IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

The People of the State of California, Plaintiff and Respondent, v. JUAQUIN SOTO, Defendant and Appellant	)	case no. S236164 (Court of Appeal case no. H041615)

Monterey County Superior Court case no. SSC 120180
Carrie Panetta, Judge

* * *

APPELLANT'S OPENING BRIEF ON THE MERITS

STEPHEN B. BEDRICK
SBN 058787
Attorney at Law
1970 Broadway, Suite 1200
Oakland, CA 94612
tel: (510) 452-1900
fax: (510) 452-1980

In association with the
Sixth District Appellate Program

Attorney for Defendant and Appellant
JUAQUIN SOTO

TABLE OF CONTENTS

ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

Introduction 2

Prosecution Evidence 2

Defense Evidence 7

I. THE TRIAL COURT ERRED (AS THE COURT OF APPEAL FOUND) WHEN IT INSTRUCTED THE JURY THAT INTOXICATION WAS IRRELEVANT TO IMPERFECT SELF-DEFENSE 11

A. Historical Facts 11

B. Procedural Facts 12

C. The Trial Court Erred (as the Court of Appeal found) when It Instructed that Voluntary Intoxication Is Not Relevant to the Actuality of the Defendant's Belief in the Need to Act in Imperfect Self-Defense 14

1. Instructions on imperfect self-defense 14

2. Instructions on intoxication 15

3. Intoxication is made relevant to imperfect self-defense by two separate clauses in Penal Code §29.4, the intoxication instruction 17

4. Intoxication is relevant to imperfect self-defense, because Penal Code §29.4 provides that intoxication may disprove express malice 18

5. Intoxication is relevant to imperfect self-defense, because Penal Code §29.4 provides that intoxication may disprove knowledge and specific intent 23

D. Respondent's Arguments at the Court of Appeal on this Point Were Without Merit 25

E. Failure to Instruct on the Defense Theory of the Case 29

F. These Arguments May Be Raised on Direct Appeal 30

1. *Sua sponte* instruction required 30

2. Ineffective assistance of counsel 30

II. THE INSTRUCTIONAL ERRORS WERE PREJUDICIAL 31

A. The Correct Standard of Prejudice Is Harmless Beyond a Reasonable Doubt under Chapman 31

B. The Instructional Errors Were Prejudicial 38

1. The errors were prejudicial under Appellant's version of the facts 38

2. The instruction was prejudicial under the victim's girlfriend's version of the facts 41

3. Prejudice is shown by events during deliberation, including the jury's written notes to the judge 44

4. Prejudice is shown by the combination of the jury's questions and the verdicts 45

TABLE OF AUTHORITIES

CASES

Chapman v. California (1967) 386 U.S. 18 ..... 31, 33, 34, 35, 36, 37, 38

Del Monte v. Wilson (1992) 1 Cal.4th 1009 37

Houge v. Ford (1955) 54 Cal.2d 706 27

In re Christian S. (1994) 7 Cal.4th 768 ..... 19, 20, 25, 29, 42

In re Jesusa V. (2004) 32 Cal.4th 588 27

Marks v. United States (1977) 430 U.S. 188 37

Mathews v. United States (1988) 485 U.S. 58 ..... 29, 33

Montana v. Egelhoff (1996) 518 U.S. 37 ..... 36, 37, 38

Mullaney v. Wilbur (1975) 421 U.S. 684 ..... 20, 21

Olden v. Kentucky (1988) 488 U.S. 227 46

People v. Banks (1977) 67 Cal.App.3d 379 ..... 31, 33, 34, 35

People v. Banks (2014) 59 Cal.4th 1113 33

People v. Barton (1995) 12 Cal.4th 186 31

People v. Brown (1993) 17 Cal.App.4th 1389 46

People v. Cameron (1994) 30 Cal.App.4th 591 ..... 13, 14, 21, 23, 26

People v. Covarrubias (2016) 1 Cal 5th 838 32

People v. Castillo (1997) 16 Cal.4th 1009 30

People v. Cruz (1964) 61 Cal.2d 861 46

People v. Elmore (2014) 59 Cal.4th 121 ..... 19, 20, 28, 31, 32, 33

People v. Flannel (1979) 25 Cal.3d 668 ..... 19, 29

People v. Godinez (1992) 2 Cal.App.4th 492 46

People v. Gonzales (2012) 54 Cal.4th 643 ..... 33, 34

People v. McCoy (2001) 25 Cal.4th 1111 24

People v. Mendoza (1998) 18 Cal.4th 1114 ..... 24, 26, 28, 30, 34, 37

People v. Najera (2006) 138 Cal.App.4th 212 ..... 19, 21, 32

People v. Nation (1980) 26 Cal.3d 169 30

People v. Pearch (1991) 229 Cal.App.3d 1282 46

People v. Pope (1979) 23 Cal.3d 412 30

People v. Quach (2004) 116 Cal.App. 4th 291 ..... 42, 43

People v. Rios (2000) 23 Cal.4th 450 ..... 19, 20, 21, 31, 32

People v. Roldan (2005) 35 Cal.4th 646 ..... 24, 25

People v. Soto (2016) 248 Cal. App. 4th 884 ..... 1, 20, 21

People v. Thomas (2013) 218 Cal.App.4th 630 ..... 35, 36

People v. Timms (2007) 151 Cal.App.4th 1292 ..... 25, 37

People v. Trevino (1988) 200 Cal.App.3d 874 43

People v. Watson (1956) 46 Cal.2d 818 ..... 1, 31, 34, 35, 47

People v. Whitfield (1994) 7 Cal. 4th 437 ..... 25, 26

People v. Wilkins (2013) 56 Cal.4th 333 ..... 33, 34, 35

People v. Woodard (1979) 23 Cal.3d 329 46

Sandstrom v. Montana (1979) 442 U.S. 510 ..... 32, 33, 34, 35

Strickland v. Washington (1984) 466 U.S. 668 30

United States v. Escobar de Bright

(9th Cir. 1984) (en banc) 742 F.2d 1196 29

Valdez v. Castro, 2007 U.S. District LEXIS 53174

2007 WL 2019564 34

STATUTES

United States Constitution

5th Amendment 29, 32, 33

6th Amendment 29, 30, 33

14th Amendment 29, 30, 32, 33

Evid. Code §791 39

Penal Code §22(b) 17, 18, 24, 25, 26, 28

Penal Code §26 (three) 20, 25

Penal Code §28 25

Penal Code §29.4 ..... 1, 17, 18, 23, 25, 27, 28, 29

Penal Code §187 1

Penal Code §187(a) 18, 31

Penal Code §188 ..... 18, 19, 29

Penal Code §459 1

Penal Code §1259 30

Penal Code §12022(b) 1, 25, 26, 27, 28

OTHER AUTHORITIES

CALCRIM 505 ..... 40, 42, 43

CALCRIM 571 ..... 14, 19, 31, 32, 42, 44

CALCRIM 625 ..... 14, 15, 16, 18, 27, 28, 29

CALCRIM 3426 ..... 14, 16

CALCRIM 3470 40

CALCRIM 3471 43

Penal Code §1259 30

Penal Code §12022(b) 1, 25, 26, 27, 28

OTHER AUTHORITIES

CALCRIM 505 ..... 40, 42, 43

CALCRIM 571 ..... 14, 19, 31, 32, 42, 44

CALCRIM 625 ..... 14, 15, 16, 18, 27, 28, 29

CALCRIM 3426 ..... 14, 16

CALCRIM 3470 40

CALCRIM 3471 43

ISSUES PRESENTED

1) Did the trial court err (as the Court of Appeal found) in instructing the jury that intoxication was not relevant to imperfect self-defense?

2) Was the instructional error prejudicial?

STATEMENT OF THE CASE

Appellant Juaquin Soto (Appellant) was charged by information: Count I, murder, Penal Code §187, of Israel Ramirez on July 10, 2012; with use of a knife, Penal Code §12022(b); Count II, Penal Code §459, first degree burglary of Ramirez's apartment, with use of a knife, Penal Code §12022(b), with a person present. (CT:I:29-33)

The taking of evidence at trial lasted five days. The jury deliberated for two full days. (CT:II:307-311) On June 27, 2014 the jury found Appellant not guilty of first degree murder. It found him guilty of second degree murder, and of burglary, with use of a knife, and with a person present. (CT:II:311-312)

On September 30, 2014 the trial court sentenced Appellant to 15 years - life for second degree murder, plus one year for use of a knife, for a total of 16 years - life. On count II, burglary, it sentenced Appellant to six years, upper term, but ran that sentence concurrent. (CT:II:367)

On June 30, 2016, the Court of Appeal, Sixth District, filed a partially-published opinion, People v. Soto (2016) 248 Cal. App. 4th 884, which held: 1) The trial court erred when it instructed that intoxication was not relevant to imperfect self-defense. 2) The standard of prejudice for such error is a reasonable probability of a more favorable result under People v. Watson (1956) 46 Cal.2d 818, 826. 3) Under Watson, the instructional error was harmless.

STATEMENT OF FACTS

Introduction

Appellant Soto testified that, while on a four-day methamphetamine and alcohol binge, during which time he had not slept, he entered a small apartment building in Greenfield, Monterey County. He was looking for someone who, three years earlier and at that location, had hired Appellant to do farm labor.

Appellant had three baggies containing methamphetamine residue in his pocket. Appellant's neuropsychological expert testified that he was suffering from a methamphetamine-induced psychotic disorder. Symptoms could include entering a building without knowing whom you are going to visit, and breaking into an apartment.

Appellant knocked on one apartment door, looking for that person. He was not there. Appellant then kicked in the door at a second apartment, again looking for that person. Appellant engaged in a knife fight with the resident of the second apartment, first in the kitchen, then in the hallway outside the apartment. The evidence was conflicting as to whether it was Appellant, or Ramirez (the resident of the second apartment), who began the stabbing. Appellant fled from the apartment. Ramirez chased after Appellant. Ramirez resumed the fight. Ramirez stabbed Appellant a total of three times, leading to a punctured lung. Appellant ultimately stabbed the victim to death. Appellant attempted to defend on the grounds of complete self-defense, or alternatively, imperfect self-defense.

Prosecution Evidence

Bernadino Solano lived in an apartment on the second floor of the building in Greenfield. On July 10, 2012 Appellant Soto knocked loudly at his front door. Soto had his right hand behind his back. Soto told Solano to step outside. Solano refused. He tried to shut the door. Appellant jammed

his foot inside the door so it would not close. Appellant took three steps into the apartment. He looked around. Appellant appeared intoxicated and angry. Then Appellant left. (RT:V:114-122, 127)

Solano's daughter called 911. Later Solano heard noises in the hallway. Someone knocked on another door. Then someone kicked that door in. He heard noises that sounded like a fight. (RT:V:127-131)

Patricia Saavedra lived with her boyfriend Israel Ramirez, the homicide victim, and their two children in an apartment down the hall from Solano. She was an agricultural field worker. (RT:V:139-142) On July 10, 2012 she and Ramirez were sitting on the sofa, watching TV. Appellant kicked in the front door of their apartment and walked in. Ramirez asked Appellant what he wanted. Appellant was walking around, looking from side to side. Appellant asked Ramirez in Spanish if he was alone (even though Ms. Saavedra was sitting there). Appellant's right hand was inside his pocket. Appellant asked a few more times if Ramirez was alone. Then Appellant took out a small folding knife and stabbed Ramirez once in the side of his neck. Ramirez got up quickly and went into the kitchen. Appellant followed him. (RT:V:147-152).

Ms. Saavedra took her young son to the back bedroom. She heard noises like Appellant and Ramirez were grabbing each other. Five minutes later she went outside the apartment. Ramirez's body lay in the hallway. (RT:V:150-152)

When Ramirez stood up to go to the kitchen, Appellant said something to Ms. Saavedra in English, which she did not understand, because she does not speak English. (RT:V:156-158) Ms. Saavedra described Appellant's behavior as "strange." (RT:V:160-164)

Jae Song Yi managed a grocery store downstairs in Solano's and Ramirez's building. Yi heard noises. Appellant came down the stairway

from the apartments, bleeding and in pain. Appellant was talking to himself in Spanish. (RT:V:189-198) Yi said he would call an ambulance. Appellant left. (RT:V:180-187)

Cynthia Venegas was married to Appellant's brother Jaime Soto. On July 10, 2012 Frank Rico, Appellant's ex-brother-in-law, brought Appellant to her house. (RT:V:200-204) Appellant was bleeding, groaning, and in pain. He seemed under the influence of alcohol. Appellant had a long history of drinking. Appellant sat on the couch. Someone called 911 for medical help. When Appellant heard a siren, he said "Why the f— did you call the cops?" (RT:V:205-213)

Estella Rico had been in a domestic relationship with Appellant. They had two daughters, aged 12 and 13. Appellant was lying in the back seat of her brother Frank's car, bleeding. He asked her to take him to the hospital. (RT:V:222-232)

Veronica Luna, cousin of Estella Rico, saw Appellant lying in the back seat, bleeding. Appellant said "Don't effing touch me." Appellant was under the influence of alcohol. He was holding a beer can. (RT:V:241-248)

Frank Rico saw Appellant lying on his living room floor, yelling in pain, and bleeding. Appellant was gasping for air. He had been stabbed. He asked Rico to take him to the hospital. (RT:V:253-261) Then Appellant said he wanted to go to his mother's house, instead. Rico drove Appellant to the house of his brother, Jaime Soto. Someone called 911. (RT:VI:264-270) Appellant was under the influence of alcohol. He was holding a 24 ounce beer can. (RT:VI:276-286)

Arnulfo Trevino, Greenfield officer, saw Ramirez lying in a pool of blood on the second floor hallway. A large kitchen knife was under Ramirez's right knee. (RT:VI:287-293) Trevino entered Ramirez's apartment. He did not see any blood in the living room, or on the living

room walls, or on the couch. He saw blood in the kitchen, on the cabinet doors and counter tops. (RT:VI:312-315)

Armando Mendoza, Greenfield officer, arrived at Appellant's brother-in-law's house. Appellant was sitting on the couch. He asked Appellant to show his hands. Appellant did not comply. He was yelling gibberish. Appellant stood up and partially lunged at Mendoza. Mendoza knocked him to the floor. He handcuffed Appellant. He found a bloody folding knife in Appellant's back pocket. Medical personnel took Appellant to the hospital. (RT:VI:317-326)

Mendoza believed Appellant was drunk. Later he saw Appellant in the hospital. (RT:VI:334-340) Appellant seemed nervous and jumpy. That fact, plus the way his eyes moved, made Mendoza think he was under the influence of drugs. (RT:VI:341-345) Appellant's speech was slurred. His eyes were bloodshot. Appellant's behaviour at his brother's house, namely, being non-responsive and then shouting, was consistent with being under the influence of drugs. (RT:VI:345-351)

Appellant had several knife wounds. One was the size of a golf ball. One wound punctured his lung.

Michael Rice, Greenfield officer, took a few photographs at the scene on July 10. Two days later he returned and took more photos. On that latter day, he took a photo of one drop of suspected blood on the living room floor, near the couch. That was the only suspected blood drop he saw in the entire living room. (RT:VI:376-379)

There were changes in the scene between July 10, the day of the homicide, and July 12, when he took more photos. The crime scene was not secured during this two-day interval. (RT:VI:401-403) People had walked through. Most of the blood had been cleaned up. (RT:VI:393-395)

Dr. John Hain, pathologist, performed the autopsy. Ramirez suffered

approximately 10 stab wounds. There was a stab wound to the left side of his neck. It did not cut major veins or arteries, so it probably did not bleed much. (RT:VII:427) There was a stab wound to of his left shoulder, several stab wounds near his left armpit, and stab wounds to his upper left arm and abdomen. The most damaging stab wound entered the left chest and into his heart. It caused massive bleeding. (RT:VII:412-423) There were also defensive wounds on the back of Ramirez's hands and arms. The cause of death was multiple stab wounds, primarily the wound to the heart. (RT:VII:424-425)

Josh Sehhat, DOJ criminalist, performed DNA testing. The blood on the folding knife found in Appellant's back pocket contained a mixture of DNA from two people. Ramirez was the major contributor. Appellant was the minor contributor. (RT:VII:482-497)

Ray Medelas, Greenfield officer, observed Appellant at the hospital. Appellant seemed to understand their questions. He said he had not used drugs, except for marijuana. He said he recently drank beer. Medelas did not think Appellant was under the influence, because he was answering questions. (RT:VII:507-514)

Medelas conceded that Appellant's answers were short, grunted, and monosyllabic. He was bleeding and in pain. At times he answered questions. Other times he did not. (RT:VII:508-519)

Stipulation: Officer Medelas recovered three mostly empty baggies from Appellant's pocket, with methamphetamine residue. (RT:VII:451)

Lino Sanchez, Greenfield officer, saw Appellant sitting on his brother-in-law's couch, bleeding. Officers ordered Appellant to show his hands and lie on the floor. Appellant did not respond. He started to get up. Then Mendoza tripped him. (RT:VII:540-546) Appellant was under the influence of something. His speech was slurred and mumbly. His eyes were

bloodshot. He seemed impaired. He was not following simple commands. (RT:VII:547-555) Appellant was holding his hands, covering a stab wound. (RT:VII:556-559)

Defense Evidence

Joaquin Soto, Appellant, testified on his own behalf. He remembered only parts of July 10, 2012. He had never seen Ramirez before. (RT:VII:581-583) Appellant had been living "in the streets" for three to four days. He drank beer throughout the day, starting in the early morning. He used as much methamphetamine as he could find. He regularly snorted and smoked meth during that three or four day period. (RT:VIII:583-584) When he uses alcohol and meth for three to four days in a row, he becomes tired, because he does not sleep much. He starts hearing voices. He sees shadows. (RT:VIII:584)

On July 10, 2012 he smoked meth in the early morning, before the sun came up. He drank beer all day, starting early. (RT:VIII:584-586)

On July 10, Appellant was looking for work. A few years earlier, someone outside the Greenfield apartment building had hired Appellant to do both field work and paper work. On July 10, Appellant was looking for that person. Appellant walked up the stairs, and knocked on Solano's door. Appellant asked if someone was there. He wanted to see the "supervisor" who had hired him before. Appellant had a folding knife in his pocket which he used for field work.

After Appellant left Solano's apartment, he went next door. He kicked the door in. He saw a man and a lady. He had never seen them before. He entered the apartment and asked the man if he was alone. (RT:VIII:586-591)

The woman went into the bedroom. The man (Ramirez) went into

the kitchen. Appellant started walking out of the apartment. Ramirez came after Appellant with a knife. He was swinging the knife and jabbing it. It was Ramirez who pulled his knife first. Appellant put his hands and arms up to defend himself. Ramirez cut Appellant's finger. Appellant was scared. He pushed Ramirez away. Ramirez kept coming at Appellant, while swinging and jabbing with his knife. Appellant opened his folding knife and started swinging his knife at Ramirez. (RT:VIII:592-595)

Appellant fought with Ramirez both in the kitchen and in the hallway inside Ramirez's apartment. At some point, Appellant pushed Ramirez away, and "took off running." Appellant ran out the front door, and toward the stairs which led down to the first floor, trying to leave the building. Ramirez chased after Appellant down the hallway outside his apartment. Appellant turned around. He saw Ramirez coming at him with the knife and swinging the knife at him. Appellant confronted and fought Ramirez. Ramirez stabbed at Appellant with a large kitchen knife. Appellant tried to block the knife. He was afraid of being killed by the large knife. Appellant tried to back up. Appellant stumbled and fell backwards. Ramirez landed on top of him. (RT:VIII:595-597)

Ramirez was on top of Appellant, trying to stab him. Appellant used his left hand to keep Ramirez's knife away from him. Appellant had his own knife in his right hand. Appellant started swinging wildly with the knife. Appellant closed his eyes and screamed. He stopped swinging the knife when he felt Ramirez "freeze up." Appellant slipped out from under Ramirez's body. (RT:VIII:598-601)

Appellant left the building. He walked a few blocks to Frank Rico's house, hoping he would take Appellant to the hospital. (RT:VIII:602-605)

When asked about his statement at the hospital that he did not take drugs, Appellant said that was false, because he was not in the right state of

mind. (RT:VIII:604-606)

When Appellant entered Ramirez's apartment, he did not intend to hurt Ramirez. Ramirez sliced Appellant's finger inside the apartment, even before Appellant had his knife out. Appellant accepted responsibility for kicking in the door. Appellant felt bad for killing Ramirez. He felt bad because he left the children fatherless. (RT:VIII:607-610)

Appellant believed that, when Ramirez came at him with a knife, there was nothing that Appellant could have done to avoid a violent confrontation. If Appellant had not fought back, Ramirez would have killed him. (RT:VIII:616-617) Appellant did not know why he kicked Ramirez's door in. He was not in the right state of mind. He was looking for his prior employer, whom he believed lived there. (RT:VIII:625-626, 652-653)

Dr. Amanda Gregory, neuropsychologist at U.C.S.F., believed Appellant was suffering from a methamphetamine-induced psychotic disorder. He was also suffering from methamphetamine dependence, alcohol dependence, and cannabis abuse. (RT:VIII:679-683) Methamphetamine psychosis often leads to delusional thinking, paranoia, and hearing voices. Symptoms could include being incoherent, behaving in ways that do not make sense, going without sleep for several days, entering a building without knowing whom you are going to visit, and breaking into an apartment. (RT:VIII:684-686) Paranoid delusions make people misperceive things. People might perceive threats where there are none. Prolonged methamphetamine use affects judgment, impulse control, and memory. (RT:VIII:684-688)

A delusional person can still make sane statements. One can have both rational thoughts and psychotic thoughts during the same period of time. Delusions are usually specific to certain subjects. (RT:VIII:744-746)

Stipulation: Three hours after the stabbing, a toxology test was

conducted on Appellant's urine. It tested positive for methamphetamine and marijuana. His blood alcohol level, three hours after the stabbing, was .035.[1] (RT:VII:568)

Michelle Villanueva, emergency room nurse treated Appellant. He denied drug or alcohol use. Those denials were false. He tested positive for both drugs and alcohol. (RT:VIII:574-580)

---

[1]According to the DMV's blood alcohol table, blood alcohol content is reduced .01% for every 40 minutes after drinking. http://apps.dmv.ca.gov/pubs/hdbk/actions drink.htm There are four and one-half 40-minute intervals in three hours. That means that Appellant's blood alcohol content would have been reduced .045% (4-1/2 x .01%) in the three hours between the stabbing and the toxicology test. Appellant's blood alcohol level three hours after the stabbing was .035. That means his blood alcohol content at the time of the stabbing was .08% (.035 +.045), the legal limit for driving impairment.

I.

THE TRIAL COURT ERRED (AS THE COURT OF APPEAL FOUND) WHEN IT INSTRUCTED THE JURY THAT INTOXICATION WAS IRRELEVANT TO IMPERFECT SELF-DEFENSE

A. Historical Facts

As of July 10, 2012, the day of the homicide, Appellant Soto had been living "on the streets" for several days. He was out of work. He used as much methamphetamine as he could find. He started snorting meth and drinking beer at dawn. He drank and used meth throughout the day. A toxicology test revealed both methamphetamine and alcohol. Several baggies with meth residue were found in Appellant's pocket.

Appellant testified that during the afternoon of July 10, he was looking for work. He was out of money. Three years earlier, someone outside an apartment building in Greenfield hired Appellant to do farm labor. So Appellant returned to that building to search for his former employer. Appellant went upstairs. He knocked on Solano's door. He did not see the person he was seeking. He went to the next apartment. He kicked in the door of Ramirez's apartment, again seeking his former employer. Several times Appellant asked Ramirez, who was sitting next to his girlfriend, if he was alone.

There were two different versions of what happened next. Appellant testified that, after he determined his former employer was not there, Appellant started to leave. Then Ramirez attacked Appellant with a knife. Appellant fought back. Appellant tried to flee. He ran out of the apartment, and ran down the hallway toward the stairs. Ramirez caught up with him in the hallway. Appellant turned around and confronted Ramirez. Appellant stumbled and fell to the floor. Even though Ramirez had stabbed Appellant three times, puncturing Appellant's lung, and even though Ramirez was on

top of him, Appellant managed to force Ramirez's knife away from him. Appellant started swinging upward "wildly" with his own knife. Appellant swung his knife "wildly" several times at Ramirez. Appellant only stopped when he felt Ramirez "freeze up."

Ramirez's girlfriend, Ms. Saavedra, testified differently. She said Appellant struck the first blow. Ramirez was sitting on the couch. Appellant kicked in the door, walked up with his knife, and cut Ramirez once in the side of the neck. Then Ramirez ran into the kitchen, where Ramirez grabbed a knife. She did not see anything else.

At least three of Appellant's relatives, and two police officers -- Mendoza and Sanchez -- believed Appellant was under the influence of alcohol. The relatives knew Appellant had a history of drinking. They had frequently seen Appellant drunk. Officer Mendoza thought he was under the influence of drugs, as well. Appellant had several baggies with methamphetamine residue inside his pocket.

Dr. Gregory, the neuropsychological expert, believed Appellant was suffering from a methamphetamine-induced psychotic disorder. That condition often leads to delusional thinking, paranoia, and hearing voices. Paranoid delusions make people misperceive things. People might perceive threats where there are none.

B. Procedural Facts

Appellant moved *in limine* to admit expert testimony regarding his methamphetamine-induced psychotic disorder and use of alcohol. (CT:I:134-135) Appellant argued that voluntary intoxication can raise a reasonable doubt as to express malice, and that an unlawful homicide committed without malice may be either voluntary or involuntary manslaughter. (CT:I:135-136) Appellant argued that intoxication can negate the specific intent to commit the felony which underlies the felony murder

rule. (id.) Finally, Appellant argued: "evidence of mental disease, defect, or disorder or voluntary intoxication can be used to establish that a defendant subjectively believed in the need for self-defense, even if the evidence shows that such a belief was unreasonable." (CT:I:136-137)

Appellant appended a report by psychiatrist Dr. Jeff Gould. (CT:I:147-163)[2] Dr. Gould stated, inter alia, that the "effects of methamphetamine use could have impaired his cognitive ability to process and react to the unfolding dynamics between himself and the victim at the time of the instant offense." (CT:I:162)

The prosecutor filed a memorandum arguing for limitations on expert testimony. (CT:I:165-179) However, the prosecutor explicitly conceded, pursuant to People v. Cameron (1994) 30 Cal.App.4th 591, 601, that evidence of intoxication was admissible regarding whether the defendant had an actual but unreasonable belief in the need for self-defense. The prosecutor wrote:

> The People [d]o not disagree that evidence of intoxication *should* be admissible on the issue of whether the defendant had an unreasonable but actual belief in the need for self-defense. As pointed out in *People v. Cameron* (1994) 30 Cal.App.4th 591, "[p]roof of intoxication tends to support a claim of honest but mistaken belief in an imminent aggravated assault, providing a reason to account for the defendant's objectively unreasonable belief." (*Id.* at p. 601.) (CT:I:168)

At argument on *in limine* motions, the prosecutor said:

> I think that a jury can understand that when you are under the influence of alcohol, when you are under the influence of a controlled substance, that that does affect your thinking. (RT:I:5)

---

[2]Dr. Gould did not testify. Psychologist Dr. Amanda Gregory, who testified, relied upon Dr. Gould's report.

Defense counsel responded that voluntary intoxication is admissible regarding several issues, including imperfect self-defense. (RT:I:7)

Thus, prior to trial, defense counsel had argued that voluntary intoxication was relevant to imperfect self-defense, and the prosecutor had agreed, citing People v. Cameron, supra. Nonetheless, when counsel requested jury instructions, he requested CALCRIM 625 and CALCRIM 3426 (RT:IX:773, 783-784), which effectively bar intoxication from being used, regarding whether the defendant had the necessary knowledge or intent for imperfect self-defense. The trial court instructed on intoxication with slightly modified versions of CALCRIM 625 and CALCRIM 3426. (CT:II:407)

C. The Trial Court Erred (as the Court of Appeal found) when It Instructed that Voluntary Intoxication Is Not Relevant to the Actuality of the Defendant's Belief in the Need to Act in Imperfect Self-Defense

1. Instructions on imperfect self-defense

The trial court instructed on voluntary manslaughter, under the theory of imperfect self-defense, under CALCRIM 571 as follows:

> 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.
>
> If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.
>
> The defendant acted in imperfect self-defense if:
>
> 1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; and
>
> 2. The defendant actually believed that the immediate

use of deadly force was necessary to defend against the danger; but

3. At least one of these beliefs was unreasonable.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder.

Imperfect self-defense does not apply if a defendant's conduct creates circumstances where the victim is legally justified in resorting to self-defense against the defendant. But the defense is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant.

Imperfect self-defense does not apply to purely delusional acts.

Imperfect self-defense is not a defense to felony murder. (CT:II:405-406)

2. Instructions on intoxication

The trial court gave the jury two instructions on intoxication. Both instructions told the jury, in substance and effect, that it could not rely upon Appellant's intoxication in deciding whether Appellant had the necessary *mens rea* for imperfect self-defense. First, the trial court delivered CALCRIM 625, voluntary intoxication, as follows:

You may consider evidence, if any, of the defendant's

voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or the defendant was unconscious when he acted. Voluntary intoxication can only negate express malice, not implied malice.

A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

You may not consider evidence of voluntary intoxication for any other purpose. (CT:II:407, emphasis added)

Second, the court delivered CALCRIM 3426, as follows:

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. In addition to CALCRIM 625, you may consider that evidence only in deciding whether the defendant acted with the intent to commit assault with a deadly weapon or assault with force likely to commit great bodily injury at the time the defendant entered the apartment of Israel Ramirez.

A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

In connection with the charge of burglary, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to commit assault with a deadly weapon or assault with force likely to commit great bodily injury at the time the defendant entered the apartment of Israel Ramirez.

You may not consider evidence of voluntary intoxication for any other purpose. This instruction is to be used in conjunction with CALCRIM 625. (CT:II:416,

emphasis added)

When the trial court instructed, twice, that "you may not consider evidence of voluntary intoxication for any other purpose," it effectively told the jury, twice, that it could not consider Appellant's intoxication in determining whether he acted in imperfect self-defense.

3. Intoxication is made relevant to imperfect self-defense by two separate clauses in Penal Code §29.4, the intoxication instruction

There are two statutory grounds, discussed below, which establish that intoxication is relevant to imperfect self-defense. Each ground relies upon a different clause in former Penal Code §22(b) (renumbered as Penal Code §29.4),[3] the statute defining when evidence of intoxication is admissible. Penal Code §29.4 reads:

> Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

One ground for admitting intoxication focuses on the clause in §29.4 that "... intoxication is admissible ... on the issue of ... whether the defendant... harbored express malice aforethought." The other ground for admitting intoxication focuses upon the clause in §29.4 that "... intoxication is admissible ... on the issue of whether or not the defendant actually formed a required specific intent..." To prevail, Appellant needs only to establish one of these two grounds.

---

[3]Appellant refers to the intoxication statute by both section numbers, depending upon context.

4. Intoxication is relevant to imperfect self-defense, because Penal Code §29.4 provides that intoxication may disprove express malice

The Court of Appeal held that the intoxication instructions were erroneous, because they were contrary to former Penal Code §22(b) (current §29.4). The Court of Appeal held that intoxication is relevant to prove imperfect self-defense. It was correct in so holding. It reasoned that "the state of mind required for imperfect self-defense negates express malice, and §29.4 by express terms makes voluntary intoxication admissible on the issue of express malice." (opinion, p. 15) Because imperfect self-defense negates malice, and because §29.4 makes intoxication relevant to express malice, intoxication is relevant to imperfect self-defense.

The pertinent part of the intoxication instruction given here, CALCRIM 625, told the jury:

> You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or the defendant was unconscious when he acted. Voluntary intoxication can only negate express malice, not implied malice.

The Court of Appeal held that portion of the instruction was error, because it told the jury that it could only rely upon intoxication to determine if ". . . the defendant acted with intent to kill, or the defendant acted with deliberation and premeditation. . . ." (opinion, p. 18) The Court of Appeal found that part of the instruction erroneous, because intoxication is relevant to express malice, not just to intent to kill. Express malice means more than intent to kill. Express malice means the intent to kill *unlawfully.* Penal Code §188 ("express malice" exists "when there is manifested a deliberate intention unlawfully to take away the life . . .").

Malice is a necessary element of murder. Penal Code §187(a). A

defendant lacks malice, and is not guilty of murder, but is guilty, instead, of the lesser-included offense of voluntary manslaughter, if he kills in actual (meaning honest) but unreasonable belief in the need to exercise self-defense. People v. Elmore (2014) 59 Cal.4th 121, 129-130, 133-134; In re Christian S. (1994) 7 Cal.4th 768, 773; People v. Flannel (1979) 25 Cal.3d 668, 680. Imperfect self-defense disproves malice, and renders the homicide manslaughter. (Id.) Because express malice requires an intent to kill unlawfully, Penal Code §188, a killing in the belief that one is acting lawfully is not malicious.

When there is sufficient evidence of imperfect self-defense, as there was here, the prosecution must prove the absence of imperfect self-defense to establish malice. People v. Elmore, supra, 59 Cal.4th at 135-136; CALCRIM 571.[4] In other words, the prosecution must prove the defendant lacked an actual belief in the need for self-defense in order to prove malice. People v. Rios (2000) 23 Cal.4th 450, 454, 460-462. Thus, proof of the absence of imperfect self-defense is a necessary element of murder. As the Court of Appeal held in People v. Najera (2006) 138 Cal.App.4th 212, 227 "when a jury must consider both murder and voluntary manslaughter, . . . the absence of heat of passion is an element of murder the prosecution must prove beyond a reasonable doubt."

At the minimum, and alternatively, proof of the absence of imperfect self-defense is a component of the necessary element of malice, which the prosecution must prove. As this Court explained in People v. Rios, 23 Cal.4th at 454:

---

[4]The pertinent paragraph of CALCRIM 571 reads:

> The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder.

> . . . where murder liability is at issue, evidence of heat of passion or imperfect self-defense bears on whether an intentional or consciously indifferent criminal homicide was malicious, and thus murder, or nonmalicious, and thus the lesser offense of voluntary manslaughter. In such cases, the People may have to prove the *absence* of provocation, or of any belief in the need for self-defense, in order to *establish* the *malice element of murder*. (italics in original)

Imperfect self-defense, also referred to as unreasonable self-defense, is a variation of the statutory defense of mistake of fact, Penal Code §26 (three). "[U]nreasonable self-defense involves a misperception of objective circumstances . . ." People v. Elmore, supra, 59 Cal.4th at 134. "Unreasonable self-defense is based on a defendant's assertion that he lacked malice because he acted under an unreasonable *mistake of fact* - - that is, the need to defend himself against imminent peril of death or great bodily injury." People v. Elmore, supra, 59 Cal.4th at 136, quoting from In re Christian S., 7 Cal.4th at 779, n. 3.

Imperfect self-defense requires that the defendant have an actual belief a) that he was at risk of imminent death or GBI, and b) that he must act immediately with deadly force to protect himself. The defendant's beliefs do not have to be reasonable, but they must be actual (honest). People v. Elmore, supra; In re Christian S., supra.

When, as here, there is sufficient evidence of imperfect self-defense, the prosecution has the burden of proving the absence of imperfect self-defense beyond a reasonable doubt in order to prove malice, and in order to prove murder. People v. Elmore, supra, 59 Cal.4th at 135-136. As this Court held in People v. Rios, supra, 23 Cal.4th at 462:

> If the issue of provocation or imperfect self-defense is thus "properly presented" in a murder case (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704), the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice.

(*Id.*, at pp. 703-704) (italics in original)

In Mullaney v. Wilbur (1975) 421 U.S. 684, 704, a heat of passion case, the United States Supreme Court held: "the Due Process Clause requires the prosecution to prove beyond reasonable doubt the absence of the heat of passion or sudden provocation when the issue is properly presented in a homicide case." In People v. Rios, supra, 23 Cal.4th at 462, this Court held that the same principle applies regarding imperfect self-defense. Under the Due Process Clause when, as here, the issue of imperfect self-defense is properly presented, the prosecution must prove the absence of imperfect self-defense beyond a reasonable doubt. (Id.)

Thus, when there is sufficient evidence to establish imperfect self-defense, the prosecution must disprove imperfect self-defense in order to prove murder. Under such circumstances, the absence of imperfect self-defense is a necessary element of the crime of murder. People v. Rios, supra; People v. Najera, supra; Mullaney v. Wilbur, supra. Alternatively, the absence of imperfect self-defense is a necessary component of malice, which element the prosecution must prove beyond a reasonable doubt.

The instructions that intoxication may not be considered in determining the actuality of Appellant's beliefs in self-defense were erroneous. Intoxication is relevant, because it could tend to show how or why the defendant could honestly, although mistakenly and unreasonably, believe in the imminence of danger, or how the defendant could honestly, although mistakenly and unreasonably, believe in the need to use deadly force. Intoxication is thus relevant to the defense of mistake of fact. People v. Cameron (1994) 30 Cal.App.4th 591, 601.

Appellant had been ingesting meth for three days and nights. He had been drinking beer all day. When he was in Rico's car, he was holding a 24-oz. can of beer which was half empty. In addition, Appellant had

smoked enough meth to leave him with three empty baggies of meth residue. The toxicology test confirmed these facts.

As Appellant's expert Dr. Gregory testified, methamphetamine psychosis often leads to delusional thinking, paranoia, and hearing voices. Symptoms could include being incoherent, and behaving in ways that do not make sense. Symptoms could include going without sleep for several days, entering a building without knowing whom you are going to visit, and breaking into an apartment. Prolonged methamphetamine use affects judgment, impulse control, and memory. Paranoid delusions make people misperceive things. People might perceive threats where there are none. (RT:VIII:684-686)

Alcohol intoxication clouds perception.It often makes one act more aggressively than normal, and often makes one think that others are acting more aggressively than they really are. It may cause a person to start fighting sooner than he would if he was sober. It may cause a person to think or fear that things are about to happen, when they are not. It may cause a person to think that things are happening faster, or slower, than they actually are.

Thus, the combination of methamphetamine intoxication and alcohol intoxication could help explain how a defendant could honestly, but mistakenly, believe the victim remained an imminent deadly threat, even if he was no longer attacking, or if he was disabled. Intoxication could help explain why the defendant could still believe, although unreasonably, that he needed to continue stabbing the victim to protect himself from death or GBI.

Appellant's partial defense of imperfect self-defense depended upon the jury understanding that the reason why Appellant mistakenly believed Ramirez continued to remain a threat was because of Appellant's intoxication. This partial defense depended upon the jury understanding that

Appellant's perception of these events, and/or his memory of these events, if inaccurate, was caused by intoxication, rather than by prevarication.

However, the trial court's instructions totally removed that defense from the jury's consideration when it told the jury twice, that "you may not consider evidence of voluntary intoxication for any other purpose." Those instructions were erroneous, because the combination of intoxication and imperfect self-defense may help disprove malice.

The Court of Appeal held in People v. Cameron (1994) 30 Cal.App.4th, 591, 601, that voluntary intoxication is relevant to imperfect self-defense, because:

> evidence of intoxication could be material to the defense of unintentional killing in the course of "imperfect self-defense." Proof of intoxication tends to support a claim of honest but mistaken belief in an imminent aggravated assault, providing a reason to account for the defendant's objectively unreasonable belief. (footnote omitted)

Prior to trial, the prosecutor, citing Cameron, and defense counsel both stated that intoxication was relevant to imperfect self-defense. The trial court erred when it ignored both of them.[5]

Accordingly, trial court erred under Penal Code §29.4, and under its provision that intoxication is relevant to express malice, when it instructed that intoxication was not relevant to imperfect self-defense.

5. Intoxication is relevant to imperfect self-defense, because Penal Code §29.4 provides that intoxication may disprove knowledge and specific intent

There is a second statutory reason why intoxication is relevant to imperfect self-defense. Penal Code §29.4 provides that intoxication is admissible "on the issue of whether or not the defendant actually formed a required specific intent...." Because the statute allows intoxication to

---

[5]See p. 26, n. 6, for further discussion of Cameron.

disprove specific intent, it also allows intoxication to disprove knowledge. One cannot have a specific intent unless one has knowledge of the underlying facts.

In People v. Mendoza (1998) 18 Cal.4th 1114, 1126, this Court construed the partial defense of voluntary intoxication in former Penal Code §22(b) (renumbered as §29.4). In Mendoza this Court concluded that, under Penal Code §22(b), the term "specific intent" has a "knowledge" component. When knowledge is a component of a crime, and/or a component of specific intent, the prosecution must prove it. People v. McCoy (2001) 25 Cal.4th 1111, 1117. If the defendant lacks the necessary knowledge because of intoxication, he cannot be liable for any aspect of the crime that requires knowledge. People v. Mendoza, supra, 18 Cal.4th at 1126-1130. Thus, an intoxication instruction should be given, if the evidence supports it, whenever the defendant's knowledge is at issue.

Under Mendoza, the jury should be instructed in an imperfect self-defense case that intoxication is relevant to the defendant's knowledge and intent. Here, Appellant's knowledge and awareness of whether the victim remained a threat were crucial facts in dispute.

Although Mendoza was an aiding and abetting case which addressed the effect of intoxication upon the mental state of an aider and abettor, the holding of Mendoza has not been limited to aiders and abettors. For example, in People v. Roldan (2005) 35 Cal.4th 646, 715, a murder case involving a single perpetrator, this Court stated that intoxication is admissible regarding the specific intent of the actual killer.

> . . . a defendant is entitled to an instruction on voluntary intoxication "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.'
>
> - - People v. Roldan, 35 Cal.4th at 715

Thus, intoxication is admissible in an imperfect self-defense case under §29.4, because it may disprove knowledge or specific intent. It can help explain mistake of fact under Penal Code §26 (three). It is admissible to disprove knowledge and intent in a homicide case, just as intoxication is admissible to disprove knowledge and intent in any other kind of specific intent case. People v. Roldan, supra. Intoxication could show why the defendant honestly, although mistakenly and unreasonably, could have incorrect knowledge or awareness of the imminence of danger, or of the need to use deadly force.

D. Respondent's Arguments at the Court of Appeal on this Point Were Without Merit

1. In 1995 the Legislature amended former Penal Code §22(b) to read as it does now, in order to abrogate People v. Whitfield (1994) 7 Cal. 4th 437, 446, which allowed intoxication as a stand-alone defense to implied malice second degree murder. See People v. Timms (2007) 151 Cal.App.4th 1292, 1298. Respondent argued at the Court of Appeal that such an amendment barred intoxication from being used as a basis for imperfect self-defense, because intoxication is not a defense to implied malice second degree murder. Respondent was incorrect. The amendments to former §22(b) did not abrogate imperfect self-defense.

Such contention was similar to the argument made by the Attorney General in In re Christian S., supra, 7 Cal.4th at 774-778. In that case the AG argued that the 1981 statutory amendments to former Penal Code §28, which eliminated the defense of diminished capacity, also eliminated the defense of imperfect self-defense. In In re Christian S. this Court rejected those contentions. It held that nothing in the relevant amendments said anything about imperfect self-defense. Id., 7 Cal.4th at 774-778. Those amendments merely prevented intoxication from serving as a stand-alone defense to second degree implied malice murder. The same logical analysis

should apply here. Because nothing in the 1995 amendments to former Penal Code §22(b) said anything about the relationship between intoxication and imperfect self-defense, those amendments are similarly inapplicable to imperfect self-defense.[6]

2. Respondent argued below that former §22(b) barred intoxication from proving anything in a murder case other than whether the defendant premeditated, deliberated, or harbored express malice aforethought. That contention was incorrect. Former Penal Code §22(b) also explicitly allowed evidence of intoxication to be used to determine whether "the defendant actually formed a required specific intent. . ." That clause in former Penal Code §22(b) governs here.

In People v. Mendoza, 18 Cal.4th at 1126, 1131, the defendant was charged with aiding and abetting several crimes, including shooting at an occupied dwelling, and second degree murder. This Court held that intoxication was applicable in determining whether the aider and abettor had the required specific intent to assist a murder, and whether he had the knowledge which was necessary for that specific intent. As Mendoza explained, one cannot form a specific intent without having the knowledge necessary to form that specific intent. Because §22(b) made intoxication relevant to specific intent, §22(b) also made intoxication relevant to the knowledge which underlies that specific intent. People v. Mendoza, supra.

3. The AG argued below, by implication, that the word "or" in former §22(b), between the phrases "required specific intent" and

---

[6]As noted, People v. Cameron, 30 Cal. App. 4th at 601, held that intoxication is relevant to imperfect self-defense. Respondent argued below that Cameron should be disregarded, because it was based in part on People v. Whitfield (1994) 7 Cal.4th 437, 446, which was abrogated. Respondent was incorrect. The statutory amendment which abrogated Whitfield did not say anything about imperfect self-defense. Thus, the holding in Cameron remains good law.

"when charged with murder, whether the defendant premeditated, [etc.] . ." must be read in the disjunctive.[7] The AG contended, by implication, that the word "or" establishes two mutually exclusive alternatives, such that, in a murder case, intoxication may only be used to disprove "premeditation," "deliberation," and "express malice," but that, in a murder case, intoxication may not be used to disprove any other "required specific intent . . ." That claim was incorrect. The word "or" does not mandate mutually exclusive alternatives. Instead, the word "or," as used in §22(b), refers to two possible alternatives, such that it is used in the conjunctive. Indeed, the word "or" is commonly used in the conjunctive. See, e.g., In re Jesusa V. (2004) 32 Cal.4th 588, 621 (child custody statute requiring "the physical presence of the prisoner *or* the prisoner's attorney is read in the conjunctive; both must be present); Houge v. Ford (1955) 54 Cal.2d 706, 712 (the phrase "protect or collect" is read as two alternative possibilities, neither of which is mutually exclusive).

The Legislature did not intend for the word "or" to be used in the disjunctive. Intoxication has always been relevant to specific intent in murder cases. For example, intoxication is relevant to the specific intent needed to commit the felony underlying a felony murder. See CALCRIM 625, Bench Notes. Intoxication is also relevant to other specific other intents required for murder, or special circumstances, such as intent to inflict torture, or to kill a witness. See Bench Notes to CALCRIM 625.

Thus, the word "or" in (former) §22(b) merely provides for

---

[7]Former §22(b), current §29.4, reads:

> Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, *or*, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. (emphasis added)

alternative ways in which intoxication may be used. It does not establish mutually exclusive provisions. The word "or," read in conjunctive with the phrase directly following it, allows intoxication to be used in determining specific intent in a murder case, just as intoxication may be used to determine premeditation, deliberation, and malice.

People v. Mendoza, 18 Cal.4th at 1131-1134, effectively held that the word "or" in former Penal Code §22(b) was used in the disjunctive. Mendoza held that evidence of intoxication could be relevant to the defendant's specific intent, even though Mendoza was a murder case. Mendoza held in effect that the word "or" in former §22(b) refers to alternative ways in which evidence of intoxication may be used. Accordingly, under former §22(b), evidence of intoxication should have been usable here to prove *either* the question of whether the defendant formed a required specific intent, *or* the question of whether the defendant premeditated, deliberated, or harbored express malice. The trial court erred when it instructed to the contrary.

4. Respondent argued below that CALCRIM 625 was correct because "it amounts to little more than a restatement" of Penal Code §29.4. The Court of Appeal rejected that argument. It correctly held:

> But a close examination reveals a flaw in the instruction [CALCRIM 625]. The instruction allowed the jury to consider evidence of voluntary intoxication in deciding whether the defendant harbored an "intent to kill" But express malice is not equivalent to an intent to kill. Malice is express "when there is manifested a deliberate intention *unlawfully* to take away the life of a fellow creature." (Pen. Code, §188, italics added) "[M]alice requires an *intent to kill* that is 'unlawful' because the law deems it so. '"The adverb 'unlawfully' in the express malice definition means simply that there is no justification, excuse, or mitigation for the killing recognized by the law."'" (Elmore, supra, 59 Cal.4th at p. 133, quoting Saille, supra, 54 Cal. 3d at p. 1115.) In other words, when a defendant honestly believes in the need for self-defense, the

> intent to kill is not "unlawful" under Penal Code section 188, and, therefore, express malice is negated. (opinion, p. 16)

The Court of Appeal was correct. Express malice means more than intent to kill. It means the intent to kill *unlawfully*. Penal Code §188.

The part of CALCRIM 625 which told the jury that it could only use intoxication to determine if the defendant "acted with an intent to kill, or if the defendant acted with deliberation and premeditation" effectively told the jury, contrary to Penal Code §29.4, that intoxication could not be used to prove some aspects of express malice. That instruction was error. Express malice is different then the intent to kill. Express malice means not just the intent to kill, but the intent *unlawfully* to kill. Persons acting in imperfect self-defense often act with the intent to kill, but they do not act with the intent *unlawfully* to kill. In re Christian S., supra, 7 Cal.4th at 773; People v. Flannel, supra, 25 Cal.3d at 680. That is because they believe (although unreasonably) that their acts are justified. CALCRIM 625, as given here, was defective, because it instructed contrary to that principle.

E. Failure to Instruct on the Defense Theory of the Case

Part of the defense was that Appellant, because of his intoxication, acted based upon a mistake of fact. His mistakes may have included believing he had to stab the victim in the hallway, and believing he needed to continue to stab the victim, even after the victim no longer presented a deadly threat. Under the doctrine of imperfect self-defense, and because of those mistakes of fact, Appellant's crime should have been no worse than manslaughter.

The failure to instruct on the defense theory of the case violated the due process and jury trial rights of the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. Mathews v. United States (1988) 485 U.S. 58, 63-64. As the Court held in United States v. Escobar de Bright (9th Cir. 1984) (*en banc*) 742 F.2d 1196, 1201-1202,

> [A] failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a

defendant to offer up a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create reasonable doubt in the jury's mind, will entitle the defendant to acquittal.

F. These Arguments May Be Raised on Direct Appeal

1. *Sua sponte* instruction required

In People v. Mendoza, supra, and in People v. Castillo (1997) 16 Cal.4th 1009, 1014, this Court held: "a trial court has no *sua sponte* duty to instruct on the relevance of intoxication, but, if it does instruct . . . it has to do so correctly." People v. Mendoza, supra, 18 Cal.4th at 1134. The trial court did instruct here on intoxication. Under Mendoza and Castillo, it had a *sua sponte* obligation to instruct correctly. Thus, no defense objection was needed to preserve the issue for appeal. Penal Code §1259.

2. Ineffective assistance of counsel

Alternatively, defense counsel's failure to request correct intoxication instructions constituted ineffective assistance of counsel (IAC) under the Sixth and Fourteenth Amendments. Strickland v. Washington (1984) 466 U.S. 668; People v. Pope (1979) 23 Cal.3d 412. IAC occurs (i) when a trial counsel fails to exercise the proper level of professional competency, and (ii) when that failure is prejudicial, meaning that, without the IAC, there was a reasonable probability of a more favorable result. That occurred here. Correct instruction on intoxication would have greatly helped Appellant's imperfect self-defense case.

These issues may be raised on direct appeal, because there could not have been any valid strategic reason for trial counsel not to request correct instructions on intoxication. People v. Nation (1980) 26 Cal.3d 169, 180. Counsel tried to defend on the basis that Appellant's perception and beliefs were confused by his intoxication.[8]

---

[8]Appellant discusses prejudice in the following section.

II.

THE INSTRUCTIONAL ERRORS WERE PREJUDICIAL

A. The Correct Standard of Prejudice Is Harmless Beyond a Reasonable Doubt under Chapman

The Court of Appeal found the intoxication instruction erroneous. However, it held that the error was one of state law, not federal law, such that the standard of prejudice was a reasonable probability of a more favorable result under People v. Watson (1956) 46 Cal.2d 818, 826. Applying Watson, it found the instructional errors harmless. (opinion, pp. 19-22)

The Court of Appeal erred in applying Watson. The correct test for prejudice for instructional errors like these is harmless beyond a reasonable doubt under Chapman v. California (1967) 386 U.S. 18. Here is why Chapman should apply:

1. In all murder cases, the prosecution must prove malice as a necessary element of the crime of murder. Penal Code §187(a). In addition, once sufficient evidence of self-defense, or imperfect self-defense, is presented, as was done here, the prosecution has the burden of disproving such justification in order to prove malice. People v. Elmore, supra, 59 Cal.4th at 134; People v. Rios, supra, 23 Cal.4th at 460-462; People v. Banks (1977) 67 Cal.App.3d 379; CALCRIM 571.[9] Accordingly, the lack of such justification is a necessary element of the crime of murder. As this Court explained in People v. Barton (1995) 12 Cal.4th 186, 200-201, unreasonable self-defense is not a true defense. Rather it is a shorthand version of voluntary manslaughter. This is still another reason why the

---

[9]The pertinent paragraph in CALCRIM 571, voluntary manslaughter, is quoted supra at p. 19, n. 4.

absence of an actual belief in the need for self-defense is a necessary element of the crime of murder.

Alternatively, the lack of such justification is a required component of a necessary element of murder, namely, malice. As this Court stated in People v. Rios, supra, 23 Cal.4th at 454,

> . . . where murder liability is at issue, evidence of heat of passion or imperfect self-defense bears on whether an intentional or consciously indifferent criminal homicide was malicious, and thus murder, or nonmalicious, and thus the lesser offense of voluntary manslaughter. In such cases, the People may have to prove the *absence* of provocation, or of any belief in the need for self-defense, in order to *establish* the *malice element of murder*. (italics in original)

Thus, in order to prove the element of malice, and in order to prove the element of lack of justification, the prosecution was required to prove beyond a reasonable doubt (i) that Appellant did not actually believe that he was in imminent danger of death or GBI, and (ii) that he did not actually believe that the immediate use of deadly force was necessary, regardless of whether those beliefs were reasonable. People v. Elmore, supra, 59 Cal.4th at 133-134; CALCRIM 571; Accord: People v. Najera (2006) 138 Cal.App.4th 212, 227 ("when a jury must consider both murder and voluntary manslaughter, . . . the absence of heat of passion is an element of murder the prosecution must prove beyond a reasonable doubt.")

Because malice and lack of justification are necessary elements of the crime of murder, the failure to instruct correctly on malice and the lack of justification violated Appellant's Fifth and Fourteenth Amendment due process right to have the jury correctly instructed on all elements of the charged crimes. Sandstrom v. Montana (1979) 442 U.S. 510; People v. Covarrubias (2016) 1 Cal 5th 838, 928 (incorrect instruction on the intent to kill needed for aiding and abetting violated due process, because that

constituted misinstruction on a necessary element of the crime); People v. Banks (2014) 59 Cal.4th 1113, 1153 (failure to instruct on necessary elements of "willful," "deliberate," and "premeditated" violated due process, because that constituted misinstruction on necessary elements of the crime); People v. Wilkins (2013) 56 Cal.4th 333, 348-349 (error regarding instruction on necessary element that burglary and escape were part of one continuous transaction violated due process, because that constituted misinstruction on a necessary element of the crime); People v. Gonzales (2012) 54 Cal.4th 643, 663 (incorrect instruction on mental state needed for provocative act murder constituted misinstruction on a necessary element of the crime).

In the same way, the failure to instruct correctly that the prosecution must disprove imperfect self-defense, in order to prove malice, and that intoxication is relevant to malice, violated the defendant's due process right to have the jury correctly instructed on all necessary elements. Sandstrom v. Montana, supra; People v. Banks, supra; People v. Wilkins, supra.

The incorrect instructions on intoxication also violated the duty to instruct on the defense theory of the case. That violated the due process and jury trial rights of the Fifth, Sixth and Fourteenth Amendments. Mathews v. United States, supra.

For all such constitutional violations, the correct standard of prejudice is harmless beyond a reasonable doubt under Chapman. Sandstrom v. Montana, supra, 442 U.S. at 526; People v. Covarrubias, supra, 1 Cal 5th at 928; People v. Banks, supra, 59 Cal.4th at 1153; People v. Wilkins, supra, 56 Cal.4th at 348-349; People v. Gonzales, supra, 54 Cal.4th at 663.

2. The Court of Appeal held that the instructional errors prohibiting the jury's consideration of voluntary intoxication with regard to

imperfect self-defense constituted state law error, only, warranting the Watson standard of prejudice. (opinion, p. 19) It reasoned such errors have "the effect of excluding defense evidence . . ." (opinion, p.19) That supposedly makes them "subject to the usual standard for state law error," namely, Watson. (opinion, p. 19) For this proposition it cited People v. Mendoza, supra, 18 Cal.4th at 1134-1135. (opinion, p. 19)

Mendoza, 18 Cal.4th at 1134-1135, seemed to suggest that an error regarding instructions on intoxication is state law error, subject to the Watson test. But Mendoza never fully analyzed the question of whether Chapman or Watson applied. And Mendoza remanded the case to the Court of Appeal for it to decide prejudice.

Appellant respectfully submits that re-analysis is warranted regarding the correct standard of prejudice. That is because Sandstrom v. Montana, supra, 442 U.S. at 526, and the recent California cases cited above - - Covarrubias, Banks, Wilkins, and Gonzales - - all hold that prejudice in instructing incorrectly on necessary elements - - in this case, malice, and lack of justification - - is evaluated under Chapman.[10]

---

[10]The eventual result of the case of Mr. Valdez, the aider and abettor in Mendoza, is informative. Valdez filed a federal habeas corpus petition. The Ninth Circuit held during Valdez's first federal appeal that the correct standard of prejudice on direct appeal for the errors identified in Mendoza, namely, the failure to instruct correctly on intoxication, knowledge, and intent, was harmless beyond a reasonable doubt under Chapman. The Ninth Circuit determined that Mendoza was mistaken when it applied Watson. Valdez v. Castro, 2007 U.S. Dist. LEXIS 53174, *23, 28, 2007 W.L. 2019564.

That holding supports Appellant's position here.

The Ninth Circuit did not itself apply Chapman, because federal habeas corpus cases utilize a different standard of prejudice. Ultimately, the instructional error regarding intoxication was held prejudicial to co-defendant Valdez, and a new trial was ordered. Valdez v. Castro, supra.

The Court of Appeal was also mistaken when it characterized these errors as ones which have "the effect of excluding defense evidence," such that the errors only constituted state law error. That assertion was incorrect. These errors were not the exclusion of evidence. The jury heard testimony that Appellant had methamphetamine in his blood stream, that he had not slept in three days, and that he was drunk. It heard testimony that Appellant had several baggies containing methamphetamine residue. It heard testimony from the neuropsychologist that Appellant may have been acting under methamphetamine psychosis when he knocked on doors, and kicked in doors, looking for someone he last saw three years ago. Thus, the errors were not the exclusion of evidence. Instead, the errors were the failure to instruct correctly on necessary elements of a crime, namely, malice, and the lack of justification, and the failure to instruct correctly on the defense theory of the case. Such federal constitutional errors are reviewed for prejudice under Chapman. Sandstrom v. Montana, 442 U.S. at 526; People v. Banks, supra; People v. Wilkins, supra.

3. In People v. Thomas (2013) 218 Cal.App.4th 630, 633 this Court had a somewhat similar question before it. The question was whether the prejudice from the erroneous failure to instruct the jury on provocation, which would reduce a murder to voluntary manslaughter, under heat of passion, was governed by Chapman or Watson. When Thomas was first before the Court of Appeal, it held the error harmless under Watson. But, on defendant's petition for review, this Court granted review, and transferred his case back to the Court of Appeal "with directions to address defendant's contention that the trial court's refusal to instruct on heat of passion voluntary manslaughter constituted federal constitutional error." People v. Thomas, 218 Cal.App.4th at 633. The Court of Appeal then concluded that the failure to instruct that provocation could

negate malice aforethought was federal constitutional error. It applied the Chapman test. It concluded under Chapman that the error was prejudicial, and reversed. People v. Thomas, 218 Cal.App.4th at 633.

After the Court of Appeal in Thomas applied Chapman and reversed the conviction, the People petitioned for review. This Court denied review. See People v. Thomas, 218 Cal.App.4th at 647, referring to case no. S213262. A similar result should occur here.[11]

4. There is still another reason why Chapman should apply. The Court of Appeal held that, under its reading of Montana v. Egelhoff (1996) 518 U.S. 37, the question of which standard of prejudice applied was very close. It stated,

> Defendant's position that the Chapman standard applies finds some support in the opinions of several United States Supreme Court justices in Montana v. Egelhoff (1996) 518 U.S. 37 (Egelhoff). There, the court considered the effect of a Montana law restricting juries from considering voluntary intoxication in determining the state of mind required for any criminal offense. Based on historical common law principles, a four justice plurality held the law did not violate federal due process standards. (Id. at p. 51 (plur. opn. of Scalia, J.).) Justice Ginsburg concurred on the ground that a state is not constitutionally prohibited from defining mens rea so as to eliminate the exculpatory nature of voluntary intoxication. (Id. at pp. 58-59 (conc. opn. of Ginsburg, J.).) But Justice Ginsburg distinguished the Montana statute from evidentiary rules that are unconstitutional because they prevent the defendant from introducing relevant, exculpatory evidence that could negate an essential element of the offense. Four justices dissented and would have held the Montana law violated due process by preventing the jury from considering evidence relevant to the defendant's *mens rea*.

---

[11]Appellant acknowledges that the denial of review lacks precedential value. Nonetheless, the history of Thomas suggests that this Court agreed with the second decision from Court of Appeal, applying Chapman.

(Id. at p. 93 (dis. opn. of O'Connor, J.).)

> The instruction at issue here arguably prevented the jury from considering evidence which California law makes relevant to an element of the offense, such that Justice Ginsburg and the four dissenting justices in Egelhoff might have held it unconstitutional. However, absent a clearer statement of the law from the United States Supreme Court, we are bound by the precedent set forth by this state's high court in Mendoza. (opinion, p. 20)

Appellant believes the Court of Appeal understated the import of Montana v. Egelhoff. Correctly interpreted, that case holds that rules which exclude relevant exculpatory evidence violate due process. See People v. Timms (2007) 151 Cal.App.4th 1292, 1299. That was the principle upon which Justice Ginsburg, concurring, and the four dissenting justices agreed.[12] Indeed, all the justices seemingly agreed on this specific point. Because such rule would violate due process, as the Supreme Court held in Montana v. Egelhoff, the Chapman standard would apply.

Here, the instructional error at issue was equivalent to the problem with the statute in Montana v. Egelhoff. This instruction told the jury that it

---

[12]As People v. Timms explained, 151 Cal.App.4th at 1299-1300:

> Respondent [the same Respondent here] acknowledges that Justice Ginsburg's concurring opinion [in Montana v. Egelhoff] "may be viewed as the holding of the Court." "'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . ."' (*Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 1023, quoting *Marks v. United States* (1977) 430 U.S. 188, 193. Justice Scalia's plurality opinion expressed apparent complete agreement with Justice Ginsburg's rationale. (*Egelhoff, supra*, 518 U.S. at p. 50, fn. 4)

could not rely upon exculpatory evidence on critical points. Such an instruction violated due process. Montana v. Egelhoff, supra. Thus, under Montana v. Egelhoff, there was a federal due process violation, and the Chapman standard of prejudice applies.

For all these reasons, the standard of prejudice for the errors here should be harmless beyond a reasonable doubt under Chapman.

B. The Instructional Errors Were Prejudicial

The jury heard two versions how the fight started. In one version, Ramirez stabbed first. In the other version, Appellant stabbed first. Appellant analyzes the two versions separately.

1. The errors were prejudicial under Appellant's version of the facts

According to Appellant, Ramirez stabbed Appellant first. Under that scenario, Appellant had the right to self-defense.

Appellant testified that, as he started to walk out of the apartment, Ramirez went into the kitchen. Ramirez attacked Appellant with a large cooking knife. Appellant tried to defend himself. He tried to push Ramirez away. Appellant pulled out his pocket knife. He and Ramirez fought with knives in the kitchen. Appellant pushed Ramirez away, ran out of the kitchen, out of the apartment, and down the hallway toward the stairs. Appellant was done with fighting and trying to leave. Ramirez ran down the hallway after him. Appellant turned around because he thought Ramirez was about to attack him. Appellant confronted Ramirez in the hallway.

Appellant tried to fight back. Appellant stumbled and fell to the floor. Ramirez was on top of Appellant, trying to stab Appellant with the large cooking knife. Appellant used his left hand to grab Ramirez's right wrist, which hand was holding Ramirez's knife. Appellant was able to hold Ramirez's knife hand away while Appellant stabbed Ramirez "wildly" with

the knife. Thus, under Appellant's testimony, he had the right to complete self-defense. In the same way, he also had the right to imperfect self-defense, if any of his beliefs were actual but unreasonable.[13]

There were two points in time when Appellant and Ramirez were in the hallway outside the apartment when Appellant should have been able to defend on the combination and intoxication and imperfect self-defense, and when the failure so to instruct was prejudicial.

(1) The first point in time was when Appellant was fleeing out of the apartment down the hallway and toward the stairs. Appellant sensed Ramirez was behind him, and believed Ramirez was about to stab him. Because Appellant thought Ramirez was about to stab him, Appellant turned around and confronted Ramirez with his knife. Appellant believed that he was about to be stabbed then. He may have been mistaken, because his meth and alcohol intoxication made may have caused him to perceive and/or understand things incorrectly. Appellant may have been mistaken when he thought Ramirez was about to stab him. Appellant may have been mistaken when he did not think he had time to flee down the stairs and escape. Because of those mistaken understandings caused by intoxication, Appellant may have resumed the fight with Ramirez, when, otherwise, Appellant could have safely fled. Under this scenario, the incorrect intoxication instruction was prejudicial, because it prevented the jury from understanding why Appellant may have actually and honestly, but mistakenly, believed he had to continue fighting Ramirez in self-defense.

If the jury had been allowed to rely on intoxication, it probably

---

[13]Appellant's trial testimony was consistent with the statement he gave to the police the day after the homicide. (CT:I:189-240) However, the trial court denied Appellant's motion to introduce that statement under Evid. Code secs. 791 and 1236, prior consistent statement. (See opinion, pp. 22-26)

would have determined that Appellant believed he needed to act in self-defense, or else he would be killed. The jury could have made that finding even if it thought Appellant was wrong (meaning unreasonable) in turning around and fighting Ramirez at the end of the hallway, rather than continuing to flee. The jury could well have found that Appellant's belief in the need to use self-defense was actual, because his intoxication made him more fearful, and more paranoid, than he would have been if he were sober.

(2) The second point in time when Appellant was prejudiced by the inability to defend on the combination of intoxication and imperfect self-defense was as follows: Appellant and Ramirez were fighting with knives while both were lying on the floor of the exterior hallway (outside the apartment). Appellant was holding Ramirez's knife hand at bay, while Appellant stabbed "wildly" at Ramirez. Appellant kept stabbing Ramirez until Appellant felt Ramirez "freeze up."

However, the jury may well have determined that Appellant only had the right to stab Ramirez in self-defense up until a certain point, namely, once Ramirez was neutralized. See CALCRIM 505, 3470. Thus, key questions were whether, and if so, when, Appellant formed the knowledge that Ramirez was neutralized, and no longer a threat.

This knowledge may have been distorted by Appellant's intoxication. The combined intoxication, especially the meth intoxication, may have produced paranoia, and may have caused Appellant to misperceive the situation, and believe Ramirez was a threat when he was no longer a threat. Appellant's intoxication may have caused him to believe incorrectly that Ramirez had more fight in him than he actually did. If Appellant continued to stab Ramirez because Appellant, in his intoxicated state, believed Ramirez remained a deadly threat, when, in fact, he had been neutralized, then Appellant's continued stabbing was based upon a mistake

of fact due to intoxication. Accordingly, the erroneous intoxication instructions were prejudicial under this scenario, because they prevented the jury from understanding how Appellant could actually (honestly) think that he needed to continue to stab Ramirez, even though Ramirez had been disabled.[14]

If the jury had been properly instructed that intoxication was relevant to the actuality of Appellant's beliefs, it probably would have determined that the reason why Appellant continued to stab Ramirez, after Ramirez was neutralized, was because Appellant's intoxication and drug-based paranoia caused him mistakenly to think that Ramirez still remained a deadly threat. Under these circumstances, the jury probably would only have convicted Appellant of manslaughter, under imperfect self-defense. However, without correct intoxication instructions, the jury could not use Appellant's intoxication to understand how his beliefs could be honest, even if they were unreasonable.

2. The instruction was prejudicial under the victim's girlfriend's version of the facts

The victim's girlfriend testified to another scenario. She said Appellant was the first one to use a knife. Appellant approached Ramirez, while he was sitting on the sofa, and stabbed him once in the neck. Only then did Ramirez run to the kitchen and grab a knife. However, her testimony was open to question. No blood was found on the couch. Only one drop of blood was found on the floor anywhere near the couch. When officer Trevino examined the living room shortly after the homicide, he did not see any blood.

---

[14]The fact that the jury did not find complete self-defense is of no moment. Intoxication is irrelevant to complete self-defense, because complete self-defense requires the defendant's beliefs to be reasonable.

But even if, arguendo, her testimony was accurate, that still did not bar Appellant from defending on imperfect self-defense. That is because CALCRIM 571, as given here, provided, *inter alia* that the defense of imperfect self-defense can be reacquired by an original attacker. The defense of imperfect self-defense "is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant." CALCRIM 571. As the Bench Notes to CALCRIM 505 (on complete self-defense) explain,

> An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim's legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1). If the aggressor attempts to break off the fight and communicates this to the victim [by word or deed] but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor.

Appellant testified that, after Ramirez stabbed him inside the apartment, Appellant ran out the apartment door and down the hallway toward the stairs. He was trying to flee. However, he heard Ramirez running after him. Appellant turned around. Ramirez started to stab him. Appellant stumbled and fell down. Then the two men fought when they were on the floor.

So, even if Appellant "set in motion the chain of events that led the victim to attack him" (CALCRIM 571, as given here) when he (allegedly) started the knife fight, Appellant would have regained the right to self-defense when he tried to withdraw, but when Ramirez thereafter renewed his attack upon Appellant. Having withdrawn, Appellant reacquired the right to act in (imperfect) self-defense when Ramirez renewed his attack upon Appellant. See People v. Quach (2004) 116 Cal.App. 4th 291, 300;

People v. Trevino (1988) 200 Cal.App.3d 874, 879. As the Bench Notes to CALCRIM 505 provide:

> . . . if the victim responds with a sudden escalation of force, the aggressor may legally defend against the use of force. (People v. Quach (2004) 116 Cal.App.4th 294, 301-302; See CALCRIM No. 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor.*)

Under such circumstances, the incorrect instructions on intoxication were prejudicial under the girlfriend's testimony, just as they were prejudicial under Appellant's testimony. (1) A correctly instructed jury could well have determined that Appellant's intoxication mistakenly caused him to believe, although uncessesarily, that he had to resume fighting Ramirez in the exterior hallway, rather than continue to run away. That is because Appellant's intoxication may have caused him mistakenly to believe that Ramirez was going to be able to reach Appellant, and stab Appellant, before Appellant was able to run down the stairs and escape. (2) In the same way, a correctly-instructed jury could also have determined, once Appellant and Ramirez were fighting on the hallway floor, that Appellant's intoxication caused him to mistakenly think that he had to continue stabbing Ramirez, even though Ramirez had already been neutralized and disabled. But without correct instructions on intoxication, the jury would not have been able to understand how Appellant could honestly hold such unreasonable beliefs.

Both of these acts required instantaneous decision-making under highly stressful conditions. Each of these choices had to be made in a split second. It would not have taken much intoxication to cause Appellant to be mistaken or confused about these choices. And Appellant was intoxicated on multiple substances.

Thus, the instructional errors were prejudicial. If they jury had been

allowed to rely upon Appellant's intoxication, it may well have determined that he was honestly acting in imperfect self-defense (even if his beliefs were unreasonable) i) when he turned around in the hallway and confronted and fought Ramirez, and/or ii) when he continued to stab Ramirez on the floor, even though Ramirez had been neutralized.

3. Prejudice is shown by events during deliberation, including the jury's written notes to the judge

During deliberation, the jury submitted two written questions to the trial court. The second question asked about "CALCRIM no 571 [the imperfect self-defense instruction] when it states: 'when the defendant set in motion the chain of events that led the victim to attack the defendant' is it start of fight or Breaking in door? Please clarify jurors are interpreting differently." (CT:II:469)

This question was critical in multiple ways in determining the jurors' thinking. First, the phrase "set in motion the chain of events" comes from the language in CALCRIM 571, the imperfect self-defense instruction, as given here. (See p. 19, n. 4, supra.) That means the jury was considering imperfect self-defense, even without correct instructions on intoxication.

This question also means the jurors were unsure whether Appellant or Ramirez started the fight. That is because, if they believed Appellant started the fight, they would not have needed to ask this question about breaking in the door, or starting the fight. Under such a scenario, Appellant would have been the person who *both* broke in the door, and started the fight. However, this question means, even if the jurors were clear that Appellant broke in the door, that the jurors probably disagreed as to whether it was Appellant, or Ramirez, who started the fight. The fact that the jurors were unsure who started the fight suggests that the jury might have found imperfect self-defense, if it had been properly instructed.

The jury also requested a reread of the "testimony from Soto in

regards to start of fight." (CT:II:466) That re-read request suggests the jury was giving serious consideration to Appellant's version of the events.

4. Prejudice is shown by the combination of the jury's questions and the verdicts

It is clear that the jury had significant doubt as to the prosecution's case.

(a) First, and most important, the jury acquitted Appellant of first degree murder. That means the jury rejected both of the prosecution's primary theories of the case, first degree premeditated murder and felony-murder.

(b) Second, the jury rendered inconsistent verdicts, when it convicted Appellant of burglary, but acquitted him of felony murder. This suggests the jury intended to show some degree of leniency. That is because, if the jury convicted him of burglary, then, under the felony murder instructions, it ordinarily would have to convict him of first degree murder, too. The jury's decision to show leniency in this manner provides strong indication that the jury may well have returned an even lesser verdict, namely, voluntary manslaughter under imperfect self-defense, if the jury knew that it could rely on intoxication.

(c) Third, the jury sent a note to the trial court (discussed above) explicitly inquiring about the imperfect self-defense instruction. The fact that the jury was considering imperfect self-defense, even without a correct intoxication instruction, suggests it may well have returned a verdict on manslaughter under imperfect self-defense, if it were told correctly that intoxication was relevant. That is because intoxication could help explain how Appellant's beliefs could have been actual and honest, even if they were unreasonable. The instructional errors were significant. The jury received not just one, but two, instructions which effectively told it that

intoxication was irrelevant to imperfect self-defense.

(d) The fact that the jury was questioning who started the fight suggests that at least some of the jurors rejected the prosecution's theory that Appellant did the initial stabbing. If the jury believed Appellant was the original stabber, it would not have mattered whether the fight started with kicking in the door, or with the actual stabbing. If Appellant did not start the fight, his case for imperfect self-defense would have been stronger. And, if the jury had been allowed to rely upon Appellant's intoxication, his case for imperfect self-defense would have been stronger still.

(e) The prosecutor explicitly told the jury in closing argument that "voluntary intoxication cannot be considered for imperfect self-defense." (RT:X:883) His jury argument clarified any questions the jury may have had on this topic, and helped render the instructional errors even more prejudicial. People v. Cruz (1964) 61 Cal.2d 861, 868; People v. Godinez (1992) 2 Cal.App.4th 492, 504.

(f) Finally, the case was close. (i) The jury deliberated two full days after a relatively short trial where the taking of evidence only lasted for five days (CT:II:307-311), and where the only real issue was the degree of the homicide. This length of deliberation, especially after such a relatively short trial, shows the case was close. People v. Woodard (1979) 23 Cal.3d 329, 341. (ii) The jury rejected major portions of the prosecution's case, when it refused to convict on felony-murder, and when it acquitted on first degree murder. That, too, means the case was close. See, e.g., Olden v. Kentucky (1988) 488 U.S. 227, 233; People v. Brown (1993) 17 Cal.App.4th 1389, 1398. (iii) The jurors' questions and readback request showed the case was close. See, e.g., People v. Pearch (1991) 229 Cal.App.3d 1282, 1295.

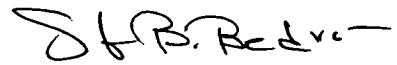
(g) Appellant had a strong case for imperfect self-defense. There were two different points in time when Appellant's intoxication may have caused him to misunderstand the seriousness of the threat, and when Appellant's intoxication may have caused him to fight back more aggressively or forcefully than was reasonable or legally proper. The jury convicted Appellant of the lightest version of homicide on which it was instructed correctly. There was no doubt that Appellant was intoxicated on multiple substances. There was no doubt that Appellant was acting bizarrely, because of his intoxication. Given all these factors, Appellant would have had a strong case for imperfect self-defense, if only the jury had been allowed to rely on intoxication. Correct instructions would have allowed the jury to understand how intoxication caused Appellant actually to believe that his acts were justifiable, even if those acts were unreasonable.

For all these reasons, the instructional errors were not harmless beyond a reasonable doubt. Indeed, they were prejudicial under any standard.[15]

WHEREFORE, Appellant prays for reversal and a new trial.

DATE: December 22, 2016

Respectfully submitted,



/s/ STEPHEN B. BEDRICK
STEPHEN B. BEDRICK
Attorney for Appellant

---

[15]When the Court of Appeal analyzed prejudice under Watson, its analysis was incomplete. It failed to consider any of the facts, described above, which showed that the jury exercised leniency, that the jury was considering imperfect self-defense, that the jurors were questioning who started the knife fight, and that the case was close.

Certification of Word Count

I certify that, according to our computer's word count, the text of this APPELLANT'S OPENING BRIEF ON THE MERITS is 13620 words.

Dated: December 22, 2016

/s/ STEPHEN B. BEDRICK
STEPHEN B. BEDRICK
Attorney for Appellant

PROOF OF SERVICE BY MAIL

I, S.B. MERIDIAN, hereby declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 1970 Broadway, Suite 1200, Oakland, CA 94612.

On the date below, I served the following documents:

APPELLANT'S OPENING BRIEF ON THE MERITS

by placing a true copy thereof, enclosed in a sealed envelope, postage prepaid, in the United States mail addressed as follows, except as to those parties where an e-mail address is given, and they have been served through the TrueFiling system:

Office of Attorney General
State of California
455 Golden Gate Avenue, Rm. 11000
San Francisco, CA 94102-3664
sfagdocketing@doj.ca.gov

Court of Appeal
Sixth District
333 W. Santa Clara St., #1060
San Jose, CA 95113
Sixth.District@jud.ca.gov

Judge Carrie Panetta, c/o Clerk
Monterey County Superior Court
240 Church Street
Salinas, CA 93902

Scott Donahue, Esq.
Office of District Attorney
240 Church Street
Salinas, CA 93902

Sixth District Appellate Program
95 S. Market #570
San Jose, CA 95113
servesdap@sdap.org

Mr. Juaquin G. Soto AU9263
Solano State Prison
P.O. Box 4000
Vacaville, CA 95696

David Lee
Office of Public Defender
111 W. Alisal Street
Salinas, CA 93901

DATE: December 22, 2016

/s/ S.B. MERIDIAN
S.B. MERIDIAN