No. S272237

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

JASON CARL SCHULLER,
Defendant and Appellant.

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

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

1. When a trial court errs in failing to instruct on imperfect self-defense in a noncapital murder trial, is the error one of federal law for failure to instruct on an element of murder?

2. Was such instructional error harmless in this case?

INTRODUCTION

California defines murder as an unlawful killing with malice aforethought. Imperfect self-defense reduces a defendant's culpability for what would otherwise be murder to voluntary manslaughter. This is because the unreasonable but actual belief in the need for self-defense shows an absence of malice.

The failure to instruct on voluntary manslaughter based on imperfect self-defense as a lesser included offense of murder has long been held to be an error of state law. Nonetheless, seizing on the aspect of imperfect self-defense that negates malice, Schuller contends that a failure to instruct on imperfect self-defense is tantamount to a failure to fully define the malice element of murder. Thus, he contends, an erroneous failure to instruct on imperfect self-defense is a violation of federal constitutional law subject to the harmless-beyond-a-reasonable-doubt standard of review for prejudice.

The United States Supreme Court has recognized that states may place on the prosecution the burden of disproving a defense that negates an element of a crime without also designating the absence of the defense an element of that crime. Imperfect self-defense operates much like a defense in that it is a mitigating

circumstance which reduces a defendant's culpability for what would otherwise be murder.

While imperfect self-defense negates malice, and California has placed on the prosecution the burden to prove the absence of imperfect self-defense when evidence in the record suggests its existence, federal due process does not require that it be treated as an element of murder in the manner Schuller suggests. This Court has in fact held that the absence of imperfect self-defense is not an element of murder. Instead, it is analogous to other defenses that negate an element of a crime and which are treated as implicating state law alone. The failure to instruct on the lesser included offense of voluntary manslaughter based on imperfect self-defense should continue to be construed the same way, as an error of state law only.[1]

STATEMENT OF THE CASE

A. The Trial

The Nevada County District Attorney charged Schuller with murder and alleged that he personally used and discharged a firearm causing death (Pen. Code, §§ 187, 12022.53). (1CT 58-59.)[2] Schuller initially entered a plea of not guilty, but later pleaded not guilty by reason of insanity. (1CT 62, 99; 1RT 247-248, 281-285.) The trial proceeded as follows.

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[1] The People use unreasonable self-defense and imperfect self-defense interchangeably. (See *People v. Beltran* (2013) 56 Cal.4th 935, 951.)

[2] Further statutory references are to the Penal Code unless otherwise designated.

1. Prosecution case-in-chief

W.T. lived in Grass Valley where he had converted his two-story home into two residences. (2RT 520-521.) He lived in the smaller apartment downstairs, while his daughter, H.T., lived in the larger upstairs residence with her two young children. (2RT 521-522; 3RT 560-563.)

W.T. and Schuller were friends, and W.T. tried to help Schuller get his life together. (2RT 522-524.) Schuller lived with W.T. for a few months in the summer of 2015. (2RT 522-523; 3RT 588-589.) Around the same time, Schuller told W.T.'s next door neighbor, Jesse McKenna, that he (Schuller) was trying to "come out of the closet." (2RT 529, 544, 546.) Around Christmas or New Year's, Schuller told McKenna that he was "out of the closet." (2RT 545-546.)[3] In approximately January or February, W.T. told Schuller that he was no longer welcome at W.T.'s house. (3RT 553, 554-555.)

On March 20, 2016, at around 8:00 p.m., H.T. sent her father a text message asking if he would help with her children. (3RT 565.) W.T. did not respond. (3RT 565; 4RT 1029.) About an hour later, H.T. heard loud noises coming from her father's residence. (3RT 567.) H.T. tried to text her father a second time and called him twice with no response. (4RT 1031-1032.) She then heard a loud explosion coming from her father's residence (3RT 569), and

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[3] McKenna realized that Schuller was claiming that he was openly gay. (*Ibid.*) Although he could not recollect doing so, McKenna was sure he mentioned this to investigators. (2RT 551; 3RT 552, 557-559.) McKenna did not believe W.T. was a homosexual. (2RT 545-546; 3RT 557.)

she saw Schuller's Chrysler 300 speed off (3 RT 563, 571; 4RT 1033). She knew something was wrong so she called her father twice more but he did not answer. (3RT 569-571; 4RT 1032-1033.)

McKenna also saw Schuller's car race out of the driveway with its tires screeching. (2RT 529, 535.) Flames and smoke were coming from W.T.'s residence. (2RT 518-519, 537.) He rushed in and found W.T. lying on the floor; both W.T. and the wall behind him were on fire. (2RT 537-538.) McKenna retrieved an extinguisher and put the fire out. (2RT 537-538; 3RT 572-573.) McKenna then noticed that the four burners on W.T.'s stove were lit and the oven door was open with the oven on. (2RT 538-540.) He turned everything off and called 911. (*Ibid.*)

H.T. entered the residence and saw W.T. lying on the floor. (3RT 574.) W.T.'s dentures were out, and his glasses were off. (3RT 574, 582.) H.T. also noticed that there was a large knife, a gun case, and a gas can on the dining room table. (2RT 492; 3RT 583-584.)

Police arrived at about 9:30 p.m. (2RT 484-485, 500-505.) Thick white smoke was coming from W.T.'s residence. (2RT 487, 506.) W.T.'s charred, dead body was lying between the kitchen and dining room. (2RT 488, 493, 495, 507-509.) There was a large pool of blood around his head and neck. (2RT 488, 508; 3RT 582.) The shower in the bathroom was running, and there were dark smudges at the bottom of the shower stall. (2RT 514.)

Thirteen expended bullet casings were found on the floor near W.T.'s body, as well as a number of spent projectiles, a live

round, the gas can, a gun case with an empty magazine, beer bottles, and an acetylene torch. (2RT 488-490, 508; 3RT 684, 867; 3RT 687, 690, 698, 748, 751.) Officers also collected the knife from the table and W.T.'s cell phone, which had a bullet hole in it, from under the dining room table. (3RT 710-711, 736, 752, 888-889; 4RT 882-884, 886-888.) There was no blood spatter on the knife. (5RT 1332.) There was some fire damage to the walls, and the apartment smelled of gas. (2RT 509-510.)

Nevada County Fire District Chief Jim Turner determined that some type of ignitable liquid like gasoline was poured on the body and ignited. (3RT 654-655, 658-659.) An autopsy later confirmed that W.T. had sustained nine gunshot wounds to the left side of his head and one to the right side of his head, likely from a ricochet bullet that bounced back into his head. (4RT 839, 846-848, 851-871.) W.T. had also sustained postmortem, superficial burn injuries to his body. (4RT 834-835, 840.) The cause of W.T.'s death was multiple wounds to the head. (4RT 845.)

While investigators were on the scene, Schuller led police on a high-speed, 38-mile chase. (3RT 621-634.) With the use of spike strips and an armored SWAT vehicle, Schuller was eventually stopped and taken into custody. (3RT 596-598, 602, 630-635, 637-638, 640, 642.) Schuller looked groggy and disoriented. (3RT 602.) When interviewed by detectives about the murder, he appeared to exaggerate being intoxicated. (5RT 1344.)

When Schuller's car was searched, police found a loaded semiautomatic handgun underneath a jacket on the front passenger side floorboard. (3RT 720-721.) It was determined that all 13 bullet casings and five of the recovered projectiles found at the scene were fired from the gun recovered from Schuller's vehicle. (3RT 729-733.)

2. Defense

Schuller testified in his own defense. He claimed to have seen hallucinations since he was a child, and he believed he was telepathic. (4RT 1036, 1063, 1065-1067.) He also used various drugs, which he claimed pacified his visions and the voices. (4RT 1067-1068.)

Schuller met W.T. in 2013, after he moved from Nebraska to California for a job. (4RT 1039-1041, 1059-1060.) According to Schuller, W.T. was a pot farmer. (*Ibid*.) Schuller went over to W.T.'s house to buy some "weed" a couple of times, and they became friends. (4RT 1042.) Schuller began selling marijuana for W.T. (4RT 1044.) Schuller also lived with W.T. for a couple of months in late 2013. (4RT 1044-1045, 1048.) After he moved out, Schuller spent the night once in a while at W.T.'s but lived primarily elsewhere. (4RT 1047-1050.)

Sometime in early 2016, Schuller was injured in a car accident and began having visions of dead people. (4RT 1061-1064.) He also started seeing what he called "the light." (4RT 1062, 1079-1081, 1083-1084, 1086-1088.) Schuller described "the light" as a gift from God that protected him and allowed him "to lift the transgressions from all the pains and ailments of every

man, woman, and child on earth." (4RT 1085, 1087.) He believed that there was a battle taking place in the spiritual realm involving Satan's army. (4RT 1090.) Although he would sometimes be attacked as part of this spiritual battle, he remained unharmed because he was protected by the light. (4RT 1097, 1099-1102; 5RT 1104-1106, 1109, 1113, 1117, 1120-1123.)

Schuller traveled back to Omaha for short periods of time because voices in his head directed him to. (4RT 1077-1081.) He usually went there to sell marijuana. (4RT 1079-1081.)

On one such trip in March 2016, police officers contacted Schuller in Winnemucca, Nevada in response to a call of a suspicious person driving recklessly in a white Chrysler 300. (5RT 1268-1270, 1279-1281.) Schuller did not have any form of ID, credit cards, or a cell phone in his possession but he told the officers his name, date of birth, and driver's license number. (CAT 6-7; 5RT 1275, 1285.)

When speaking to the officers, Schuller moved around a lot. (CAT 15; 5RT 1274-1275.) He spoke slowly, but did not smell of alcohol or marijuana. (CAT 8-9; 5RT 1274-1275, 1281-1282.) He wanted the officers to leave so he could rest. (CAT 8; 5RT 1277.) Schuller told the officers that three men were trying to attack him in the throat with needles. (CAT 12; 5RT 1273.) He said that "the entire police force and agencies of the world are letting Satan" do something. (CAT 11.) He made a comment about the antichrist being a "fake miracle performer" and "fake light." (CAT 17; 5RT 1274.) The officers searched both Schuller and his car and found nothing. (CAT 13-15, 19-20; 5RT 1283-1284.)

Since they did not believe he was a danger to himself or others, the officers let Schuller go. (5RT 1285.)

With respect to the killing of W.T. a few days later, Schuller testified that he had acted in self-defense. (5RT 1237.) According to Schuller, he had called W.T. on his drive back to California to ask W.T. for help to pay for gas. (5RT 1124-1125.) W.T. told Schuller he could not help him. (*Ibid.*) Schuller asked W.T. if he could come over to W.T.'s house. (5RT 1125.) He also told W.T. that he had to go to Monterey Bay and put one foot in the sea and one foot on land and say a certain prayer to end the threats against him. (*Ibid.*) W.T. hung up after telling Schuller he was "burning up." (5RT 1124-1125.) Nonetheless, when Schuller got to Grass Valley, he went to W.T.'s house to gather his belongings so he could drive back to Omaha. (5RT 1124, 1131.)

When Schuller arrived at W.T.'s house, it was dark outside. (5RT 1127.) Schuller felt safe, and he was glad the trip was over. (*Ibid.*) Schuller and W.T. drank some beers and smoked marijuana. (5RT 1129-1130.) Schuller told W.T. about his trip and shared the light with him. (5RT 1127.) According to Schuller, W.T. looked surprised and in awe. (*Ibid.*) W.T. said, "Yes, it is him" to people outside. (5RT 1128.)

Schuller took a shower. (5RT 1129, 1131.) He claimed he heard five gunshots while he was in the shower. (5RT 1131.) When he looked out the shower door, Schuller saw a figure in the mist. (5RT 1131-1132.) He thought it was W.T. (*Ibid.*) Schuller got of the shower and asked W.T. why he had shot at him. (5RT 1132.) W.T. ignored the question. (*Ibid.*)

Schuller and W.T. then drank more beer and smoked more marijuana. (5RT 1131-1132, 1136.) Schuller had a gun that he stored at W.T.'s house. (5RT 1133.) W.T. retrieved the gun, took the cable lock off it, and told Schuller to take it with him. (5RT 1132-1135.) Schuller agreed to do so and placed the gun on the dining room table to take with him when he left. (5RT 1135.)

Schuller again shared the light with W.T. because W.T. had told him he had a fondness for children. (5RT 1139.) Schuller believed he could cleanse W.T. of this evil by doing so. (5RT 1135-1136, 1139.) Schuller was usually able to take the light back after sharing it with someone. (5RT 1136.) But this time W.T. kept the light. (*Ibid.*) When Schuller looked up, W.T. had a smirk on his face and said, "See, I told you I could take it from him" as he looked outside. (5RT 1136, 1139.) Schuller asked "Why would you want to take it from me?" (5RT 1139.)

W.T. grabbed a big knife from a kitchen drawer. (5RT 1136-1137.) Schuller tried to run out of the house through the French doors in the kitchen but they were locked. (5RT 1137.) Schuller then ran toward the kitchen table to put something between him and W.T. (*Ibid.*) W.T. tried to stab Schuller but he could not get close enough because there was large white angel protecting Schuller. (5RT 1137-1138.)

W.T. reached for the gun on the table, but Schuller grabbed it first. (5RT 1138.) Schuller pointed the gun at W.T. and asked if he was Lucifer. (*Ibid.*) W.T. nodded his head up and down affirmatively. (*Ibid.*) Schuller asked W.T. again, and W.T. said, "Yes." (*Ibid.*) Schuller replied, "Ha, ha, you're not Lucifer," and

put the gun down on the dining room table. (*Ibid.*) As soon as Schuller put the gun down, W.T. reached for it with his right hand and raised the knife up into a stabbing motion with his left hand. (*Ibid.*) W.T. was about five feet from Schuller. (5RT 1226-1227.) Schuller picked up the gun again, took two steps back, and shot W.T. in the forehead. (5RT 1138, 1227.) W.T. dropped the knife on the ground as he fell onto his right side. (5RT 1223, 1228-1229.) Schuller was "freaked out" and asked him, "Why did you do that?" (5RT 1138-1140, 1213-1217, 1219, 1222, 1226-1227, 1299-1230.) Schuller testified that he acted out of fear because W.T. had a big knife with "intention." (5RT 1139-1140, 1141.)

Schuller claimed that, after being shot, W.T. quickly tried to push himself up off the ground in an attack on Schuller. (5RT 1231.) As he did, W.T. said, "You f'd up." (5RT 1141.) Schuller jumped back and shot W.T. four to five more times in the head. (5RT 1139, 1231.) Schuller was afraid, and he wanted the attacks on his life to stop. (5RT 1138-1139, 1141, 1231.) Schuller did not know if W.T. had grabbed the knife, but it ended up back on the table. (5RT 1138-1139.)

Schuller sat down on a chair and thought God would come and the world would end. (5RT 1142-1143.) Schuller tried to use W.T.'s cell phone to call 911 but could not because it kept ringing. (5RT 1143.) W.T. then gasped and his dentures flew out of his mouth. (5RT 1143-1144.) This scared Schuller. (*Ibid.*) He jumped back and shot W.T. three more times. (5RT 1144.)

Schuller's gun was empty, so he put a new magazine in, and slid a round into the gun's chamber. (5RT 1144-1145.)

W.T.'s phone continued to ring, so Schuller shot it three times. (5RT 1145.) The third shot went through the phone. (*Ibid.*) Schuller believed that demons were flowing through his body and W.T.'s. (5RT 1144-1147.) As Schuller turned to leave, he saw a gas can. (5RT 1147.) He took the can and poured gas on W.T. so he could light the body on fire and send the demons back to hell. (*Ibid.*) Schuller ignited the body with a lit cigarette. (5RT 1147-1148.)

The burners on the stove were on when Schuller arrived at W.T.'s residence that evening. (5RT 1149.) W.T. liked to heat his house with them on. (*Ibid.*) Schuller tried to turn them off, but was unable to do so because he was panicked. (5RT 1149-1150.) Schuller turned the shower on and moved the gas can because he did not want the entire house to catch on fire. (5RT 1149-1150, 1195.)

Schuller got into his car and decided to drive to Monterey before the sunrise to end what was happening to him. (5RT 1148-1149, 1150-1151.) He admitted he drove out of the driveway "pretty fast" and ran through a red light. (5RT 1151.) Schuller felt demons in his body again. (*Ibid.*) He eventually noticed that police, including a helicopter, were following him. (5RT 1151-1155.) When the police put down spike strips and stopped his vehicle, he was surprised. (*Ibid.*) Since he believed the police could not get any closer, Schuller voluntarily gave himself up. (5RT 1156.)

Schuller thought that everything he went through sounded a little crazy, and he could see someone diagnosing him as crazy or insane. (5RT 1157-1158.) However, he insisted that the hallucinations he had were real. (5RT 1255.) He shot W.T. because W.T. came at him with a knife and he was in fear for his life even though the armor of God had protected him. (5RT 1159, 1162.)

3. Rebuttal

Jesse McKenna's wife, Nicole, testified that her husband told her before the shooting that Schuller told him he was gay. (5RT 1359.) McKenna also told her that W.T. had said Schuller was no longer welcome at W.T.'s residence. (5RT 1361-1362.)

Dr. Kevin Dugan, a clinical and forensic psychologist, was appointed by the court to evaluate Schuller. (6RT 1387, 1402-1407.) Dr. Dugan concluded that Schuller was exaggerating and faking his psychiatric symptoms. (6RT 1407-1418.) Dr. Dugan noted that Schuller exhibited psychotic features around the time of the shooting, particularly during the Winnemucca incident. (6RT 1410.) However, Dr. Dugan did not believe Schuller had a qualifying (for purposes of an insanity finding) mental health disorder but rather that he had a history of drug abuse that could have been the cause of any hallucinations he reported. (6RT 1394-1395, 1419-1420.) Dr. Dugan believed that the fact Schuller shot the victim multiple times, burned the body, and tried to evade arrest demonstrated that Schuller knew what he was did was wrong and that he understood the consequences of his actions. (6RT 1418.) Dr. Dugan concluded that Schuller's actions

in this case were consistent with his "historic pattern of aggressive violent substance abusing and criminal conduct." (6RT 1421.)

Dr. Deborah Schmidt, a forensic psychologist, was also appointed by the court to evaluate Schuller. (6RT 1449-1450.) She concluded that Schuller was malingering or exaggerating his mental health conditions. (6RT 1462.) Dr. Schmidt believed Schuller knew what he did was wrong based on his conduct during and after the shooting. (6RT 1460, 1462, 1463.) She also stated that Schuller's visual hallucinations were more likely the result of his long history of drug abuse rather than any mental health issues. (6RT 1455-1458, 1461.)

Lisa Shippers testified that she had been in a dating relationship with Schuller in 2015 and 2016. (6RT 1446.) She described Schuller as manipulative and horrible. (6RT 1447.) Schuller had been aggressive toward her and her father and had threatened to kill her. (*Ibid.*) As a result, Shippers left the area. (6RT 1446-1448.)

4. Further proceedings

Before jury deliberations, Schuller requested a jury instruction on the lesser included offense of voluntary manslaughter based on imperfect self-defense. The trial court denied the request on the ground that much of the evidence that would support the defense was improperly based on asserted delusions and the remaining evidence was insufficient to warrant the instruction. (2CT 396-399; 6RT 1498-1510.) The jury

thereafter found Schuller guilty of first degree murder and found true the firearm allegation. (2CT 355-356, 404-405.)

A separate sanity phase was then held, but the jury was unable to reach a decision on the question of sanity. (2CT 429.) The issue was retried before a different jury, which found Schuller legally sane at the time he committed the murder. (3CT 660, 664.)

The trial court sentenced Schuller to 25 years to life in prison for the first degree murder conviction and a consecutive term of 25 years to life for the gun enhancement. (3CT 818, 827-828.)

B. The Appeal

In the Court of Appeal, Schuller contended that the trial court committed federal constitutional error in denying his request to instruct the jury on the lesser included offense of voluntary manslaughter based on a theory of imperfect self-defense. The Court of Appeal agreed there was instructional error, but held that, given the overwhelming evidence that Schuller was not acting in any form of self-defense, the error was harmless under the state law harmless error test.

Following the issuance of the Court of Appeal's decision affirming the judgment, Schuller filed a petition for rehearing, arguing that the Court of Appeal had improperly applied the state law standard for assessing prejudice because the error was of federal constitutional dimension. The Court of Appeal denied the rehearing petition but modified its opinion with no change in judgment. The modification analyzed this Court's decision in

People v. Gonzalez (2018) 5 Cal.5th 186, in which the trial court failed to instruct on imperfect self-defense or heat of passion—both of which are defenses to murder that negate malice aforethought. The Court of Appeal reasoned that *Gonzalez* did not equate the failure to instruct on these theories with a failure to fully instruct on the element of malice so as to make the error a federal constitutional one. The Court of Appeal nonetheless concluded that under either the *Watson* or *Chapman* standard for assessing prejudice, the error was harmless.[4]

ARGUMENT

I. BECAUSE THE ABSENCE OF IMPERFECT SELF-DEFENSE IS NOT AN ELEMENT OF MALICE MURDER, THE FAILURE TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER DOES NOT VIOLATE DUE PROCESS

Schuller claims that an erroneous failure to instruct on imperfect self-defense in a murder case violates the federal Constitution and is therefore subject to the *Chapman* standard of

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[4] While Schuller argued in his opening brief on appeal that the instructional error violated his federal Constitutional right to due process, necessitating *Chapman* review (AOB 45-46), he did not advance the theory that failing to instruct on imperfect self-defense is tantamount to failing to fully define the element of malice until his Petition for Rehearing, in which he cited *People v. Dominguez* (2021) 66 Cal.App.5th 163. The court did not request an Answer to the petition (Cal. Rules of Court, rule 8.268(b)(2)), and therefore the People did not address that argument below. And while the People contested that the court had erred in the first place by declining Schuller's request for the imperfect self-defense instruction, the People did not seek review of that question.

harmless error review. (OBM 23-25.)[5] His claim turns on one central assertion—that the absence of imperfect self-defense is functionally an element of malice murder. (OBM 36.) He argues that imperfect self-defense (and heat of passion) "are key parts of the *definition of malice*, an essential element of the greater crime of murder." (OBM 36, original italics.)[6] Schuller's premise, however, is wrong.

Within the bounds of the Due Process Clause, the Federal Constitution gives states the ability to designate the elements that make up crimes, along with those that constitute such things as affirmative defenses. The prosecution always bears the burden of proving malice in a murder case. But California does not include the absence of imperfect self-defense (or heat of passion) in the general definition of malice. Rather, imperfect self-defense is a circumstance that, if present in a particular case,

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[5] Under *Chapman v. California* (1967) 386 U.S. 18, 24, which states the standard of review for prejudicial error arising from a violation of federal constitutional rights, the question is whether the People can demonstrate that the error was harmless beyond a reasonable doubt, that is, whether the court can conclude beyond a reasonable doubt that the error did not contribute to the verdict. The state-law harmless error standard under *People v. Watson* (1956) 46 Cal.2d 818, 837, requires the appellant to demonstrate that it is reasonably probable that a result more favorable to the appellant would have occurred absent the error.

[6] Because the doctrines of imperfect self-defense and heat of passion based on provocation function similarly as forms of voluntary manslaughter, the People presume that the principles discussed in this brief concerning the former doctrine apply equally to the latter.

may be used by the defense to argue that the prosecution has failed to prove malice beyond a reasonable doubt, making the defendant guilty of, at most, the lesser-included offense of voluntary manslaughter.

That well-settled framework does not violate federal due process. In particular, California's choice to allocate to the prosecution the burden of proving malice beyond a reasonable doubt in the face of an imperfect self-defense claim that is properly presented on the facts of a case—sometimes described as an obligation to disprove the presence of imperfect self-defense beyond a reasonable doubt—does not transform the circumstance into an essential component of malice, and thus an element of murder. The manner in which California has treated the doctrine of imperfect self-defense reveals instead that, in practice, this exculpatory theory operates much like other defenses that negate an element of the charged offense, thereby lessening a defendant's culpability for a crime, which have been treated as matters solely of state law.

A. Voluntary manslaughter is a lesser-included offense to murder, and the failure to instruct on lesser-included offenses is state law error

Murder is defined as "the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Malice aforethought "may be express or implied." (§ 188, subd. (a).)[7] "In

[7] Malice is "express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature." (§ 188, subd. (a)(1).) It is "implied when no considerable provocation appears, or when the circumstances attending the (continued…)

certain circumstances, however, a finding of malice may be precluded, and the offense limited to manslaughter, even when an unlawful homicide was committed with intent to kill. In such a case, the homicide, though not murder, can be no less than voluntary manslaughter." (*People v. Rios* (2000) 23 Cal.4th 450, 460.) Where a defendant kills in an actual but unreasonable belief in the need for self-defense, he or she is guilty of voluntary manslaughter. (*People v. Elmore* (2014) 59 Cal.4th 121, 133-134.) Because imperfect self-defense (or provocation based on heat of passion) reduces an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice, this form of voluntary manslaughter is considered a lesser and necessarily included offense of murder. (*People v. Simon* (2016) 1 Cal.5th 98, 132, citing *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

It is well-established in California that the failure to instruct on a lesser included offense in a noncapital case is error of state law alone. This Court has so held repeatedly. (*Breverman, supra,* 19 Cal.4th at p. 165; *People v. Moye* (2009) 47 Cal.4th 537, 555-556; *Gonzalez*, *supra*, 5 Cal.5th at p. 196.) Recently, this Court confirmed that "[a]lthough we have long recognized the duty to instruct on lesser included offenses under *California* law, neither we nor the United States Supreme Court recognizes a

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(…continued)

killing show an abandoned and malignant heart." (§ 188, subd. (a)(2).)

similar duty to instruct on lesser included offenses under *federal constitutional* law—at least in noncapital cases." (*Gonzalez*, *supra*, 5 Cal.5th at p. 198, original italics.)[8]

These authorities seem to resolve Schuller's claim in this case. Indeed, in both *Breverman* and *Moye*, this Court determined that the erroneous failure to instruct the jury in a murder case on heat of passion voluntary manslaughter is state law error governed by *Watson*. (*Breverman*, *supra*, 19 Cal.4th at pp. 165-179; *Moye*, *supra*, 47 Cal.4th at pp. 555-556.) Similarly, in *Gonzalez*, this Court applied *Watson* to the erroneous failure to instruct on lesser included offenses to first-degree murder, including voluntary manslaughter. (*Gonzalez*, *supra*, 5 Cal.5th at pp. 198-199.) These authorities strongly suggest that the issue in this case is settled.

Schuller nonetheless presses a particular claim that was not directly addressed in these cases. Schuller's argument—that the instructions on malice murder were incomplete because they did not include the requirement that the prosecution prove the absence of imperfect self-defense—has its roots in Justice Kennard's dissents in both *Breverman* and *Moye*. (*Breverman*, *supra*, 19 Cal.4th at p. 189 (dis. opn. of Kennard, J.); *Moye*, *supra*, 47 Cal.4th at pp. 563-564 (dis. Opn. of Kennard, J.).) Though

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[8] The *Gonzalez* court stated that it has yet to determine whether a trial court's failure to instruct on a requested affirmative defense instruction supported by substantial evidence is federal constitutional error or state law error. (*Gonzalez*, at p. 199; *People v. Salas* (2006) 37 Cal.4th 967, 984.)

discussed in those dissents, this Court declined in each case to address the issue because it had been neither raised by the defendant nor briefed by the parties. (*Breverman*, *supra*, at p. 170, fn. 19; *Moye*, *supra*, at p. 558, fn. 5.)

Though Schuller's precise argument has not been conclusively resolved by this Court, precedent indicates that the absence of imperfect self-defense is not an element of malice murder. Accordingly, the error in failing to instruct the jury on imperfect self-defense is state law error alone.

B. The absence of imperfect self-defense is not an element of murder under California law

The doctrine of imperfect self-defense is, and historically has been, applied as an exculpatory circumstance that mitigates a defendant's culpability for what would otherwise constitute murder. When evidence supporting the existence of the doctrine is properly presented in a case, this State has tasked the prosecution with proving its absence beyond a reasonable doubt—that is, maintaining that the element of malice remains present beyond a reasonable doubt. (*Barton*, *supra*, 12 Cal.4th at p. 199-203, *Rios*, *supra*, 23 Cal.4th at p. 461-462.) This common law scheme does not lead to the conclusion that California treats the absence of imperfect self-defense as an integral part of the element of malice. Nor does the fact that imperfect self-defense negates malice logically lead to the conclusion that the absence of imperfect self-defense is an element of murder. In fact, this Court in *People v. Martinez* (2003) 31 Cal.4th 673, explicitly held that the absence of imperfect self-defense is *not an element* of the offense of murder.

In *Martinez*, the defendant was convicted of first degree murder with a prior murder special circumstance and related crimes. (*Martinez*, *supra*, 31 Cal.4th at p. 678.) The special circumstance finding was based on the defendant's 1980 Texas murder conviction following a guilty plea. (*Ibid.*) On automatic appeal, the defendant challenged a pretrial holding by the Court of Appeal that the Texas murder conviction was for an offense that, under Texas law, included all elements of second degree murder, as defined by California law, thereby satisfying section 190.2. (*Ibid.*) Specifically, he argued that the Texas murder statute did not permit malice to be negated by mitigating circumstances such as imperfect self-defense and voluntary intoxication. (*Id.* at p. 683.)

This Court rejected the defendant's argument, reasoning that "mitigating factors [such as imperfect self-defense] are not elements of the offense of murder but are defensive matters, which may reduce murder to manslaughter by negating malice." (*Martinez*, *supra*, 31 Cal.4th at p. 685.) Thus, the unavailability of imperfect self-defense under Texas law did not defeat application of the prior murder special circumstance. (*Id.* at pp. 684-685.) The Court in *Martinez* explained that, "the absence of imperfect self-defense or voluntary intoxication is not an *element* of the offense of murder to be proved by the People. Instead, these doctrines are 'mitigating circumstances,' which may reduce murder to manslaughter by negating malice." (*Id.* at p. 685, emphasis in original, quoting *Rios*, *supra*, 23 Cal.4th at p. 461.)

The history and development of the doctrine of imperfect self-defense as a theory of voluntary manslaughter further demonstrates that the absence of imperfect self-defense is not an element of murder. Murder is an unlawful killing with malice aforethought (§ 187, subd. (a)); manslaughter is an unlawful killing without malice (§ 192). "The vice is the element of malice; in its absence the level of guilt must decline." (*People v. Flannel* (1979) 25 Cal.3d 668, 680.) The doctrine of imperfect self-defense arose from this principle and has both statutory and common law roots. (*In re Christian S.* (1994) 7 Cal.4th 768, 773-774.)[9]

As early as 1936, a California court approved the imperfect self-defense doctrine: "'[I]f the act is committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter' [citation]." (*People v. Best* (1936) 13 Cal.App.2d 606, 610.) For years, however, the rule remained indistinct and failed to achieve headnote status or to be included in the standard CALJIC instruction. (*Flannel, supra,* 25 Cal.3d at p. 682.)

That changed in 1981, when this Court cemented imperfect self-defense as a general principle of law. (*Flannel*, *supra*, 25

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[9] Because malice is a statutory requirement for a murder conviction (§ 187, subd. (a)), the statute requires courts to determine whether an actual but unreasonable belief in the imminent need for self-defense rose to the level of malice within the statutory definition. (*Christian S.*, *supra*, 7 Cal.4th at pp. 773-774.)

Cal.3d at p. 682.) This Court held that an honest but unreasonable belief in the need to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the requisite mental state for murder, thus reducing that offense to manslaughter. (*Id.* at pp. 679-680.) This Court observed that the doctrine of imperfect self-defense was "universally supported by those legal commentators who have given i[t] consideration." (*Id*. at p. 680.) Following the *Flannel* decision, imperfect self-defense has been "considered a general principle for purposes of jury instruction." (*Id*. at p. 682.)[10]

Because imperfect self-defense was firmly established by this Court's *Flannel* decision in 1981, it is assumed the Legislature was aware of the doctrine and would have made clear any intent to abolish the doctrine since then. (*Christian S.*, *supra*, 7 Cal.4th at p. 774.)[11] By the same token, the Legislature could have made clear any intent to establish the absence of imperfect self-defense as an element of murder had it intended the doctrine to operate that way. It has not done so. In fact, just recently, the Legislature amended the definition of malice when it passed Senate Bill No. 1437 (2017-2018 Reg. Sess.). That legislation added the language found in section 188, subdivision (a)(3), concerning the imputation of malice, and also made minor

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[10] The doctrine is sometimes referred to as the "*Flannel* defense." (See e.g., *Martinez, supra,* 31 Cal.4th at p. 681.)

[11] In contrast, *Christian S.* concluded that the Legislature meant to abrogate diminished capacity when it amended the Penal Code in 1981. (*Christian S.*, *supra*, 7 Cal.4th at p. 783.

grammatical changes to section 188 and separated its provisions into sequential subdivisions and subsections. Despite having knowledge of district court holdings that the definition of malice includes the absence of imperfect self-defense and the absence of heat of passion (*Dominguez*, *supra*, 66 Cal.App.5th at pp. 183-184; *People v. Thomas* (2013) 218 Cal.App.4th 630, 641-642), it appears the Legislature saw no need to amend the definition of malice to include the absence of these circumstances.

These authorities and the history of imperfect self-defense demonstrate that, despite requiring the prosecution to prove the absence of imperfect self-defense beyond a reasonable doubt where evidence has been presented to support it, the state of California has not and does not define or treat imperfect self-defense as an element of murder. Instead, imperfect self-defense is a "form of voluntary manslaughter." The doctrine amounts to an exculpatory theory which decreases malice murder to the lesser offense of manslaughter by negating malice, similar to a defense. In other words, it is an extrinsic circumstance that operates by lessening a defendant's culpability for what is otherwise murder by explaining or partially excusing the deadly act. There is no evidence that California has ever intended the absence of imperfect self-defense to be an element of murder. Rather, the relevant element of murder is malice, which the prosecution must prove beyond a reasonable doubt whether or not any imperfect self-defense claim is raised. And due process does not require that this State treat imperfect self-defense as part of the malice element, even though the burden of persuasion

remains on the prosecution in the face of an imperfect self-defense claim.

C. California's choice to place on the prosecution the burden of disproving imperfect self-defense does not make the doctrine an element of murder

In California, if substantial evidence exists in the record that could support imperfect self-defense, the prosecution is assigned the burden to prove the absence of imperfect self-defense—that is, to maintain beyond a reasonable doubt that malice exists despite the claim of imperfect self-defense. (*Rios*, *supra*, 23 Cal.4th at p. 462.) California's choice to assign this burden to the prosecution does not mean, however, that the absence of imperfect self-defense is part of the element of malice, and hence, an element of murder.

The United States Supreme Court has "explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) The case of *Patterson v. New York* (1977) 432 U.S. 197, involved a *Winship* challenge to a New York statue defining murder as causing death with intent, subject to an affirmative defense of extreme emotional disturbance for which there was a reasonable explanation. (*Id*. at pp. 205-206.) Patterson contended that because the presence or absence of an extreme emotional disturbance affected the severity of sentence, *Winship* and *Mullaney v. Wilbur* (1975) 421

U.S. 684, required the State to prove the absence of that fact beyond a reasonable doubt. (*Patterson*, at pp. 198, 201.)

The *Patterson* Court, reasoning that extreme emotional disturbance was an affirmative defense not necessary to prove the commission of the crime but was instead a separate issue, rejected this argument and "decline[d] to adopt as a constitutional imperative . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." (*Patterson*, *supra*, 432 U.S. at p. 210.) The Court expressly disavowed the notion that the prosecution must "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." (*Id.* at p. 207.) Thus, *Patterson* appeared to leave open to the states the ability to decide the elements that define their crimes, with some limit upon state authority to reallocate the traditional burden of proof.

This latter proposition was explicitly pronounced by the High Court in *Engle v. Isaac* (1982) 456 U.S. 107. In that case, three Ohio state prisoners brought federal habeas claims in which they argued that jury instructions on self-defense were unconstitutional. (*Id.* at p. 110.) For over a century, Ohio had required criminal defendants to carry the burden of proving self-defense by a preponderance of the evidence. (*Ibid.*) Prior to petitioners' trials, the Ohio legislature passed a statute (Ohio Rev.Code Ann. § 2901.05), which reallocated that burden to the

prosecution, with the burden of production remaining with the defendant. (*Engle*, *supra*, 456 U.S. at p. 111.) However, it was not until two years later that the Ohio Supreme Court interpreted the statute, concluding that once the defendant produced some evidence of self-defense, the prosecutor had to disprove self-defense beyond a reasonable doubt. (*Id*. at p. 107.) Prior to that time, courts had applied the statute as though it did not alter Ohio's traditional burden-shifting rules. (*Id*. at p. 111.) The *Engle* defendants, each of whom raised self-defense, were tried after passage of the statute but before the state supreme court's articulation of how the new burdens operated. (*Id*. at pp. 111-112.) As a result, their juries were instructed that the accused bore the burden of persuasion on self-defense. (*Ibid*.)

Analogous to Schuller's argument here, the *Engle* defendants argued that, as set forth in *Winship*, *Mullaney*, and *Patterson*, due process required the prosecution to prove beyond a reasonable doubt the absence of self-defense, which negated elements of the offense, as the new Ohio statute had "implicitly designated absence of self-defense an element of the crimes" with which they were charged because it assigned the burden of persuasion to the prosecution. (*Engle*, *supra*, 456 U.S. at p. 119, 121.) The Supreme Court rejected that argument, recognizing that "the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime." (*Id.* at p. 120.) It stated that its prior opinions—*Winship*, *Mullaney*, and *Patterson*—"do not suggest that whenever a State requires the prosecution to

prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. (*Ibid*.) Rather,

> [a] State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. The Due Process Clause does not mandate that when a State treats absence of an affirmative defense as an 'element' of the crime for one purpose, it must do so for all purposes.

(*Id*. at p. 120, fn. omitted.) In the case of Ohio's Code, the State decided to assist defendants by requiring the prosecution to disprove certain affirmative defenses, but without concrete evidence that the State meant to designate absence of self-defense an element of the crimes, the High Court refused to adopt the defendants' construction of state law. (*Id*. at pp. 120-121.) Thus, the *Engle* court concluded that the defendants' claim did not amount to a violation of the federal Constitution, but rather suggested that the instructions at their trials may have only violated Ohio state law. (*Id*. at p. 121.)[12]

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[12] In *Patterson*, the Court made clear that a state would not be permitted "to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes." (*Patterson*, 432 U.S. at p. 210.) And in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, and subsequent cases, the Court held that regardless of how a state labels the elements of a crime, any fact that increases the statutorily authorized punishment must be submitted to a jury and proved beyond a reasonable doubt. No such issue is implicated in this case, since the prosecution bears the burden to prove malice beyond a reasonable doubt, whether or not a claim of imperfect self-defense is raised.

These United States Supreme Court decisions make clear that the fact that a state may place the burden of proof (or disproof) beyond a reasonable doubt regarding a particular defense on the prosecution does not necessarily mean that the defense becomes fused with the elements of the crime so that it is subject to federal constitutional requirements governing elements. In the circumstances here, the assignment of the burden does not mark the absence of imperfect self-defense as an element of murder, but, as will be discussed below (see Arg. I.D, *post*), imperfect self-defense is an exculpatory theory operating much like other defenses that implicate only state law.

Schuller's reliance on *Mullaney* in this regard is misplaced. In *Mullaney*, the High Court held that due process of law requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when that issue is properly presented. (*Mullaney, supra,* 421 U.S. at p. 704.) Schuller argues that *Mullaney* supports the conclusion that the absence of imperfect self-defense is considered a fact necessary to constitute the crime of murder, and thus the failure to instruct the jury on this circumstance violates due process and must be reviewed under the federal harmless error standard. (OBM 34-39.)

At issue in *Mullaney* was whether Maine's murder statute met the constitutional due process requirement that the state must prove every element of a criminal offense beyond a reasonable doubt. (*Mullaney*, *supra*, 421 U.S. at pp. 684-685.) Maine law provided that, absent justification or excuse, all

intentional or criminally reckless killings were presumed to be murder, unless the defendant proved that the killing was committed in the heat of passion. (*Id*. at pp. 691-692.) Under Maine law, murder required malice aforethought. (*Id*. at p. 686 & fn.3.) Without malice aforethought, "homicide would be manslaughter." (*Ibid*.) In practice, therefore, "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." (*Ibid*.) In other words, the prosecution benefited from a statutory presumption that all homicide was murder punishable by life imprisonment, which is at odds with the traditional view of the burden of proof in criminal cases. (*Id*. at p. 704.)

Mullaney determined that this burden-shifting violated the constitution, holding that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (*Mullaney*, *supra*, 421 U.S. at p. 704.) It reasoned that "the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction." (*Id*. at p. 701.) *Mullaney* thus "held unconstitutional a mandatory rebuttable presumption that shifted to the defendant a burden of persuasion on the question of intent." (*Francis v. Franklin* (1985) 471 U.S. 307, 317.)

To be sure, a state may not simply redefine elements as defenses so as to shift the burden of proof onto a criminal defendant. (See fn. 12, *ante*.) But in California, unlike Maine, defendants do not have the burden of proof to show the existence of imperfect self-defense. Thus, the jury in Schuller's case was not instructed that the burden shifted to him such that he had to prove that he acted in unreasonable self-defense or that without such proof, malice would be conclusively implied from an intentional killing. Because the Maine statute is quite different from California's law, *Mullaney* does not support Schuller's argument. Schuller's jury was properly instructed that the prosecution was burdened with proving beyond a reasonable doubt every element of the offense of murder. (2CT 443.) Importantly, *Mullaney* does not stand for the proposition that a mitigating circumstance that limits culpability or negates an element of an offense, even where the prosecution has the burden to prove it, is an element of the offense. And just two years after *Mullaney*, the Supreme Court in *Patterson* clarified that all *Mullaney* held was that the state must prove "every ingredient of an offense" and that it cannot shift to the defendant any part of that burden by means of a presumption. (*Patterson*, *supra*, 432 U.S. at p. 215.)

D. The absence of imperfect self-defense is analogous to other types of defenses that implicate state law only

Fundamentally, imperfect self-defense operates no differently from other defenses that negate an element of a crime and that are not considered to be part of the elements of a crime.

In order for the jury to be instructed on the theory, the defendant must raise some evidence to show the existence of the defense. The burden of persuasion to show its absence may then shift to the prosecution. But proof of the absence of a defense in general has not been seen as an element of an offense, and the same should be true more specifically as to imperfect self-defense.

Section 26, for example, describes a range of circumstances or "defenses" which, the Legislature has recognized, operate to negate the mental state element of crimes and show there is no union of act and criminal intent or mental state. (See *People v. Mower* (2002) 28 Cal.4th 457, 479, fn. 7 [listing California defenses that merely require evidence that raises a reasonable doubt of an element].) When a defense operates to negate an element of the crime, the defendant must raise a reasonable doubt as to the underlying facts. (*Id*. at p. 479, citing Evid. Code, § 501.)

Imperfect self-defense, while denominated a form of voluntary manslaughter by this Court, operates identically to such defenses in that it is exculpatory in nature and acts to negate the element of malice where murder is alleged. Rather than operate as a complete defense to the charge of murder, however, it instead reduces murder to voluntary manslaughter.

Illustrative of this concept is *People v. Babbitt* (1988) 45 Cal.3d 660, where this Court considered whether the affirmative defense of unconsciousness should be considered an element of murder for purposes of due process. In *Babbitt*, the defendant was charged with murder, rape, burglary and robbery. One of the

theories advanced by the defendant was unconsciousness stemming from a psychomotor epileptic seizure. (*Id*. at p. 676.) The defendant argued that because unconsciousness negates the element of intent, proof of consciousness is a fact necessary to prove intent. Thus, according to the defendant, the presumption of consciousness created in CALJIC No. 4.31 impermissibly lightened the prosecutor's burden of proving intent, or, stated conversely, it impermissibly shifted the burden of negating intent to the defendant. (*Id*. at p. 691.) The People argued that consciousness is not an element of the offenses, but rather, unconsciousness is an affirmative defense, and that placing on the defendant the burden of proving an affirmative defense does not violate due process. (*Ibid*.) Only when there is evidence tending to show that the defendant was unconscious is the prosecution required to establish beyond a reasonable doubt that he was conscious, and in those circumstances there is no due process violation in permitting the prosecution to rely on the rebuttable presumption of consciousness. (*Id*. at pp. 691-692.)

The *Babbitt* court rejected the defendant's argument, holding that while the State had assumed the burden of disproving unconsciousness as an affirmative defense to the crime of murder, consciousness is not an element of murder for purposes of due process. (*Babbitt*, *supra*, 45 Cal.3d at p. 693.) The court relied on *Engle*'s pronouncement that determining whether the prosecution has a constitutional duty to negate an affirmative defenses depends, at least in part, on "the manner in which the State defines the charged crime," and that a State may

want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. (*Engle*, *supra*, 456 U.S. at p. 120.) The *Babbitt* court explained that the elements of murder are death, causation, and malice, whereas unconsciousness is a defense. (*Babbitt*, *supra*, 45 Cal.3d at p. 693.) It further reasoned,

> Although the state, once the defendant raises the issue, has assumed the burden of disproving unconsciousness, this fact of itself does not transform absence of the defense—consciousness—into an element of murder for purposes of due process analysis. This is true even though unconsciousness negates the elements of voluntariness and intent, and when not voluntarily induced is a complete defense to a criminal charge.

(*Ibid*.) The court concluded that because consciousness is not an element of the offense of murder, the jury instruction did not impermissibly shift to the defendant the burden of negating an element, nor did the instruction violate due process by impermissibly lightening the prosecution's burden of proving every element beyond a reasonable doubt. (*Id*. at pp. 693-694.)

Comparing unconsciousness to imperfect self-defense provides a useful analogy. Just as the absence of unconsciousness is not an element of murder for purposes of due process, neither is the absence of imperfect self-defense.

In fact, *Barton* recognized that "voluntary manslaughter closely resembles an affirmative defense," because it is generally the defendant who offers evidence to show that the killing occurred in a sudden quarrel or heat of passion, or in unreasonable self-defense, and therefore the crime committed is not murder, but only voluntary manslaughter. (*Barton*, *supra*, 12

Cal.4th at p. 199.) In particular, unreasonable self-defense "closely resembles true self-defense," the only difference being whether the defendant's fear is reasonable or not. (*Id*. at pp. 199-200.) This Court has also noted that unreasonable self-defense involves and may be considered a form of mistake of fact. (*Elmore*, *supra*, 59 Cal.4th at pp. 130, 136-137, citing *Christian S*., *supra*, 7 Cal.4th at p. 779, fn. 3.) And this Court has held that "'[e]rror in failing to instruct on the mistake-of-fact defense is subject to harmless error review under *Watson*.'" (*People v. Molano* (2019) 7 Cal.5th 620, 670, quoting *People v. Russell* (2006) 144 Cal.App.4th 1415, 1431; accord *People v. Watt* (2014) 229 Cal.App.4th 1215, 1219-1220 [collecting cases noting that *Watson* applies to failure to instruct on a lesser included offense, mistake of fact, and self-defense].)

As with many other defenses, the prosecution has the burden of proving the absence of imperfect self-defense beyond a reasonable doubt, and the relevant circumstance operates to negate an element of murder. Yet, just as this Court held in *Babbitt*, the absence of imperfect self-defense is not essential to establishing the crime of murder and the failure to instruct on this theory does not amount to a due process violation by impermissibly lightening the prosecution's burden of proving every element beyond a reasonable doubt.

Moreover, inasmuch as imperfect self-defense reduces culpability for murder by negating the element of malice, the theory resembles a "pinpoint" defense—one which "relate[s] particular facts to an element of the charged offense and

highlight or explain a theory of the defense" in order to negate part of the prosecution's case. (*People v. Nelson* (2016) 1 Cal.5th 513, 542.) And this Court has treated such instructions as subject to the *Watson* standard of harmlessness applicable to errors of state law. (*People v. Pearson* (2012) 53 Cal.4th 306, 325.)[13]

Treating the absence of imperfect self-defense as part of the malice element of murder rather than like a defense would also, in practice, require trial courts in all cases involving a charge of murder to instruct on it, regardless of the state of the evidence. Taken to its logical end, the rule suggested by Schuller would impose an onerous instructional burden on trial courts in all cases involving homicide. Trial courts would be required to instruct juries that to prove a defendant guilty of murder, it must find (1) the defendant committed an act that caused the death of another person; (2) when the defendant acted, he had a state of

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[13] As this Court recognized in *Barton*, imperfect self-defense "resembles" a true affirmative defense because it relies on evidence usually presented by the defense and because it differs from the affirmative defense of self-defense only as to the reasonableness of the defendant's belief in the need to defend. (*Barton*, *supra*, 12 Cal.4th at pp. 199-200.) But it is not a true affirmative defense because it operates to negative an element of the crime, and in that way is similar to a pinpoint defense. (See *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1601 [affirmative defense is "one which does not negate any element of the crime, but is a new matter which excuses or justifies conduct which would otherwise lead to criminal responsibility"]; see also *People v. Frye* (1992) 7 Cal.App.4th 1148, 1158; *People v. Spry* (1997) 58 Cal.App.4th 1345, 1369.)

mind called malice aforethought; and (3) the defendant did not unreasonably believe that he was in imminent danger of being killed or suffering great bodily injury and that the immediate use of force was necessary to defend against the danger.[14] Holding that the absence of imperfect self-defense is an element of murder would require trial courts to instruct the jury on imperfect self-defense (and heat of passion), regardless of its factual relevance, anytime murder is alleged.[15]

In an effort to avoid that result, Schuller's argument implies a type of "situational element," in which trial courts would be required to instruct a jury with additional elements only where there is substantial evidence presented that the defendant killed in imperfect self-defense. While it would be possible to create such a new definition of murder, its situational nature illustrates the impracticality and potential confusion entailed in relabeling the absence of imperfect self-defense an element of murder. This Court should decline to adopt Schuller's interpretation and should hold, consistent with precedent, that the absence of

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[14] As noted above (see fn. 6, *ante)*, there is no principled basis to treat heat of passion and imperfect self-defense any differently. Thus, if absence of imperfect self-defense is a required element for malice murder, then the absence of heat of passion would also be a required element.

[15] Schuller's theory could also open the door to even further bloating of murder instructions. On the same theory, any factual scenario that would negate malice—for example, mistake of fact, discussed above—could be seen as part of the "element" of malice, requiring its addition to the standard malice instructions given to the jury.

imperfect self-defense is not an element of murder and that instructional error related to that doctrine does not violate the federal Constitution.

II. IN THIS CASE, THE ERROR IN FAILING TO INSTRUCT ON IMPERFECT SELF-DEFENSE WAS HARMLESS

Even if this Court determines that the error in this case violated the federal Constitution, affirmance is still required. And the same is therefore necessarily true under the state-law test. Under the more stringent *Chapman* standard that applies to federal constitutional errors, reversal is not required if it appears "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Chapman*, *supra*, 386 U.S. at p. 24; accord, *People v. Flood* (1998) 18 Cal.4th 470, 494.) "'To say that an error did not contribute to the verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*Flood*, *supra*, 18 Cal.4th at p. 494.) If, after "a thorough examination of the record," a reviewing court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error," it should affirm. (*Neder v. United States* (1999) 527 U.S. 1, 18, 19; accord, *People v. Mil* (2012) 53 Cal.4th 400, 417.)[16]

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[16] Schuller relies on *Sullivan, supra,* 508 U.S. at p. 279, for the proposition that a court in applying *Chapman* must examine the basis upon which "the jury actually rested its verdict" rather than speculate about what a hypothetical jury might have concluded. (OBM 66.) As the United States Supreme Court later recognized, however, "this strand of reasoning in *Sullivan* cannot

(continued…)

If an instruction on imperfect self-defense had been given, the jury would have been told to convict Schuller of the lesser-included offense of voluntary manslaughter if it concluded that he (1) actually believed that he was in imminent danger of being killed or suffering great bodily injury, and (2) actually believed that the immediate use of deadly force was necessary to defend against the danger, but (3) at least one of those beliefs was unreasonable. (See CALCRIM 571; 2CT 396-399.) The jury would also have been told to consider all the circumstances as they were known and appeared to the defendant. (CALCRIM 571.) Properly instructed, however, the jury would additionally have been informed that "unreasonable self-defense, as a form of mistake of fact, has no application when the defendant's actions are entirely delusional," though the defense may be based on the negligent misperception of objective circumstances. (*Elmore*, *supra*, 59 Cal.4th at pp. 136-137.)[17]

First, its first degree murder verdict, and rejection of second degree murder, shows that the jury necessarily rejected Schuller's testimony that he acted in self-defense, leaving no doubt the jury would have returned the same verdict had it been

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(…continued)

be squared with our harmless-error cases." (*Neder*, *supra*, 527 at p. 11; see also *People v. Aledamat* (2019) 8 Cal.5th 1, 12-13.)

[17] *Elmore* held that a defendant's behavior that is entirely based on delusion is the proper subject of sanity-phase proceedings, but such behavior "was never intended to encompass reactions to threats that exist only in the defendant's mind." (*Elmore*, *supra*, 59 Cal.4th at p. 137.)

instructed regarding imperfect self-defense. (See *People v. Lewis* (2001) 25 Cal.4th 610, 646 ["Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions."].) In *Manriquez*, the defendant was charged with four separate murders occurring on different occasions. (*People v. Manriquez* (2005) 37 Cal.4th 547, 551.) As to one of them, the murder of victim Baldia, the jury was instructed on heat of passion manslaughter, but the court declined a defense request to instruct on imperfect self-defense. (*Id.* at p. 580.) The *Manriquez* Court held that the instruction was properly declined because no evidence in the record supported it. (*Id.* at pp. 581-582.) The court further reasoned:

> The jury's verdict finding defendant guilty of the first degree murder of Efrem Baldia implicitly rejected defendant's version of the events, leaving no doubt the jury would have returned the same verdict had it been instructed regarding imperfect self-defense. [Citation.] Accordingly, even if we were to assume the failure to instruct on imperfect self-defense violated defendant's constitutional rights, we would find the error harmless.

(*Id.* at p. 582.)

So too, the jury in this case, in determining that the murder was willful, deliberate, and premeditated, necessarily found that Schuller carefully weighed his decision to kill W.T., a finding inconsistent with his having an actual but unreasonable belief that he needed to kill to defend himself from imminent danger. And, the jury did so in decidedly quick fashion; the jury deliberated only 4 hours before reaching a first degree murder

verdict following a 10-day trial. (2CT 404-405.) Even without the instruction, had the jury believed that Schuller killed W.T. in response to his attempt to stab Schuller, the jury would not have found Schuller guilty of deliberate and premeditated first degree murder, but instead second degree murder. (2CT 481-483 [instructions on first and second degree murder].) Having not done so, the jury implicitly rejected the theory that Schuller killed the victim spontaneously out of fear, and therefore would have reached the same result even with an imperfect self-defense instruction. The jury necessarily rejected any evidence that Schuller killed in imperfect self-defense.

Second, there was overwhelming evidence of Schuller's guilt of first degree murder. Schuller testified at trial that he picked up the gun off the kitchen table and shot W.T. in the head from about five feet away. (5RT 1138-1140, 1213-1217, 1227.) When W.T. tried to get up off the ground, Schuller shot him four to five more times in the head. (5RT 1138-1139, 1141, 1231.) Finally, Schuller testified that when W.T. gasped and spit out his dentures, Schuller shot him three more times in the head. (5RT 1144.) Each time Schuller shot W.T. in the head, he made a decision to aim the gun at W.T.'s head from a short distance and squeeze the trigger. Each shot demonstrated a deliberate intent to kill W.T. Moreover, Schuller testified that W.T. did not die after the first shot to the head. (5RT 1231.) As the 67-year-old W.T. lay on the floor suffering from a gunshot wound to the head, struggling to lift himself off the floor, Schuller shot him repeatedly. At this point, any suggestion that Schuller shot W.T.

in unreasonable self-defense strains credulity. Even assuming Schuller fired the first shot under circumstances amounting to imperfect self-defense, the subsequent fatal shots were inconsistent with an honest but unreasonable belief in the need to defend himself from imminent harm. Each successive shot after the first shot shows Schuller made a deliberate, premeditated, and calculated decision to kill W.T. that went beyond mere defense. These actions constitute first degree murder, not voluntary manslaughter.

There was also evidence of Schuller's consciousness of guilt that is inconsistent with his assertion that he acted in self-defense. Once he shot and killed W.T., Schuller poured gasoline on him and lit him and the house on fire. (2RT 537-538; 5RT 1147-1148.) He then fled the scene with the gun and led police on a 38-mile high speed chase before he was stopped and apprehended by the use of spike strips and an armored police vehicle. (3RT 621-634.) Schuller's effort to destroy the victim's body and his flight from the murder scene strongly demonstrated a consciousness of guilt. (*People v. Cooper* (1991) 53 Cal.3d 771, 833 [destruction of evidence shows consciousness of guilt]; *People v. Abilez* (2007) 41 Cal.4th 472, 521-523 [flight demonstrates consciousness of guilt].)

Moreover, the weight of the evidence demonstrates that Schuller was not acting under an honest belief in the need for self-defense when he killed W.T., that is, Schuller did not shoot W.T. based on an actual but unreasonable belief in the need to defend himself from imminent harm. The assertion that Schuller

believed deadly force was necessary to defend himself is dependent on the allegation that W.T. had a knife and tried to stab Schuller. Schuller testified that he was in fear for his life because W.T. had a big knife and "intention." (5RT 1139-1141.) He explained that he ran toward the kitchen table as W.T. tried to stab him. (5RT 1137-1138.) When Schuller grabbed the gun off the table, W.T. raised up the knife in a stabbing motion towards Schuller. (5RT 5RT 1138.) Schuller shot W.T., causing him to fall to the floor and drop the knife. (5RT 1223, 1228-1229.) Schuller then shot W.T. four or five more times in the head. (5RT 1138, 1231.)

However, the physical evidence contradicted Schuller's version of events. Inexplicably, the knife was not found on the floor, possibly with blood on it, as it should have been if Schuller's story was true. Instead, the knife was found on top of the table, and it had no blood on it. (5R 1138-1139, 1332.) There was nothing to indicate that the knife was in W.T.'s hand when he was shot or that it had been on the ground next to W.T.'s body. (5RT 1332-1333.) Schuller himself testified that he did not know how the knife ended up on the table. (5RT 1138-1139.)

Additionally, the autopsy revealed that W.T. sustained nine gunshot wounds to the left side of his head, some of which were "quite closely grouped" together, and one to the right side of his head. (4RT 839, 846-848, 851-871.) The fact that there were no gunshot wounds directly to W.T.'s face undercuts Schuller's claim that W.T. came at him straight on with a stabbing motion. And the gunshot wounds that W.T. did suffer are inconsistent with

Schuller's claim that he shot in panicked self-defense as W.T. came at him with a knife.

Schuller's assertion that he actually believed lethal force was necessary also falls flat when considering that W.T. was lying on the ground following the first gunshot to his head. At that point, 67-year-old W.T. did not even have the ability to pick himself up off the floor. Under such conditions, W.T. did not pose a threat to Schuller and certainly would not have caused Schuller to believe that deadly force was necessary to defend himself from imminent danger.[18] Nevertheless, Schuller shot W.T. in the head four or five more times. When W.T. gasped and his dentures flew out of his mouth, Schuller shot W.T. three more times in the head. (5RT 1144.) Again, under these conditions, Schuller could not have believed that lethal force was necessary to defend himself from imminent harm. Thus, the evidence concerning the eight gunshots that occurred while W.T. was lying on the floor demonstrates that Schuller did not shoot W.T. based on an actual belief in the need to defend himself from imminent harm.

More broadly, Schuller's account of the incident was not believable. When Schuller was interviewed by detectives about the murder, he appeared to exaggerate being intoxicated. (5RT 1344.) And he did not tell them that he shot W.T. based on self-defense. (3RT 629-634, 642; 5RT 1179, 1188.) His account gave

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[18] At the time of the murder, Schuller was 35 years old. (5RT 1232.) He was 5'9" or 5'10" tall and weighed about 190 pounds. (*Ibid.*) W.T. was 67 years old, 5'6" tall, and weighed 170 pounds. (*Ibid.*)

no indication that he feared W.T. at all, much less that he feared imminent harm. Instead, he told detectives that W.T. was gay and had "come on" to him. (5RT 1179, 1188-1189.) Schuller later denied ever telling detectives that the killing was because of a homosexual issue. (5RT 1156-1157, 1175-1176, 1179, 1180, 1184.) But at trial he testified that he had lied to the detectives because he thought the "gay thing" would be "more justifiable for what happened" and "might help [him] get off." (5RT 1245-1246.)

Schuller claimed at trial that he tried to call 911 using W.T.'s cell phone but could not because the phone kept ringing. (5RT 1143-1144.) Instead of answering the call and trying to get help for W.T., Schuller shot the cell phone three times. (5RT 1145.) Schuller would not have destroyed his only line of communication if he truly wanted to contact the police. He also left the residence quickly without trying to summon help from the neighbors or W.T.'s daughter. (5RT 1151.) When the police pursued him for 38 miles, he did not pull over at any time to report the shooting and summon help for W.T. His actions were more consistent with trying to cover up the murder and flee.

The evidence showed that Schuller had problems in his relationship with W.T., indicating he may have had a pre-existing motive, which undermined Schuller's assertion that he acted with an honest belief in the need for self-defense. Sometime during the month or two before the murder, W.T. told Schuller he was no longer welcome at his residence. (2RT 553, 555.) On his drive back to California, Schuller called W.T. for help with gas. W.T. said he could not help him and hung up on Schuller. (5RT 1124-

1125.) Upon his arrival in Grass Valley, Schuller drove directly to W.T.'s residence even though he was not welcome there. (5RT 1124.) This evidence supports a finding that Schuller did not shoot W.T. in self-defense and instead supports the jury's finding of first degree murder.

There is also little strength to the argument that Schuller's mental issues could have led him to misinterpret the actual innocuous events as life threatening. Shortly after his arrest, Schuller made phone calls from jail. (5RT 1345.) In these conversations, which were monitored, he appeared lucid and normal. (*Ibid*.) It was only after Schuller decided to pursue a mental health defense that he began speaking as if he was suffering from delusions. (5RT 1345-1346.)

The weight of the forensic psychiatric evidence additionally contradicts Schuller's contention that his mental disorder led him to misinterpret events as life-threatening. Court-appointed psychologist Dr. Dugan testified that the Winnemucca contact and other reports showed that Schuller was "definitely impaired" and "demonstrating bizarre behavior." (6RT 1417-1418.) However, Dr. Dugan did not believe Schuller had a qualifying mental health disorder. (6RT 1419-1420.) Rather, Dr. Dugan stated that Schuller's history of drug abuse could have caused any hallucinations that he was experiencing, and that, in light of the drinking and smoking at W.T.'s residence, the shooting was consistent with his "historic pattern of aggressive and violent substance abusing and criminal conduct." (5RT 1129-1130; 6RT 1419-1421.) Dr. Dugan concluded that Schuller's actions—

including shooting W.T. multiple times in the head, burning the body, and evading arrest—demonstrated that Schuller knew what he was doing was wrong. (6RT 1418.)

Dr. Schmidt testified that it was unlikely Schuller was experiencing hallucinations at the time he shot W.T. (6RT 1459.) In fact, Dr. Schmidt concluded that Schuller was malingering or exaggerating his mental health conditions and that he knew what he did was wrong based on his conduct during and after the shooting. (6RT 1460, 1462-1463.) The testimony of these two doctors undermined Schuller's claim that he was acting in self-defense and the assertion that he was operating under psychiatric delusions.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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September 7, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 11,168 words.

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September 7, 2022

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DECLARATION OF ELECTRONIC SERVICE
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No.: **S272237**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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M. Latimer	/s/ *M. Latimer*
Declarant for eFiling	Signature

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

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Central California Appellate Program

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T. Torres-Herrera	/s/ *T. Torres-Herrera*
Declarant for U.S. Mail	Signature

STATE OF CALIFORNIA
Supreme Court of California

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