IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES ELMORE, Defendant and Appellant.	)	No. S188238

Second District Court of Appeal, Division Seven, Case No. B216917
Los Angeles County Superior Court Case No. TA090607
Honorable Arthur Lew, Judge Presiding

APPELLANT'S REPLY BRIEF ON THE MERITS

Eric R. Larson, SBN 185750
330 J Street, # 609
San Diego, CA 92101
(619) 238-5575
Larson1001@yahoo.com

Attorney for Defendant and
Appellant Charles Elmore

By Appointment of The
Supreme Court Of California

TOPICAL INDEX

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CALIFORNIA CODES

RULES OF COURT

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S188238
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
CHARLES ELMORE,	)	
	)	
Defendant and Appellant.	)	
	)	

Second District Court of Appeal, Division Seven, Case No. B216917
Los Angeles County Superior Court Case No. TA090607
Honorable Arthur Lew, Judge Presiding

APPELLANT'S REPLY BRIEF ON THE MERITS

Appellant files the following Reply Brief on the Merits to respondent's Answer Brief on the Merits. The failure to respond to any particular argument should not be construed as a concession that respondent's position is accurate. It merely reflects petitioner's view that the issue was adequately addressed in Appellant's Opening Brief on the Merits.

ARGUMENT

I

THE DOCTRINE OF IMPERFECT SELF-DEFENSE APPLIES IF THE DEFENDANT HAS AN ACTUAL, BUT UNREASONABLE, BELIEF IN THE NEED TO DEFEND HIMSELF THAT WAS BASED ON A PSYCHOTIC DELUSION

A. Respondent, Rather Than Appellant, Is Seeking To Modify The Current Statutory Scheme

The primary point of contention between appellant and respondent appears to be whether allowing evidence of a delusion to form the basis of an instruction on imperfect self-defense is consistent with the current statutory scheme, or whether doing so would constitute an impermissible expansion of the current statutory scheme.

For example, respondent alternately contends that concluding that imperfect self-defense may be based on evidence of a delusion would impermissibly "expand the doctrine" (Answer Brief ("AB") pp. 28, 39), would "create a new class of imperfect self-defense" (AB p. 34), would constitute a "doctrinal transformation of imperfect self-defense" (AB p. 34), would constitute "a new category" (AB p. 35), and would constitute "a new class of voluntary manslaughter" (AB p. 36).

Respondent is incorrect. "Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter." (*In re Christian S.* (1994) 7 Cal.4th 768, 771, emphasis in original.) The doctrine applies "no matter how the mistaken assessment is made." (*People v. Flannel* (1979) 25 Cal.3d 668, 679.)

Appellant's argument is fully consistent with the current doctrine of imperfect self-defense as set forth above by this Court. Appellant's argument is also fully consistent with the current statutory scheme, which provides that in the guilt phase of a criminal trial, a defendant charged with murder is entitled to rely upon evidence of mental disease, mental defect, or mental disorder in order to establish that he did not harbor the malice aforethought required for a murder conviction. (Pen. Code §§ 28, 29; see also *People v. Rios* (2000) 23 Cal.4th 450, 460 [imperfect self-defense is not an element of voluntary manslaughter, it is a means of negating the element of malice aforethought].)

In reality, it is respondent who is attempting to alter the current state of the law by imposing a reasonably unreasonable requirement on the

doctrine of imperfect self-defense that is not contained in either the case law or the current statutory scheme.

B. Evidence Of Delusion Is Not Limited To The Sanity Phase Of A Trial

Respondent also argues that evidence of a delusion in a homicide case is properly considered in the sanity phase of a trial, not the guilt phase. For example, respondent argues "a defendant's insanity may not be used as a basis for extending leniency." (AB p. 1.) Respondent cautions that "logic and practice dictate that insanity and guilt be considered separately; the blending of these phases in this way would result in gamesmanship and a lack of criminal accountability, not equity." (AB p. 30.) Respondent further complains that considering evidence of delusion for purposes of imperfect self-defense would "undermine the purposes of having separate guilt and insanity phases in a criminal trial." (AB p. 39.)

Respondent's arguments are not well founded for several reasons.

First, insanity has a very particular legal meaning and a finding of insanity has very particular legal requirements, and to simply equate evidence of a delusion with legal insanity is misplaced. (See Pen. Code § 25.)

Second, contrary to respondent's argument, the Legislature has expressly provided that evidence of mental disease, mental defect, or mental disorder is admissible at the guilt phase of a trial on the issue of whether or

not the accused actually premeditated, deliberated, or harbored malice aforethought. (Pen. Code §§ 28, 29.)

Third, it is entirely appropriate as a matter of public policy, entirely consistent with the purpose of having separate guilt and sanity phases, and entirely consistent with the current statutory scheme to first determine exactly what crime a defendant has committed, i.e., first degree murder, second degree murder, or voluntary manslaughter, and then make an appropriate insanity decision after the appropriate level of guilt is assigned. (See *People v. Wells* (1949) 33 Cal.2d 330, 346 ["permitting the prosecution to adduce evidence to prove a specific mental state essential to the crime and at the same time precluding the defendant from adducing otherwise competent and material evidence to disprove such particular mental state, short of legal insanity (which can be heard on the trial of that issue), would, we think constitute an invalid interference with the trial process."].)

C. Respondent Does Not Explain Why Evidence Of Delusion Is Admissible To Negate Premeditation And Deliberation, But Not Malice Aforethought

Respondent does not take issue with the Court of Appeal's decision in this case holding that the evidence of delusion was admissible to negate the premeditation and deliberations elements of the first degree murder charge,

and that the jury should have been so instructed. (Slip Opn. pp. 13-19.) Nor does respondent take issue with the Court of Appeal's decision in *Padilla*, in which the Court of Appeal similarly held that evidence of hallucination can negate the elements of premeditation and deliberation. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 679.)

However, respondent offers no explanation as to why evidence of delusion and hallucination is admissible in a homicide case to negate the elements of premeditation and deliberation, but is not admissible to negate the element of malice aforethought.

Moreover, there is no viable explanation. Penal Code sections 28 and 29 expressly provide that such evidence is admissible to negate premeditation, deliberation, *and* malice aforethought. The Legislature knows how to limit the consideration of this evidence, and in fact did so in Penal Code section 22, which provides that voluntary intoxication is admissible to negate premeditation, deliberation, and express, but not implied, malice aforethought. There is simply no basis in statute to support the conclusion that respondent is apparently asking this Court to make, which is that evidence of mental disease or defect may negate premeditation and deliberation, but may not negate malice aforethought. This Court should reject such a conclusion.

D. *Saille* Does Not Aid Respondent's Position

Respondent relies on this Court's decision in *Saille*, and argues that "[i]n *Saille*, this Court addressed the issue of whether the law in California permits a reduction of murder to nonstatutory voluntary manslaughter, i.e., manslaughter based on imperfect self-defense due to voluntary intoxication and/or mental disorder." (AB p. 18, citing *People v. Saille* (1991) 54 Cal.3d 1103, 1107.)

Respondent's reliance on *Saille* is misplaced, and the above statement is erroneous because *Saille* was not an imperfect self-defense case. (See *In re Christian, supra,* 7 Cal.4th at pp. 779-780.) By its own terms, *Saille* disavowed any application to the doctrine of imperfect self-defense. (*Ibid.*)

Similarly, respondent's reliance on *People v. Steele* is also misplaced because that was a heat of passion case. (See AB pp. 29-30; *People v. Steele* (2002) 27 Cal.4th 1230, 1253.)

E. *Wells* Is Both Relevant And Not Distinguishable On Its Facts

Respondent downplays the significance of this Court's prior decision in *Wells* by suggesting that it was only a diminished capacity case. (See AB pp. 22-23; *People v. Wells, supra,* 33 Cal.2d 330.) However, this is not an accurate characterization of that decision.

In *Wells*, this Court did for the first time recognize the doctrine of diminished capacity, and that doctrine has of course since been overruled. (See *People v. Wells, supra,* 33 Cal.2d at pp. 346-358; *People v. Wetmore* (1978) 22 Cal.3d 318, 323.)

However, in a prior portion of that decision, a portion that has not been overruled, this Court observed that the defendant's proffered evidence of mental illness, which did not amount to legal insanity, was admissible to establish that the defendant acted in the actual, but unreasonable, belief in the need to defend himself, and was therefore admissible to negate the element of malice aforethought . (*People v. Wells, supra,* 22 Cal.3d at pp. 344-345.)

Respondent also attempts to distinguish *Wells* on its facts by suggesting that in *Wells*, there was evidence of objectively reasonable provocation that was based in fact, and which therefore properly supported a claim of imperfect self-defense. (AB pp. 23-24.) On the contrary, the evidence in *Wells* disclosed an entirely unprovoked attack on a prison guard as a result of the defendant's mental illness that was not supported by any objectively reasonable provocation. (See *People v. Wells, supra,* 22 Cal.3d at p. 338.)

The facts in *Wells* consisted of the following: "Noble Brown, a prison guard, was the victim of the assault. Prior to the commission of the

offense Brown had preferred charges of misconduct against defendant. Defendant was taken before prison officials for a hearing on the charges. He became angry, insolent and noisy and the warden directed him to leave the hearing room. This, defendant did. In the hall outside the room defendant sat down on the floor and refused to go to his cell. Brown then came from the room and walked along the hall. Defendant seized a heavy crockery cuspidor and threw it at Brown. The cuspidor, apparently as defendant was swinging it in the course of throwing it at Brown, struck two other officers (who were near and to the rear of defendant endeavoring to stop him) and then hit Brown with great force, injuring him severely." (*People v. Wells, supra,* 22 Cal.3d at p. 338.)

Respondent's attempt to distinguish *Wells* on its facts fails, and respondent's argument that the attack in *Wells* was objectively reasonable underscores the folly of imposing a reasonably unreasonable requirement.

F. Other State Decisions

Respondent observes that some other states have refused to allow imperfect self-defense based on mental illness. (AB pp. 25-28.) However, the decisions of other states interpreting other statutory schemes is not particularly relevant to what the law is and should be in California.

G. Justice Brown's Concurrence In *Wright*

With respect to Justice Brown's concurring Opinion in *Wright*, respondent misinterprets both appellant's argument and the concurring opinion. (See AB pp. 36-39; *People v. Wright* (2005) 35 Cal.4th 964, 975-986 (conc. opn. of Brown, J.).) Justice Brown's concurrence is clearly a mixed bag for both appellant and respondent. In support of respondent's position, Justice Brown clearly would have liked to have imposed a reasonably unreasonable requirement upon imperfect self-defense. (*Id.* at pp. 980-986.) However, in support of appellant's position, Justice Brown also clearly observed that the current statutory scheme does not support imposing such a requirement. (*Id.* at pp. 975, 983, 985-986.)

Perhaps most importantly, the fact that the Legislature has not acted to overturn *Flannel* since it was decided over 30 years ago, and has not acted to amend the statutory scheme since Justice Brown's concurrence in *Wright* despite Justice Brown's express request that it do so (see *People v. Wright, supra,* 35 Cal.4th at pp. 975, 985-986), ultimately supports appellant's position both that the current statutory scheme does not support imposition of such a requirement, and that the Legislature has not demonstrated an intent to impose such a requirement.

As stated by this Court in *Williams* in the analogous context of the appropriate definition of assault, "the Legislature has had 30 years to amend section 240 and overturn *Rocha*, but has not done so. While legislative inaction is not necessarily conclusive, the longevity of our holding in *Rocha*, our subsequent reaffirmation of *Rocha* seven years ago in *Colantuono*, and the existence of other legislative enactments implicitly approving *Rocha* indicate that the Legislature has acquiesced in our conclusion that assault does not require a specific intent. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 178 [declining to overrule a judicial interpretation after decades of legislative inaction and the unanimity of our decisions restating that interpretation].) Under these circumstances, we 'believe it is up to the Legislature to change it if it is to be changed.' (*Ibid.*)" (*People v. Williams* (2006) 26 Cal.4th 779, 789-790.)

H. Public Policy

Respondent also does not offer any persuasive public policy reasons for concluding that a defendant who acts in the actual, but unreasonable, belief in the need to defend himself as a result of a delusion should be fictionally deemed to have acted with malice even though in reality he did

not. Respondent argues only that a defendant should not be able to set up his own standard of conduct. (See AB pp. 28, 35, 39.)

However, as noted in Appellant's Opening Brief On The Merits (ABM pp. 29-30), if a defendant has an actual belief in the need to defend himself due to a mental delusion, he is not setting up his own standard of conduct; he is reacting to what he actually perceives. Moreover, the doctrine of imperfect self-defense does not justify anything; it is a matter of setting degree of guilt, and a defendant who kills in the actual, but unreasonable, belief in the need to defend himself remains guilty of the extremely serious crime of voluntary manslaughter, just not the even more serious crime of murder. (See also *In re Christian S., supra,* 7 Cal.4th at p. 782 [recognizing the important public policy "need for legal distinctions based on moral culpability."].)

I. There Was Sufficient Evidence To Support An Instruction On Imperfect Self-Defense In This Case, And The Refusal To Give Such An Instruction Was Prejudicial

Finally, respondent contends that even assuming that imperfect self-defense may be based on mental illness or defect, there was insufficient evidence to support such an instruction in this case because appellant's assertion of self-defense was "self-serving" and "far-fetched," and any error was harmless. (AB pp. 31-32.)

To the extent this Court wishes to decide these issues for the first time rather than remanding the case to the Court of Appeal to make these determinations in the first instance, these arguments fail for three reasons.

First, in assessing whether there was substantial evidence to warrant an instruction, the court does not make any credibility determinations of the type suggested by respondent. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 615.) The jury is free to believe any portions of the testimony of any witness, including the defendant. (*Id.* at p. 610; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 51.) In addition, any doubts as to the sufficiency of the evidence to give an instruction are also to be resolved in favor of the accused. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.) The threshold is not high. (*People v. Cole* (2007) 156 Cal.App.4th 452, 484.)

Second, respondent overlooks the testimony of both the defense expert witness as well as the numerous percipient witnesses who observed appellant acting nonsensically and incoherently immediately before the incident. (See, e.g., 7 R.T. pp. 2753, 2756-2758; 8 R.T. pp. 3019-3021, 3023 [percipient witnesses].) Appellant was not acting normally prior to the stabbing, and witnesses who knew appellant believed that his strange behavior was due to being under the influence of narcotics. (7 R.T. p. 2785; 8 R.T. pp. 3109-3021.) However, subsequent medical testing revealed that appellant was not

under the influence of any controlled substances that day. (6 R.T. pp. 2157-2158.) In addition, the prosecution's own expert, Dr. Sharma, agreed that appellant is a schizophrenic, and the defense expert, Dr. Rothberg, further opined that appellant was suffering from a psychotic episode at the time of the stabbing incident. (6 R.T. p. 2166; 8 R.T. pp. 3339-3343.)

Third, and most importantly, the Court of Appeal previously analyzed the evidence in this case in great depth in connection with the analogous issue of whether the trial court committed prejudicial error in refusing to instruct appellant's jury that the hallucination and delusion evidence could be relied upon to negate the elements of premeditation and deliberation, and the Court of Appeal found both error and prejudice based on the evidence herein. (Slip Opn. pp. 13-19.) In the interests of brevity, appellant hereby adopts the analysis of the Court of Appeal with respect to these issues.

CONCLUSION

For the foregoing reasons, the additional reasons set forth in Appellant's Brief On The Merits, and in the interests of justice, appellant respectfully requests this Court find that the doctrine of imperfect self-defense applies when the defendant's actual, but unreasonable, belief in the need to defend himself was based solely on a psychotic delusion, and to therefore reverse the Court of Appeal's decision that it does not and remand

this case to the Court of Appeal for further proceedings consistent with this Court's Opinion.

Dated: 9/26/11

Respectfully submitted,

Eric Larson

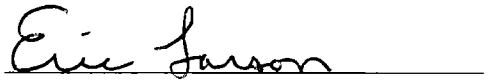
Eric R. Larson
Attorney for Defendant and
Appellant Charles Elmore

By Appointment of the Supreme
Court of California

CERTIFICATE OF WORD COUNT

I, Eric R. Larson, hereby certify pursuant to California Rules of Court, rule 8.520, subdivision (c)(1), that according to the Microsoft Word Microsoft Word computer program used to prepare this document, Appellant's Reply Brief On The Merits contains a total of 3,062 words.

Executed this 26th day of September, 2011, in San Diego, California.



Eric R. Larson, SBN 185750
330 J Street, # 609
San Diego, CA 92101
(619) 238-5575

Eric R. Larson, #185750
330 J Street, # 609
San Diego, CA 92101

Supreme Court No.: S188238
Court of Appeal No.: B216917
Superior Court No.: TA090607

DECLARATION OF SERVICE BY MAIL

I, Eric Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, #609, San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 26th day of September, 2011, I caused to be served the following:

APPELLANT'S REPLY BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

Clerk, Los Angeles Superior Court
200 W. Compton Blvd.
Compton, CA 90220

Office of the Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Office of the District Attorney
200 W. Compton Blvd, 7th Floor
Compton, CA 90220

Charles Elmore, #G68412
Kern Valley State Prison
P.O. Box 5000
Delano, CA, 93216

Second District Court of Appeal
Division Seven
300 S. Spring Street
Floor 2, N. Tower
Los Angeles, CA 90013-1213

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 26, 2011, at San Diego, California.

Eric Larson