IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

REPLY BRIEF ON THE MERITS

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JASON CARL SCHULLER by
appointment of the California
Supreme Court

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I.

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

Respondent contends that the failure to instruct on imperfect self-defense in a malice murder case amounts to, at most, an error of state law only, subject to harmless-error review under the test announced in *People v. Watson* (1956) 46 Cal.2d 818. (ABM, at pp. 22-45.) Respondent reasons that imperfect self-defense is not an element of malice murder but rather a defense and defenses are "treated as matters solely of state law." (ABM, at pp. 23-24.) Mr. Schuller respectfully disagrees. When imperfect self-defense is properly raised in a murder case, its absence is *a fact* that the due process clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt. Given such proof is a federal constitutional mandate, the erroneous failure to instruct the jury on the prosecution's burden is subject to harmless-error review under the test announced in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].[1] There are a number of flaws in respondent's reasoning.

[1] Respondent concedes that, while this court has repeatedly held the failure to instruct on lesser included offenses is generally

A. Imperfect Self-Defense as a Defense

Respondent's contention that imperfect self-defense is a defense is without merit. There was a time when this court agreed with respondent's position. But more recently, the court has expressly repudiated it. A review of the court's evolution on the matter is helpful, and that review must begin with the decision in *People v. Sedeno* (1974) 10 Cal.3d 703.

At issue in *Sedeno* was whether the trial court erred by failing to instruct the jury *sua sponte* on voluntary manslaughter, specifically based on "an intentional killing committed 'upon a sudden quarrel or heat of passion.'" (*Sedeno, supra,* 10 Cal.3d at p. 715.) The court observed it was settled law that trial courts must instruct, even without a request, on the "'general principles of law'"—those "'closely and openly connected with the facts before the court, and . . . necessary for the jury's understanding of the case.'" (*Ibid*.) That duty, it noted, included instructions on lesser included offenses and defenses. (*Id*. at pp. 715-716.) However, while trial courts are required to instruct on the former even over the objection of the defendant, they are only required to instruct on the latter if either the defendant was relying on the defense or "the defense was not inconsistent with the defendant's theory of the case." (*Id*. at p. 716.) The court then held that heat of passion fell into the latter category:

> Unlike most necessarily included offenses, . . . voluntary manslaughter in the heat of passion is

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a violation of state law only, it has not yet decided the precise question raised by Mr. Schuller. (ABM, at pp. 24-27.)

> unique in that the statutory definition of the offense specifies the circumstances in which the law will presume the absence of malice, the element which distinguishes murder from manslaughter. If a killing, even though intentional, is shown to have been committed in a heat of passion upon sufficient provocation the absence of malice is presumed.

(*Id.* at p. 719.) The court held that the trial court lacked any duty to instruct on heat of passion absent the defendant's open reliance on it. (*Id.* at p. 719; see *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10 [*Sedeno* assumed heat of passion was merely a defense "on which the defendant must openly rely before the entitlement to instructions arise"].)

At the time *Sedeno* was decided, imperfect self-defense was not a widely-recognized principle. Respondent correctly observes that this court did not find it to be a general principle of law on which trial courts must instruct juries *sua sponte* until *People v. Flannel* (1979) 25 Cal.3d 668. (ABM, at pp. 29-30.) *Flannel* held that, while the doctrine had received some prior appellate court attention and was rooted in the common law, there was "little occasion fully to explore the principle" until then. (*Flannel*, at pp. 675-681.) Therefore, the doctrine lacked sufficient commonality to make it a general principle but, "with the increased judicial cognizance" expected to follow its opinion in that case, would henceforth be one. (*Id.* at pp. 681-683.)

Three years later, in *People v. Wickersham* (1982) 32 Cal.3d 307, the court again addressed a murder defendant's claim that the trial court erred by failing to instruct *sua sponte* on voluntary manslaughter, including on the theory that the killing was the

result of imperfect self-defense. The court held "unreasonable self-defense comes within *Sedeno*'s category of 'defenses' for purposes of the obligation to instruct *sua sponte*." (*Id*. at p. 329.) It concluded the "trial court was under no obligation to instruct on unreasonable self-defense" in that case because the defendant did not rely on it and "this theory was inconsistent with her proffered defense." (*Ibid*.)

Then, in *People v. Barton* (1995) 12 Cal.4th 186, the court revisited these principles. It upheld the distinction *Sedeno* drew "between the trial court's broad duty to instruct on lesser included offenses and its narrower obligation to instruct on particular defenses." (*Id.* at pp. 196-199.) However, it expressly overruled its prior decisions treating heat of passion and imperfect self-defense as defenses. (*Id*. at pp. 200-201.)

Barton recognized that it can be difficult to distinguish between lesser included offenses and defenses and that the distinction is particularly blurry with respect to voluntary manslaughter. (*Barton, supra,* 12 Cal.4th at p. 199.) It cited as part of the reason for the confusion the defendant's frequent duty to produce evidence to support a finding that the killing was only voluntary manslaughter, thereby "closely resembl[ing] an affirmative defense." (*Ibid*.) And it noted it was particularly tempting to treat imperfect self-defense as a "'defense'" because of the use of the word in its name and the "close link" between it and "true self-defense." (*Id*. at pp. 199-200.) Nevertheless, it made clear that

> voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a

> sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder.

(*Id*. at pp. 200-201.)

Admittedly, this history does not definitively dispose of respondent's claim. *Barton*'s holding is premised on the characterization of heat of passion and imperfect self-defense as forms of voluntary manslaughter (see *Barton, supra,* 12 Cal.4th at p. 200), leading it to conflate *the circumstances* that reduce what would otherwise be murder to voluntary manslaughter with *the offense* of voluntary manslaughter itself. Mr. Schuller contends that that is not sufficiently precise. It is his position that, while voluntary manslaughter (i.e., an unlawful killing in which malice is negated) is a lesser included offense of malice murder, imperfect self-defense and heat of passion are part of the definition of malice in appropriate cases.

Respondent likewise characterizes the circumstances in question as defining "forms of voluntary manslaughter" (ABM, at pp. 25, 31, 39) while insisting they operate like and thus must be treated like defenses (ABM, at pp. 24, 31). Thus, respondent implicitly wants this court to reject *Barton* and all the cases that have followed it in the decades thereafter and to return to the *Sedeno-Wickersham* view of voluntary manslaughter. But respondent gives no good reason to do so. A further review of respondent's analysis makes that plain.

B. Imperfect Self-Defense as an Element of Malice Murder

Respondent agrees imperfect self-defense (like heat of passion) is a circumstance that can negate malice and thereby reduce the defendant's culpability for a killing to no more than voluntary manslaughter. (ABM, at pp. 23-24.) But respondent contends that, by negating malice, it operates like a state-sanctioned defense rather than a criminal element that falls within the prosecution's constitutionally-mandated burden of proof. (ABM, at pp. 24, 27.) In fact, respondent characterizes the requirement that the prosecution disprove those circumstances beyond a reasonable doubt as a "choice" the state made, like an act of lenity, rather than a federal constitutional mandate. (ABM, at pp. 24, 27, 32.) It observes that the state "does not include the absence of imperfect self-defense (or heat of passion) in the general definition of malice." (ABM, at p. 23.) And it relies on *People v. Martinez* (2003) 31 Cal.4th 673, 685 for the proposition that the absence of those circumstances are not elements of murder at all. (ABM, at pp. 27-28.) There is much to unpack with respect to this analysis.

While arguably labeling something an "element" is a convenient way to distinguish it from defenses, identifying criminal elements has sowed some confusion. This court has stated that "defining an 'element' of an offense is more of an art than a science." (*People v. Mil* (2012) 53 Cal.4th 400, 412.) The United States Supreme Court has observed that "[t]he question of how to define a 'crime'—and, thus, how to determine what facts must be submitted to the jury—has generated a number of

divided opinions." (*Alleyne v. United States* (2013) 570 U.S. 99, 105 [133 S.Ct. 2151, 186 L.Ed.2d 314].)

Notably, when announcing its seminal holding on the prosecutor's burden of proof under the due process clause of the Fourth Amendment, the nation's high court did not use the word "element." It stated, "[W]e explicitly hold 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, 361 [90 S.Ct. 1068, 25 L.Ed.2d 368], emphasis added.) Ultimately, labels do not determine what facts the federal Constitution requires the prosecution to prove. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 494 [120 S.Ct. 2348, 147 L.Ed.2d 435].) "[T]he relevant inquiry is one not of form, but of effect." (*Ibid*.)

With that focus in mind, the United States Supreme Court has arrived at a clear definition of what facts make up the elements or "'ingredient[s]' of the charged offense." (*Alleyne, supra,* 570 U.S. at p. 107.) "[A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed." (*Id.* at pp. 107-108; accord, *Apprendi, supra,* 530 U.S. at p. 476.) Included within that definition are "not only facts that increase the [punitive] ceiling, but also those that increase the floor." (*Id.* at p. 108.) Such facts "must be submitted to the jury and found beyond a reasonable doubt." (*Id.* at p. 108; accord, *Apprendi*, at p. 490 ["facts that increase the prescribed range of penalties" must

be submitted to a jury and proven beyond a reasonable doubt].) This is a federal constitutional imperative. (See *Apprendi,* at pp. 476-477 [citing 5th, 6th and 14th Amendments].)

Thus, the application of *Winship*'s constitutional protection turns, in large measure, upon the penal consequences attached to the fact in question and not necessarily on any formal or statutory definition of the crime's elements. (*Apprendi, supra,* 530 U.S. at p. 484.) In fact, it has been noted that "*Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." (*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 86 [106 S.Ct. 2411, 91 L.Ed.2d 67].) The nation's high court has held that the punitive effect of proving a given fact was a "primary lesson" of its decision in *Mullaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508]. (*Apprendi*, at p. 484.)

At issue in *Mullaney* was whether *Winship* was violated by a Maine statute that placed the burden on the murder defendant to prove heat of passion to negate malice and reduce the crime to manslaughter. (*Mullaney, supra,* 421 U.S. at pp. 684-687.) The state argued in the negative, reasoning that *Winship*'s burden of proof requirement applied only to facts that distinguish guilt from innocence and not to facts that distinguish between degrees of criminal culpability. (*Id*. at pp. 696-697.) The court rejected that argument. It observed that the "consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly." (*Id*. at p. 698.) The opinion noted that, under Maine's statutory scheme, murder was punished "by life

imprisonment" while the sentence for manslaughter could not "exceed 20 years." (*Id*. at pp. 691-692.) Citing the disparate "penalties," the court held that Maine violated *Winship* by "refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which [the distinction between punishments] turns." (*Id*. at p. 698; see *Apprendi, supra,* 530 U.S. at pp. 484-485 [observing high court's focus on distinct penal "'*consequences*'" for manslaughter and murder as basis for holding in *Mullaney*].)

The same analysis applies with equal force in this case. Murder in California is punishable by a term of at least 15 years to life. (Pen. Code, § 190, subd. (a).) By contrast, voluntary manslaughter is punishable by a determinate term of 3, 6 or 11 years. (Pen. Code, § 193, subd. (a).) Thus, as with the Maine statutory scheme, the punishments for murder and manslaughter in this state differ significantly. And like heat of passion under the Maine law, both heat of passion and imperfect self-defense under California law are facts upon which the distinction turns. Their absence increases the range of punishments—the ceiling and floor—for an unlawful killing and thus are facts (or elements or ingredients of the charged crime) that must, under the federal Constitution, be submitted to the jury and proven by the prosecution beyond a reasonable doubt. (See *Alleyne, supra,* 570 U.S. at pp. 107-108; *Apprendi, supra,* 530 U.S. at p. 490; see also *Mullaney, supra,* 421 U.S. at p. 704 ["[T]he 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"].)

Respondent attempts to distinguish *Mullaney* by noting that, in California unlike Maine, the burden to show the existence of heat of passion and imperfect self-defense does not fall on the defendant. (ABM, at p. 38.) Respondent misconstrues *Mullaney*'s relevance to this case. The issue here is not whether it is error to place the burden to prove such circumstances on the defendant. It is whether the requirement that the burden be placed on the prosecution is mandated by the federal Constitution. If it is, the failure to instruct the jury regarding that burden is a violation of federal constitutional law subject to harmless-error review under *Chapman*. And *Mullaney* holds that that burden *is* a due process requirement.

Notably, California places the burden on the prosecution *because* of *Mullaney*. In *People v. Rios* (2000) 23 Cal.4th 450, 462, this court cited *Mullaney* as the basis for its holding that "the *People* must prove *beyond reasonable doubt* that [provocation and imperfect self-defense] were *lacking* in order to establish the murder element of malice." (Emphasis in original.) Thus, the placement of that burden was not a "choice" the state made as some act of lenity, as respondent contends, but rather was constitutionally mandated.

That fact demonstrates respondent's misplaced reliance on the operational effect of imperfect self-defense and heat of passion. Respondent contends that by negating an element of murder, they operate like defenses and not elements, implying that, like defenses, the federal Constitution does not impose on

the prosecution any burden of proof with respect to them. (ABM, at p. 38.) But the United States Supreme Court has held that the burden of proof *even as to affirmative defenses* must, under the due process clause, fall on the prosecution if they negate an element of the offense. (*Smith v. United States* (2013) 568 U.S. 106, 110 [133 S.Ct. 714, 184 L.Ed.2d 570]; cf. *Patterson v. New York* (1977) 432 U.S. 197, 206-207 [97 S.Ct. 2319, 53 L.Ed.2d 281] [state did not violate due process clause by requiring defendant to prove affirmative defense of extreme emotional disturbance to reduce murder to manslaughter where defense "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder"].) Thus, no matter what label one chooses to attach to imperfect self-defense and heat of passion, they are facts that the federal Constitution requires the prosecutor to disprove beyond a reasonable doubt when raised in a murder case.

Martinez, supra, 31 Cal.4th 673 does not hold otherwise. At issue in *Martinez* was whether the defendant's 1980 guilty plea to murder in Texas could be the basis for a special circumstance finding that he was previously convicted of murder under Penal Code section 190.2, subdivision (a)(2). (*Id.* at p. 678.) The governing statute provides that an "offense committed in another jurisdiction" qualifies where it "*would be punishable* as first or second degree murder" if committed in this state. (Pen. Code, § 190.2, subd. (a)(2), emphasis added; accord, *Martinez,* at pp. 680-681.) The defendant argued that it did not qualify because, at the time of the plea, Texas did not recognize imperfect self-defense or

voluntary intoxication as theories for demonstrating the absence of the "*unlawful* intent" required for murder. (*Martinez,* at pp. 684-685, emphasis in original.) This court rejected the argument.

The court repeated its holding in *People v. Andrews* (1989) 49 Cal.3d 200, 222, that the phrase "would be punishable" in section 190.2 denotes not "'certainty of punishment, but only the capacity therefor.'" (*Martinez, supra,* 31 Cal.4th at pp. 685-686.) Under *Andrews*, it wrote, a murder conviction from a foreign jurisdiction need not afford the defendant the same procedural protections as California to qualify. (*Id.* at p. 686.) As long as it would be merely "'*possible* for [the defendant] to have been convicted of murder' in this state, the offense was 'punishable' here." (*Ibid*., emphasis in original; accord, *Andrews*, at p. 223.)

Martinez held that test was satisfied by the defendant's plea. At the time, Texas defined murder as "'intentionally or knowingly caus[ing] the death of an individual.'" (*Martinez, supra,* 31 Cal.4th at p. 686.) This court found that the mental state reflected in that definition was at least the equivalent of implied malice in California. (*Id.* at p. 688.) Thus it held,

> [B]y pleading guilty to unlawfully, intentionally, and knowingly shooting and killing someone, defendant . . . admitted committing an act that had the *capacity* of being punished as murder in this state.

(*Id*. at p. 686, emphasis in original.)

In this case, respondent relies on language in *Martinez* 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" but rather are "'mitigating circumstances,' which may

reduce murder to manslaughter by negating malice.'" (ABM, at p. 28, citing *Martinez, supra,* 31 Cal.4th at p. 685.) That language does not aid respondent, though.

This court made that statement in rejecting the relevance of imperfect self-defense and voluntary intoxication in determining whether it was *merely possible* for a *guilty plea* to murder in another state to have been punishable in California. (*Martinez, supra,* 31 Cal.4th at p. 685.) After making that statement, it explained that, in California, the defendant is required to "'proffer some showing on these issues,'" which was not done in the Texas case because of the plea. (*Ibid*.) According to the court, the defendant was merely contending "it was *conceivable*" that he might have been able to raise a reasonable doubt as to his guilt if tried in California, but the success of that effort was impossible to know because the case did not go to trial. (*Ibid*.)

Thus, *Martinez* simply stands for the proposition that mitigating circumstances, which the People only need to disprove after sufficient supporting evidence is presented by the defendant, will not be treated as an element of murder for determining whether it is possible, in the abstract, for a foreign murder conviction to be punishable here if that conviction results from a plea. That does not mean that imperfect self-defense must never be treated as an "element" of murder. It certainly does not mean that it must not be treated accordingly in cases where there is trial evidence that puts it in issue.

More importantly, as explained above, it does not really matter what label is attached to imperfect self-defense or, for that matter, to heat of passion. Whether they are called elements, facts, or ingredients of murder, or even affirmative defenses to murder, it is a federal constitutional requirement that the prosecution prove their absence beyond a reasonable doubt once they are put in issue. *Martinez* does not undermine that basic principle.

C. Public Policy Objection

Finally, respondent argues that "[t]reating the absence of imperfect self-defense as part of the malice element of murder" would "require trial courts in all cases involving a charge of murder to instruct on it, regardless of the state of the evidence." (ABM, at p. 43.) Respondent calls that result "an onerous instructional burden on trial courts." (ABM, at p. 43.) It also claims that any effort to impose on trial courts the duty to instruct on elements only where supported by substantial evidence would be impractical and potentially confusing. (ABM, at p. 44.) These concerns are without merit.

A trial court has a *sua sponte* duty to instruct on the principles of law relevant to the issues raised by the evidence and has a correlative duty to refrain from instructing on principles that are irrelevant and may confuse the jury. (*People v. Saddler* (1979) 24 Cal.3d 671, 681; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1172.) Thus, trial courts need not instruct on every element

or theory of an offense but must tailor their instructions on the offense to reflect the evidence.

For example, a trial court does not have to instruct a jury on every theory of first degree murder regardless of the evidence, such as (1) felony murder, (2) premeditation and deliberation, (3) torture, (4) lying in wait, (5) use of a destructive device or explosive, (6) use of a weapon of mass destruction, (7) use of penetrating ammunition, (8) discharging a firearm from a motor vehicle, and (9) the use of poison. (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 198-199 ["trial court's failure to instruct the jury on an alternative theory . . . is not federal constitutional error"]; see also Pen. Code, § 189, subd. (a) [delineating theories of first degree murder]; CALCRIM 521 [providing trial court optional theories of first degree murder, designated A through H, on which to instruct].) This court has even held that a trial court only has a duty to instruct on both forms of malice—the elements of both express and implied malice—if the evidence supports doing so. (See *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 47 [failure to instruct on implied malice not error where record does not contain "evidence from which a reasonable jury could conclude that the defendant killed *without* express malice"].)

And when it comes to instructing on imperfect self-defense and heat of passion, nothing about this case would alter the burden on trial courts. For decades, trial courts in California have been required to determine whether to instruct the jury on those circumstances depending upon the state of the evidence. (See, e.g., *Rios, supra,* 23 Cal.4th at p. 462; *People v. Bloyd* (1987)

43 Cal.3d 333, 349.) Merely accurately recognizing the role those circumstances have long played in murder cases—as defining characteristics of malice—changes nothing other than the test that must be applied *by a reviewing court* to assess whether the failure to instruct on them, where required, is harmless.

II.

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

Respondent contends that, even if *Chapman* applies, the error was still harmless. (ABM, at pp. 45-54.) Mr. Schuller maintains that prejudicial error occurred.

A. Chapman Test

Preliminarily, Mr. Schuller addresses a disagreement between the parties on the proper scope of review. Respondent contends Mr. Schuller misplaces reliance on *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182] for the proposition that *Chapman* review "'looks . . . to the basis on which 'the jury actually rested its verdict.'" (ABM, at p. 45, fn. 16; OBM, at p. 66.) Respondent contends that principle was overruled in *Neder v. United States* (1999) 527 U.S. 1, 11 [119 S.Ct. 1827, 144 L.Ed.2d 35]. (ABM, at pp. 45-46, fn. 16.) Mr. Schuller disagrees.

At issue in *Sullivan* was whether a defective reasonable doubt instruction was amenable to harmless error review or was *per se* reversible error. (*Sullivan, supra,* 508 U.S. at p. 279.) The court held it was the latter. (*Id.* at pp. 279-282.) It concluded that "*Chapman* itself suggests the answer," describing the scope of such harmless error review based on its own prior authorities as follows:

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee. [Citations.]

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

The court then concluded that, given those principles, it would be illogical to subject the error *in that case* to *Chapman* review. (*Sullivan, supra,* 508 U.S. at p. 280.) It explained that, in the absence of a correct reasonable doubt instruction, there has been "no jury verdict of guilty-beyond-a-reasonable-doubt," rendering meaningless an inquiry into "whether the *same* verdict of guilty-beyond-a-reasonable doubt would have been rendered absent the error." (*Ibid.*, emphasis in original.) It continued,

> There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. [Citation.] The Sixth Amendment requires more than appellate speculation about a hypothetical jury's

> action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

(*Ibid*., emphasis in original.) It further concluded that it cannot be said the error "played no significant role in the finding of guilt" because "the misdescription of the burden of proof . . . vitiates *all* the jury's findings." (*Id*. at p. 281, emphasis in original.)

> A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty." [Citation.]

(*Ibid*.)

At issue in *Neder* was whether the failure to submit to the jury *an element* of the offense was amenable to *Chapman* review. (*Neder, supra,* 527 U.S. at p. 4.) In arguing that harmless error review should be precluded, the defendant attempted to extend *Sullivan*'s analysis detailed above. (*Id*. at p. 11.) He believed *Sullivan* meant that the basis for harmless error review is absent where the constitutional error prevents a "'complete verdict'" on *each* element. (*Ibid*.) As explained by the court in *Neder*, the defendant claimed that, due to the error, there had not been an "*actual* verdict of guilty-beyond-a-reasonable-doubt" on the omitted element and thus no "'*object*, so to speak, upon which the harmless-error scrutiny can operate.'" (*Ibid*., emphasis in original.)

Neder rejected the argument. It wrote, "Although this strand of the reasoning in *Sullivan* does provide support for Neder's position, *it* cannot be squared with our harmless-error

cases." (*Neder, supra,* 527 U.S. at p. 11, emphasis added.) The court then recounted several of its own cases in which it had conducted harmless error review on errors affecting only individual elements. (*Id.* at pp. 11-12.) It later wrote,

> It would not be illogical to extend the reasoning of *Sullivan* from a defective "reasonable doubt" instruction to a failure to instruct on an element of the crime. But, as indicated in the foregoing discussion, the matter is not *res nova* under our case law.

(*Id.* at p. 15.)

In arguing that *Sullivan*'s scope of review summary was no longer good law, respondent relies on the quotation above regarding the "strand of the reasoning in *Sullivan*" but omits part of it. (ABM, at pp. 45-46, fn. 16.) Respondent writes, "As the United States Supreme Court later recognized, however, 'this strand of reasoning in *Sullivan* cannot be squared with our harmless-error cases.'" (ABM, at pp. 45-46, fn. 16.) However, read in full and in light of the overall context, the quotation appears simply to mean that "Neder's position" (the "it" referenced in the full quote), while an arguably logical extension of one "strand" of *Sullivan*'s "reasoning," was incompatible with existing authority more directly on point. Nothing in that quote disavows *Sullivan*'s summary of the scope of *Chapman* review or the conclusion it drew from that summary.

Notably, the *Neder* majority expressly reaffirmed both *Sullivan*'s view of *Chapman* and its conclusion drawn therefrom, relying on both to distinguish the error in *Sullivan* from the one before it:

> Applying our traditional mode of analysis, the Court [in *Sullivan*] concluded that the error was not subject to harmless-error analysis because it "vitiates *all* the jury's findings," [citation], and produces "consequences that are necessarily unquantifiable and indeterminate," [citation]. By contrast, the jury-instruction error here did not "vitiate *all* the jury's findings." [Citations.]

(*Neder, supra,* 527 U.S. at pp. 10-11, italics in original, underline added; see also *id.* at p. 32 (dis. opn., of Scalia, J.) [noting the majority reaffirmed *Sullivan*'s holding that "it would be structural error (not susceptible of 'harmless-error' analysis) to 'vitiate all the jury's findings'"].) Moreover, since *Neder*, *Sullivan*'s summary of the *Chapman* scope of review has been cited approvingly numerous times by courts in this state (see, e.g., *People v. Aranda* (2012) 55 Cal.4th 342, 365; *People v. Saavedra* (2018) 24 Cal.App.5th 605, 615; *People v. Mason* (2013) 218 Cal.App.4th 818, 826; *People v. Lewis* (2006) 139 Cal.App.4th 874, 886-887) and in other jurisdictions (see, e.g., *Barnes v. Thomas* (4th Cir. 2019) 938 F.3d 526, 536; *State v. Shorter* (Iowa 2020) 945 N.W.2d 1, 9; *State v. Eaglin* (La.Ct.App. 2019) 279 So.3d 949, 953; *Commonwealth v. Vasquez* (2010) 456 Mass. 350, 360-361 [923 N.E.2d 524, 533-534]).

That is not to say that *Chapman* review, even as clarified in *Sullivan*, permits *only* consideration of *the verdict itself* to determine whether, for instance, the jury necessarily found all of the elements beyond a reasonable doubt. Such a narrow construction of *Chapman* was rejected by this court in *People v. Aledamat* (2019) 8 Cal.5th 1, 8-13. The reviewing court may look

beyond the verdict itself and consider, for example, the instructions and arguments of counsel if relevant. (See *id.* at pp. 13-14.) It has also long been held that evidence of the affected element that is overwhelming and uncontested is harmless under *Chapman*. (*Neder, supra,* 527 U.S. at p. 17.)

But at its core, the *Chapman* inquiry still asks to what extent the error might have contributed to the verdict the jury actually returned. (See *Aledamat, supra,* 8 Cal.5th at pp. 12-13.) An examination of the verdict, and what it says about that jury's understanding of the case, is still relevant, as this court has held (see *id.* at pp. 14-15 [referring to an examination of "what the jury necessarily did find" as a "nonexclusive" way of assessing prejudice]). That was the point Mr. Schuller was making in his opening brief that respondent challenges. He merely objected to the Court of Appeal's speculation about how a hypothetical jury might decide the case under proper instructions and indicated that the verdict shows some jurors in his case actually accepted Mr. Schuller's claim that he believed he was defending himself. (OBM, at p. 66.) While *Chapman* review is not so narrow as to be limited to a review of the verdict returned by the defendant's jury, it is not so broad that a reviewing court is free to guess about how some *other* jury might decide the case in the absence of the error. As stated by the Court of Appeal in *Lewis, supra,* 139 Cal.App.4th at page 887,

> [T]he harmless error inquiry is directed at determining whether the error actually contributed to the jury's verdict at hand. The test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the

> absence of the error, but whether there is any reasonable possibility that the error might have contributed to the conviction in this case. If such a possibility exists, reversal is required. The test for harmless error suggested by the People in the present case—whether "any reasonable jury would have found the [elements affected by the error]"—is patently incompatible with this standard.

B. Application of Chapman

As support for its conclusion that the instructional omission in this case was harmless under *Chapman*, respondent contends (1) "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" (ABM, at pp. 46-48), and (2) "there was overwhelming evidence of Schuller's guilt of first degree murder" and only weak evidence of imperfect self-defense (ABM, at pp. 48-54). Mr. Schuller addresses each of these contentions in turn.[2]

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[2] Respondent asserts for the first time in this case that, in addition to the standard instructions on murder and imperfect self-defense, a "[p]roperly instructed" jury should be told that imperfect self-defense has no application when the defendant's actions are "'entirely delusional.'" (ABM, at p. 46, quoting *People v. Elmore* (2014) 59 Cal.4th 121, 136-137.) Respondent cites no authority supporting such an instruction. Moreover, it is irrelevant to respondent's contention that the error in this case was harmless. Respondent never argues that, based on the evidence of Mr. Schuller's delusions, a jury provided such an instruction would have rejected imperfect self-defense. In fact, respondent repeatedly claims that the evidence demonstrated his delusions were feigned. (ABM, at pp. 53-54.) Given that respondent does not rely on the principle from *Elmore* in its analysis, Mr. Schuller does not directly address it.

1. Jury's First Degree Murder Verdict

In the instant case, the jury found Mr. Schuller guilty of first degree murder, necessarily deciding that the shooting was willful, deliberate and premeditated. (2CT 483 [CALCRIM 521], 490-491 [CALCRIM 640], 535 [guilty verdict].) Respondent contends the jury's verdict constitutes an implicit rejection of Mr. Schuller's claim that he was defending himself, reasoning premeditated murder is incompatible with a defensive killing. (ABM, at pp. 46-48.) Respondent claims that, if the jury had believed him, it would have found him guilty of the lesser included offense of second degree murder instead. (ABM, at p. 48.) As support, respondent relies on *People v. Manriquez* (2005) 37 Cal.4th 547. (ABM, at p. 47.) The argument lacks merit.

As respondent notes, in *Manriquez*, the defendant was found guilty of first degree premeditated murder and challenged the trial court's failure to instruct on imperfect self-defense. (*Manriquez, supra,* 37 Cal.4th at pp. 551, 576, 580; ABM, at p. 47.) The court first held that "the evidence clearly was insufficient to require the giving of defendant's requested instruction regarding imperfect self-defense." (*Id.* at p. 582.) As an alternative basis for rejecting the claim, it also found the error harmless, citing *People v. Sakarias* (2000) 22 Cal.4th 596, 621 for the proposition that reversal is not required for such error where the evidence in support of the omitted instruction "'was, at best, extremely weak.'" (*Manriquez,* at pp. 582-583.) It also stated that the verdict left "no doubt the jury would have returned the same

verdict had it been instructed regarding imperfect self-defense." (*Id*. at p. 582.)

The latter statement, on which respondent relies, was unnecessary to the decision and thus mere dictum and not precedential. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1045, fn. 3 [defining dictum].) In some cases, dictum may have persuasive value though. (*Ibid*.) That is the case "'[w]hen the Supreme Court has conducted a thorough analysis of the issues and such analysis reflects compelling logic.'" (*People v. Williams* (2018) 26 Cal.App.5th 71, 87; *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) But where an opinion's author merely makes a passing observation without analysis, even this court has rejected subsequent reliance on it. (See, e.g., *People v. Contreras* (2018) 4 Cal.5th 349, 361 [dismissing a "passing statement" from a prior opinion as "unnecessary to our decision"]; *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 390 [rejecting party's reliance on a "passing observation" from a prior case that was "mere dictum"].)

The statement in question from *Manriquez* falls into the latter category. It was made in passing, in a single sentence, without any analysis. It also does not reflect compelling logic. The only authority cited as support was *People v. Lewis* (2001) 25 Cal.4th 610, 646, which is inapposite. *Lewis* held the absence of an imperfect self-defense instruction was harmless in light of his first degree murder conviction, but the defendant in that case was convicted of felony murder and not premeditated murder. (*Ibid*.) Because malice is not an element of felony murder,

imperfect self-defense is inapplicable to that theory. (*People v. Robertson* (2004) 34 Cal.4th 156, 165, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; see *People v. Seaton* (2001) 26 Cal.4th 598, 665 ["under the felony-murder rule, a killing in the commission of certain felonies specified in section 189 is first degree murder, not manslaughter, even if the killer acts in unreasonable self-defense"].)

Closer scrutiny of the statement from *Manriquez* makes its lack of logic plain. It is premised on the notion that a first degree premeditated murder verdict is necessarily incompatible with imperfect self-defense. It is not.

Where "it is possible to determine" that the "factual question" posed by an "omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions," the error in omitting the instruction is deemed harmless. (*People v. Elliot* (2005) 37 Cal.4th 453, 475, internal quotation marks omitted.) "[T]here can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury." (*Ibid.*, internal quotation marks omitted.) For example, this court has held that a finding of premeditation and deliberation renders harmless the failure to instruct on voluntary manslaughter based on *heat of passion*.[3] (*People v. Wharton*

[3] Significantly, the court in *Wharton* found the error harmless under the more lenient test for errors of state law announced in *Watson, supra,* 46 Cal.2d at page 836. (*Wharton, supra,* 53 Cal.3d at p. 571.) At issue in this case is whether the

(1991) 53 Cal.3d 522, 572; but see *People v. Berry* (1976) 18 Cal.3d 509, 518 [factual question posed by omitted heat of passion instruction *not* resolved by jury verdict finding defendant guilty of first degree murder].) In *Wharton*, the court explained that "[t]his state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion." (*Ibid.*) Without conceding the point, there may be some arguable logic to that conclusion.

Heat of passion exists where the defendant's ability to reason was obscured or disturbed by a provocative act that would cause an ordinarily reasonable person to act rashly and without deliberation and reflection. (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) Thus, a killing under the heat of passion is a product not "of rational thought but . . . of unconsidered reaction to the provocation." (*Ibid.*) A rash, unconsidered killing is not a premeditated and deliberate one. (*People v. Jennings* (2010) 50 Cal.4th 616, 645.)

Imperfect self-defense is different. CALCRIM 571 would have instructed the jury that the defendant acted in imperfect self-defense if he "actually believed" that he was "in imminent danger of being killed or suffering great bodily injury" and that "the immediate use of deadly force was necessary to defend against the danger" but "one of those beliefs was unreasonable." Nothing among those elements suggests the killing must be rash

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more stringent *Chapman* test actually applies. It is thus unclear whether *Wharton*'s analysis still has any significance.

or unconsidered in any way. The facts in this case demonstrate that such a defensive killing can be premeditated and deliberate.

According to Mr. Schuller, after W.T. failed to return "the light" to him, W.T. grabbed a knife from the kitchen and attempted to stab him. (5RT 1136-1137.) Mr. Schuller claimed he first tried to flee the residence but could not open the exterior doors. (5RT 1137.) He then testified that W.T. attempted to grab the gun from the dining area table while raising the knife, prompting Mr. Schuller to grab the gun first, pull the trigger, and shoot W.T. in the head. (5RT 1138.) W.T. fell to the ground and dropped the knife but then began to get back up, leading Mr. Schuller to shoot him again repeatedly. (5RT 1138-1139.) Next, again according to Mr. Schuller, W.T.'s teeth flew out at Mr. Schuller, causing him more fear and prompting him to shoot W.T. repeatedly once more, this time until the gun was empty. (5RT 1144.) Finally, as Mr. Schuller was about to leave, he claimed he saw W.T.'s body convulsing and demons swirling around, to which he responded by pouring gasoline on the body and lighting it on fire. (5RT 1145-1147.)

The jury was instructed that a willful, deliberate and premeditated murder is one in which the defendant decides to kill after weighing the consequences of that choice and before committing the fatal acts. (2CT 483 [CALCRIM 521].) And it was told that the "amount of time required for deliberation and premeditation may vary . . . according to the circumstances" and a "calculated decision to kill can be reached quickly." (2CT 483 [CALCRIM 521].) The jury could have concluded that, at each

stage preceding deadly conduct—when Mr. Schuller could not exit the residence and W.T. reached for the gun, when W.T. got up after being shot the first time, when W.T.'s teeth flew out of his mouth, and when W.T.'s body began convulsing and demons appeared—Mr. Schuller made a conscious and calculated, albeit quick, decision to kill W.T. But it also could have accepted that those premeditated and deliberate decisions to kill were the product of fear and motivated by Mr. Schuller's belief that he needed to kill to protect himself. Certainly nothing in the instructions prevented the jury from making those findings. Accordingly, a finding of premeditation and deliberation is not incompatible with a finding of imperfect self-defense, at least under the facts of this case.

That the jury found Mr. Schuller guilty of first degree murder rather than second degree murder does not render the error harmless either. While a finding of premeditation and deliberation is *compatible* with imperfect self-defense, it is wholly *incompatible* with second degree murder, which includes an intentional killing in the absence of premeditation or deliberation or both. (2CT 483 [CALCRIM 521] ["If the People have not met this burden [of proving a willful, deliberate and premeditated killing], you must find the defendant not guilty of first degree murder and the murder is second degree murder"].) Notably, CALCRIM 640 told the jury that, if it believed the fatal acts were premeditated and deliberate, it could only return a verdict of first degree murder. (2CT 490.) Thus, given that the jury clearly harbored that belief, a verdict of first degree murder was the only

option it had, even if some or all of its members may have also accepted that the fatal acts were defensive.

2. "Overwhelming" Evidence

Next, respondent contends the evidence of first degree murder was overwhelming. (ABM, at pp. 48-49.) It asserts that, before each of the fatal acts, Mr. Schuller "made a deliberate, premeditated, and calculated decision to kill W.T." (AMB, at p. 49.) That is certainly *an* interpretation of the evidence, and based on the verdict, it appears the jury may have believed that too. But as noted above, that does not necessarily mean Mr. Schuller lacked an actual belief that he needed to kill to protect himself, whether from W.T. or the demons he said he observed.

Respondent claims that "any suggestion" Mr. Schuller harbored a defensive belief "strains credulity" because each sequence of fatal conduct—e.g., each series of gunshots—was in response to what Mr. Schuller claimed was W.T.'s failure to die, thereby demonstrating his "deliberate intent to kill W.T." (ABM, at pp. 48-49.) That argument implies an intent to kill and an unreasonable belief in the need to defend oneself are mutually exclusive mental states. They are not. (See *People v. Landry* (2016) 2 Cal.5th 52, 98 ["'voluntary manslaughter requires either an intent to kill or a conscious disregard for life"']; *People v. Bryant* (2013) 56 Cal.4th 959, 970 [same].)

Next, respondent contends "there . . . was evidence" of Mr. Schuller's consciousness of guilt, which it believes is "inconsistent with his assertion that he acted in self-defense." (ABM, at p. 49.) Specifically, respondent references Mr. Schuller's destruction of

W.T.'s body and his flight from the scene. (ABM, at p. 49.) However, respondent fails to explain how that conduct was incompatible with imperfect self-defense. As Mr. Schuller explained it, he burned the body in an effort to send the demons he saw emanating from it back to hell. (5RT 1145-1147.) And he claimed he left the scene for the ocean in Monterey as part of a ritual he believed would end all the threats he perceived being lodged against him. (5RT 1125, 1148.) That conduct thus did not necessarily require a finding that imperfect self-defense's requisite fear of harm and defensive belief were lacking. Regarding a finding of consciousness of guilt, respondent merely advances one possible interpretation of the evidence that it believes a hypothetical jury could or would adopt. That is not enough to establish harmless error under *Chapman*.

Next, repeating an argument made by the Court of Appeal, respondent contends that the "physical evidence contradicted Schuller's version of events" because the knife he claimed W.T. used was found on the table rather than on the floor and had no blood spatter on it. (5RT 49-50.) As explained in the opening brief, however, those facts do not require a finding that Mr. Schuller lacked any fear of being harmed by W.T. but rather indicate only that any fear he felt might be unreasonable, indicating that the killing was not justified. (OBM, at p. 65.) For imperfect self-defense, it is enough that Mr. Schuller believed, although unreasonably, that his life was in danger.

Respondent claims "[t]here was nothing to indicate the knife was in W.T.'s hand when he was shot." (5RT 50.) That is not

accurate. Mr. Schuller's testimony was evidence that the knife was in W.T.'s hand and used against him. That there may have been no or little evidence corroborating W.T.'s threatening use of a knife, though, does not matter. Again, the issue is not whether Mr. Schuller was in fact attacked with a knife, which would make the killing justified, but whether he believed his life was in danger.

Next, respondent contends that the bullet wound pattern—with all of them inflicted on the sides of the victim's head—"undercuts Schuller's claim that W.T. came at him straight on with a stabbing motion." (ABM, at pp. 50-51.) First, respondent's interpretation of the evidence is inaccurate. Respondent correctly observes that W.T. sustained nine gunshot wounds to the left side of his head and one on the right side. (ABM, at p. 50; 4RT 847-848.) But regarding the ones on the left side, the pathologist also explained that six of them were to the left side *of the face*—specifically, one to the forehead (wound "A"), four to the cheek (wounds "D," "E," "F," "G"), and one through the upper lip (wound "H"). (4RT 852-853, 861-867.) Thus the evidence showed Mr. Schuller shot W.T. in the face, contrary to the premise of respondent's argument.

Second, the wound pattern argument is speculative. There is no way to know W.T.'s precise head and body position immediately preceding each shot. For instance, could he have turned away the moment Mr. Schuller pulled the gun's trigger the first time or could his face have been turned away during the

subsequent shots? The record does not say, but it is certainly possible.

Third, and more importantly, the wound pattern and what it may say about the nature of Mr. Schuller and W.T.'s exchange is irrelevant. Again, the issue is not whether the evidence shows W.T. actually attacked Mr. Schuller with a knife. If he had, this court would be deciding whether the trial court's failure to instruct on *perfect self-defense* was harmless. The issue is only whether Mr. Schuller may have believed his life was in danger. Nothing about the wound pattern evidence *necessarily* undermines Mr. Schuller's testimony that he did.

Respondent contends that Mr. Schuller's claimed fear "falls flat" given that, as respondent characterizes it, the first gunshot wound incapacitated W.T., eliminating any threat of harm. (ABM, at p. 51.) In so arguing, though, respondent ignores Mr. Schuller's description of the event. According to Mr. Schuller, after the initial gunshot knocked W.T. down, W.T. began to get up, leading him to shoot W.T. again. (5RT 1138-1139.) Then, W.T.'s teeth flew out at Mr. Schuller, which he claims caused him more fear. (5RT 1144.) He explained that he thought he must be missing W.T. because he did not see any of the bullets actually hitting him and did not see any holes in or blood coming from the body, meaning that he still thought W.T. was alive and posed a threat. (5RT 1144.) So, he fired some more. (5RT 1144.) Thus respondent is wrong that the gunshots that followed the initial one were necessarily inconsistent with Mr. Schuller's stated fear of harm.

Respondent concludes its argument by citing evidence that it claims undermines the believability of Mr. Schuller's account. (ABM, at pp. 51-54.) Respondent cites his failure to assert self-defense immediately after the incident and his reliance on a motive related to homosexuality that he later admitted was a lie. (ABM, at pp. 51-52.) Respondent observes Mr. Schuller failed to report the incident or summon help but instead fled from police. (ABM, at p. 52.) Respondent relies on the mere possibility of a motive other than self-defense, a motive that respondent does not even attempt to identify other than to reference vague "problems in his relationship with W.T." (ABM, at pp. 52-53.) And respondent discusses evidence permitting the inference that Mr. Schuller's delusions may have been feigned, including the testimony of two prosecution psychologists. (ABM, at pp. 53-54.)

While respondent cites evidence that would permit the inference that Mr. Schuller did not really believe he was in danger when he killed W.T., it ignores the plethora of evidence supporting Mr. Schuller's claim that he did. (See OBM, at pp. 61-62.) Respondent merely gives an interpretation of the evidence that supports its position. It is nothing more than an argument that there was substantial evidence from which a rational jury could conclude that imperfect self-defense did not apply in this case. However, mere substantial evidence cannot, under *Chapman*, support a finding that the instructional omission was harmless beyond a reasonable doubt. There was ample evidence upon which jurors could conclude that Mr. Schuller killed W.T. because he actually, although unreasonably, believed his life was

in danger. In fact, as explained in the opening brief, it appears that six of the jurors did so. (OBM, at pp. 66-67.) Respondent ignores that too.

C. Conclusion

In *Chapman*, the United States Supreme Court made clear that federal "constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." (*Chapman, supra,* 386 U.S. at p. 24.) It observed that its test embodied the

> original common-law harmless-error rule [that] put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

(*Ibid*.) Thus, it is not the defendant's burden to prove a federal constitutional violation was harmful. It is incumbent on *the People* to show it was not—to show beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Elizalde* (2015) 61 Cal.4th 523, 542.)

Chapman's placement of that burden is in stark contrast to a mere violation of California law, in which it is the *defendant's burden* to show that it is reasonably probable a more favorable result would have been reached absent the error. (*Gonzalez, supra,* 5 Cal.5th at p. 195; *People v. Hernandez* (2011) 51 Cal.4th 733, 746.) The divergent burdens lays bare the light in which a reviewing court must view an error of federal constitutional law.

The defendant must be given the benefit of every reasonable doubt regarding the impact the error may have had

on the verdict. As an initial matter, it must be presumed that such an error prejudiced the defendant. (*People v. Alvarez* (1996) 14 Cal.4th 155, 216, fn. 21; *People v. Whitt* (1990) 51 Cal.3d 620, 649; see *People v. Gordon* (1990) 50 Cal.3d 1223, 1253, fn. 5; see also *People v. Jennings* (1991) 53 Cal.3d 334, 383-384 [under *Chapman*, "'prejudice will be presumed if the denial may have affected the substantial rights of the accused'" and "'[o]nly the most compelling showing to the contrary will suffice to overcome the presumption'"].) That presumption can only be rebutted by a showing that there is no reasonable possibility the error played a role in the verdict. (See *People v. Reese* (2017) 2 Cal.5th 660, 671; *Aranda, supra,* 55 Cal.4th at p. 367.) Unless such a showing is made, reversal is required. (*Reese*, at p. 671; *Aranda*, at p. 367.)

The People have failed to demonstrate it is not reasonably possible the absence of an instruction on imperfect self-defense contributed to Mr. Schuller's murder conviction. Like the Court of Appeal, respondent merely advances interpretations of the evidence that either it would draw or that it guesses a hypothetical jury would draw if properly instructed. In doing so, it disregards evidence unfavorable to its position and overlooks indications in the record revealing some jurors in this case actually believed Mr. Schuller suffered from delusions that, in part, led him to act defensively. Respondent has not overcome the presumption of prejudice attendant to the federal constitutional violation in this case. Accordingly, reversal of Mr. Schuller's murder conviction is required.

CONCLUSION

For the reasons stated above and in the opening brief, Mr. Schuller asks this court to reverse the judgment.

Dated: November 8, 2022.

Respectfully submitted,

/s/ David L. Polsky

David L. Polsky
Attorney for Mr. Schuller

CERTIFICATE OF WORD COUNT

I, David L. Polsky, counsel for appellant, hereby certify pursuant to rule 8.520, subdivision (c), of the California Rules of Court that appellant's reply brief on the merits in the above-referenced case consists of 9,243 words, excluding tables, as indicated by the software program used to prepare the document.

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

Executed on November 8, 2022, at Ashford, Connecticut.

/s/ David L. Polsky
David L. Polsky

PROOF OF SERVICE

I declare that:

I am employed in Windham County, Connecticut; I am over the age of 18 years and not a party to the within entitled cause; my business address is P.O. Box 118, Ashford, Connecticut 06278. On November 8, 2022, I served a copy of the attached **REPLY BRIEF ON THE MERITS** in said cause on all parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Ashford, Connecticut, addressed as follows:

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Hon. Candace Heidelberger, Judge
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In addition, I electronically served the attached brief to the following parties via the TrueFiling electronic service system:

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California Court of Appeal
Third Appellate District

Central Calif. Appellate Program

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 8, 2022, at Ashford, Connecticut.

/s/ David L. Polsky
David L. Polsky

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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

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