuller

Service Recipients:

Person Served	Email Address	Type	Date / Time
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Central California Appellate Program CCAP-0001	eservice@capcentral.org	e-Serve	6/6/2022 9:16:11 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/6/2022
Date

/s/David Polsky
Signature

Polsky, David (183235)
Last Name, First Name (PNum)

Law Office of David L. Polsky

Law Firm