IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JASON CARL SCHULLER, Defendant and Appellant.	No. S272237 (Nevada Superior Court No. F16000111) Third Appellate District No. C087191

APPLICATION TO FILE AMICUS CURIAE BRIEF; and AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT JASON SCHULLER

MARY K. MCCOMB
State Public Defender

ANNE W. LACKEY (172969)
Senior Deputy State Public Defender
anne.lackey@ospd.ca.gov

JESSIE PETERSON (340214)
Barry P. Helft Fellow Attorney
jessie.peterson@ospd.ca.gov
1111 Broadway, Suite 1000
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712

WILLIAM WHALEY (293720)
Deputy State Public Defender
william.whaley@ospd.ca.gov
770 L Street, Suite 1000
Sacramento, CA 95814
Telephone: (916) 322-2676
Facsimile: (916) 327-0459

Attorneys for Amicus Curiae

APPLICATION TO FILE AMICUS CURIAE BRIEF

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The State Public Defender respectfully requests leave pursuant to California Rules of Court, rule 8.520(f)(5), to file the accompanying Amicus Curiae Brief in Support of Petitioner.

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to "engage in . . . efforts for the purpose of improving the quality of indigent defense." (Gov. Code, § 15420, subd. (b).) Further, OSPD is statutorily "authorized to appear as a friend of the court[.]" (Gov. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crimes—particularly the crime of murder.

Failure to instruct on voluntary manslaughter is an issue that arises in many murder cases, including many capital cases. When substantial evidence warrants instructing a jury that a killing done either with adequate provocation or in imperfect self-defense is a killing without malice, the failure to give such instructions removes from the jury's consideration a finding that is critical to distinguishing murder from voluntary manslaughter. Without these instructions, the prosecutor is relieved of the burden of disproving such malice-negating theories to obtain a murder conviction. In

other words, jurors may convict defendants of malice murder even if they harbor reasonable doubts about whether the defendant had been adequately provoked or actually—but unreasonably—acted in self-defense. This brief aims to assist the Court in deciding whether the failure to instruct on voluntary manslaughter, when warranted by the evidence, violates the federal Constitution and must be analyzed under the stringent test for prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

For the foregoing reasons, the State Public Defender respectfully requests that OSPD be granted leave to file the accompanying amicus curiae brief.

Dated: December 9, 2022

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

/s/ Anne W. Lackey
ANNE W. LACKEY
Senior Deputy State Public Defender

/s/ Jessie Peterson
JESSIE PETERSON
Barry P. Helft Fellow Attorney

/s/ William Whaley
WILLIAM WHALEY
Deputy State Public Defender

Attorneys for Amicus Curiae

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INTRODUCTION

Federal constitutional errors require reversal unless the prosecution proves, beyond a reasonable doubt, that such errors did not affect the outcome. (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).) By contrast, errors that violate state law alone require reversal only if the defendant demonstrates that there is a reasonable probability the errors affected the outcome. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) *Chapman* is a "more demanding" test (*People v. Hendrix* (2022) 13 Cal.5th 933, 939) that results in reversal where *Watson* would not. This case considers whether failure to properly instruct on malice-negating theories of voluntary manslaughter—here, imperfect self-defense—implicates the federal Constitution or is merely a question of state law.

This question, in turn, implicates several related strands of federal constitutional law, all of which revolve around the basic structure of a criminal trial: the requirement that the prosecution prove to a jury—unanimously and beyond a reasonable doubt—those issues that are submitted to them and necessary for their verdict.

One way to conceive of the error in failing to instruct on unreasonable self-defense or heat of passion is to frame it as an error that eases the prosecution's burden to obtain a murder conviction. When a state chooses to define murder as an unlawful killing with malice, as California does, the due process clause of the United States Constitution places the burden squarely on

prosecutors to disprove malice-negating theories like imperfect self-defense and heat of passion when those theories are properly presented by the evidence. (*Mullaney v. Wilbur* (1975) 421 U.S. 684 (*Mullaney*).) Relevant jury instructions on imperfect self-defense and heat of passion have been adapted to reflect that burden. (CALCRIM Nos. 570 & 571.) But in cases such as this one, where the trial court erroneously refuses or fails to give one of those instructions, the prosecutor is relieved of the burden to prove malice beyond a reasonable doubt because the jury remains unaware that a killing committed in imperfect self-defense or with adequate provocation is a killing without malice.

Another way to understand the very same error is to frame it as a violation of the Sixth Amendment right to a jury trial, which guarantees the defendants in all criminal trials a unanimous finding, beyond a reasonable doubt, on every "element" of a crime. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*); *In re Winship* (1970) 397 U.S. 358, 364 (*Winship*); *Ramos v. Louisiana* (2020) __ U.S. __, 140 S.Ct. 1390, 1397.) However, as petitioner's Reply notes, defining an "element" of an offense may be "more of an art than a science[.]" (RBM,[1] quoting *People v. Mil* (2012) 53 Cal.4th 400, 412.) Part of this difficulty no doubt lies with the fact that the term "element" was not even in popular use at the time of the framing of the United States Constitution or the adoption of the due process clause of the Fourteenth Amendment, and the term only became highly litigated after *Winship*. As this Court recently

[1] Reply Brief on the Merits.

announced in *People v. McDaniel* (2021) 12 Cal.5th 97, another way to describe the scope of the jury rights, such as unanimity, is to say that they apply to a jury's *findings* on all "issues of fact in criminal trials." (*Id.* at p. 142; see also *People v. Carlson* (2011) 200 Cal.App.4th 695, 702 [referencing the federal constitutional "right to have the jury decide every material issue of fact" in a criminal trial].)

But whether properly categorized under the due process clause or the Sixth Amendment (or both), and whether proceeding under the rubric "element" or "issue," the question of a defendant's malice is reserved to the jury under the federal Constitution. Thus, failure to instruct on malice-negating theories such as imperfect self-defense directly interferes with the jury's finding that defendants are guilty of the murder for which they are charged. Multiple courts have recognized this logic and held that *Chapman* applies to this form of error. (*People v. Thomas* (2013) 218 Cal.App.4th 630, 641-642; *People v. Dominguez* (2021) 66 Cal.App.5th 163, 183-184.)

The Attorney General seeks to avoid this straightforward analysis in two ways. First, it argues that the same error may also be characterized as the failure to instruct on a "lesser included offense," a larger category of error in which the error in this case is also included. Second, the Attorney General posits that failure to instruct on malice-negating theories of manslaughter are "analogous to" the failure to instruct on affirmative defenses under state law, an issue not implicated by the federal Constitution.

As to the Attorney General's first argument, a court cannot avoid the federal constitutional implications and application of *Chapman* simply by grouping the error along with other cases involving lesser-included offenses when the nature of the error in this context also relieves the prosecutor of their burden to prove an element of the offense. Yet, that is exactly what the court below did and what respondent would have this Court condone.

As to the second argument—that failure to instruct on malice-negating theories of manslaughter should be treated in the same way as affirmative defenses—this argument flies in the face of this Court's explicit holding that these theories are *not* affirmative defenses. (*People v. Barton* (1995) 12 Cal.4th 186, 200-201.) And even if they were affirmative defenses, the high court has held that that the burden of proof even as to affirmative defenses must fall on the prosecution if they negate an element of the offense. (*Smith v. United States* (2013) 568 U.S. 106, 110.)

To be sure, *People v. Breverman* (1998) 19 Cal.4th 142 *(Breverman*) sowed some confusion when it declined to treat as federal constitutional error the trial court's failure to instruct the jury sua sponte on heat of passion and applied the prejudice test for state law error set forth in *Watson*. In a footnote, however, the Court clarified that it was not reaching the federal constitutional question because the defendant "never explicitly asserted, let alone developed the argument." (*Id.* at p. 170, fn. 19.)

Some lower appellate courts, including the court below, ignored the import of that footnote and treated failure to instruct on theories of voluntary manslaughter as an error solely of state law.

(See, e.g., *In re Hampton* (2020) 48 Cal.App.5th 463, 481–482; *People v. McShane* (2019) 36 Cal.App.5th 245, 257, fn. 4.) In the absence of a definitive holding from this Court on the appropriate standard of prejudice, the law is, as described by one Court of Appeal, a "morass." (*People v. Franklin* (2018) 21 Cal.App.5th 881, 890, 891; see also *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1143 [noting that the prejudice standard in this context is unresolved].) This is an appropriate case to resolve the question left unanswered in *Breverman*.

I.
DUE PROCESS REQUIRES THE PROSECUTION TO DISPROVE IMPERFECT SELF-DEFENSE TO PROVE MALICE

A. A killing done in imperfect self-defense is a killing without malice

California's Legislature has chosen to define the crime of murder as "the unlawful killing of a human being . . . with malice aforethought." (Pen. Code, § 187, subd. (a), italics added.)[2] Malice aforethought "may be express or implied." (§ 188, subd. (a)(7))[3] To obtain a conviction for murder, the prosecution must convince a jury beyond a reasonable doubt that the defendant killed both unlawfully

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[2] Unless otherwise stated, statutory references are to the Penal Code.

[3] "Malice is express when there is manifested a deliberate intention to take away the life of a fellow creature." (§ 188, subd. (a)(1).) "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188, subd. (a)(2).)

and with malice aforethought. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 139.)

The California Legislature also has chosen to create the crime of manslaughter, defined as the "unlawful killing of a human being *without* malice." (§ 192, italics added.) Malice is the element distinguishing murder from voluntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 460, 462 (*Rios*); see also CALJIC No. 8.50 [distinction between murder and manslaughter is that murder requires malice while manslaughter does not].) By statute, an unlawful killing committed "upon a sudden quarrel or heat of passion" is an unlawful killing without malice, resulting in the crime of voluntary manslaughter. (§ 192, subd. (a).)

This Court also has long recognized that when a defendant kills with an unreasonable but actual belief in the need to use force in self-defense, the defendant has killed without malice and is guilty only of voluntary manslaughter. (See *In re Christian S.* (1994) 7 Cal.4th 768, 778–780, fn. 4; *People v. Flannel* (1979) 25 Cal.3d 668, 680.) The CALJIC jury instruction distinguishing murder and manslaughter confirms this understanding that malice is missing from the mental state of a defendant who kills in imperfect self-defense: in imperfect self-defense, "even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent." (CALJIC No. 8.50.)

B. Because a killing done in imperfect self-defense is a non–malicious killing, the due process clause of the federal Constitution requires the prosecution to bear the burden of proving the absence of imperfect self-defense beyond a reasonable doubt to obtain a murder conviction

The federal Constitution's due process clause precludes a criminal conviction unless the prosecution has proven beyond a reasonable doubt the ultimate issues which the jury is tasked with deciding in its verdict. (*Winship*, *supra*, 397 U.S. at p. 364; *People v. Vann* (1974) 12 Cal.3d 220, 227–228; *Patterson v. New York* (1977) 432 U.S. 197, 204–205 (*Patterson*); *People v. Foster* (2010) 50 Cal.4th 1301, 1347 [instructions must make "clear that ultimate facts must be proved beyond a reasonable doubt"]; *County Court of Ulster County, New York v. Allen* (1979) 442 U.S. 140, 156 [legislative devices "must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt"].)

The United States Supreme Court applied this principle in *Mullaney* when it held that, in states that include malice as an element of murder, "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, italics added.)

Both in Maine, the state's law at issue in *Mullaney*,[4] and in California, the Legislature has chosen to characterize a killing done with adequate provocation as a killing without malice, resulting in voluntary manslaughter and not murder. Thus, as this Court recognized in *Rios*, the principles articulated in *Mullaney* require that, if the issue of provocation or imperfect self-defense is "properly presented"[5] in a murder case, "the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice." (*Rios*, *supra*, 23 Cal.4th at p. 462, original italics.) CALJIC No. 8.50, quoted above, which distinguishes murder from manslaughter, was specifically amended in response to *Mullaney*. (See *People v. Lee* (1999) 20 Cal.4th 47, 67, fn. 1 (conc. opn. of Brown, J.); *People v. Najera* (2006) 138 Cal.App.4th 212, 227 ["In response to *Mullaney v. Wilbur*, the CALJIC instructions were modified to add to CALJIC No. 8.50 this sentence: 'To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove beyond a

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[4] See *Mullaney, supra,* 421 U.S. at 686, fn. 3 ["The Maine murder statute, Me.Rev.Stat.Ann., Tit. 17, s 2651 (1964), provides: 'Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.' The manslaughter statute, Me.Rev.Stat.Ann., Tit. 17, s 2551 (1964), in relevant part provides: 'Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years.'"].

[5] "Properly presented" means evidence sufficient to raise a reasonable doubt. (See, e.g., *Rios*, *supra,* 23 Cal.4th at pp. 461–462, and citations therein.)

reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel"]; see also CALCRIM No. 570 & 571 [containing similar language].)

It follows from these principles that a trial court's failure to instruct a jury on the principle of imperfect self-defense or adequate provocation and the prosecutor's burden violates both a defendant's federal Constitutional due process and Sixth Amendment rights. This straightforward logic is complicated by lower courts (and respondent's) focus on the purported similarity between imperfect self-defense and other defenses,[6] issues where the United States Supreme Court has held that the State *can* place the burden on the defendant. Further confusion is added by fixating on voluntary manslaughter's status as a "lesser included offense" of murder. Thus, amicus will briefly address respondent's effort to obfuscate the federal constitutional significance of the absence of malice when a defendant has killed in imperfect self-defense.

1. The prosecution cannot prove murder without disproving evidence of imperfect self-defense

Respondent's argument that "[t]he absence of imperfect self-defense is not an element of murder under California law" (Answer Brief on the Merits (Answer Brief) at p. 27) begins with a misstatement of the law and ends with a misunderstanding of the law.

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[6] See, e.g., *People v. Schuller* (2021) 72 Cal.App.5th 221, 238 (*Schuller*) [characterizing imperfect self-defense as a defense to murder with malice aforethought].)

First, respondent mistakenly asserts twice that *California* has "tasked" or chosen to assign to the prosecution the burden of disproving evidence of imperfect self-defense in a murder prosecution to prove the element of malice beyond a reasonable doubt. (Answer Brief at pp. 27, 32.) But this burden has not been placed on the prosecution by legislative design (unless respondent means to say that the burden flows from California's choice to include malice aforethought in its definition of murder); rather, as this Court recognized in *Rios*, it is the due process clause of the federal Constitution that places the burden on the prosecution to disprove imperfect self-defense. (*Rios*, *supra*, 23 Cal.4th at 462.)

Then, respondent spends some time reviewing the doctrine of imperfect self-defense and this Court's decisions in *Flannel*, which "cemented imperfect self-defense as a general principle of law" (Answer Brief at p. 29) and *Christian S.* (Answer Brief at p. 30), which distinguished imperfect self-defense from diminished capacity following the abrogation of the diminished capacity defense by the Legislature. But respondent fails to extract from those opinions the critical and, in this case, determinative point: that imperfect self-defense is an unlawful killing committed without the element of malice necessary for a defendant to be found guilty of murder and is the separate crime of voluntary manslaughter.

Respondent's assertion that "due process does not require that this State *treat imperfect self-defense as part of the malice element*"

(Answer Brief at p. 31, italics added) is wrong.[7] Regardless of the label attached to imperfect self-defense—element or defense or factual circumstance—due process requires the prosecution to prove the absence of imperfect self-defense to prove that the killing was malicious and therefore murder. (See *Mullaney*, *supra*, 421 U.S. at p 698 ["if *Winship* were limited to those facts that constitute a crime as defined by state law," states could undermine *Winship*'s due process requirements simply by redefining the elements that constitute different crimes].) If respondent is claiming that the prosecution can separate the due process requirement of *proving* the element of malice beyond a reasonable doubt from the due process requirement of *disproving* evidence of imperfect self-defense, *Mullaney* clearly holds otherwise. (*Id.* at p. 702 ["proving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent"].)

California has chosen to include malice as an element of murder and recognizes that a killing in imperfect self-defense is non-malicious. *Winship* and *Mullaney* make clear that due process requires the prosecution disprove the latter to prove beyond a reasonable doubt the former.

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[7] Respondent is especially mistaken in the context of an unintentional but unlawful killing done with adequate provocation. Section 188, subdivision (a)(2), expressly incorporates the malice-negating theory into the definition of implied malice: "Malice is implied *when no considerable provocation appears*."

2. California law is substantively distinguishable from the state laws at issue in *Patterson v. New York* and *Engle v. Isaac*

Respondent goes on to argue that, although California has assigned to the prosecution the burden to prove the absence of imperfect self-defense, because imperfect self-defense operates "much like other defenses that implicate only state law," federal constitutional due process protections are not triggered. (Answer Brief at pp. 38.) But again, the requirement that the prosecution bear the burden to prove the absence of self-defense is not a "choice" made by California; it is a mandate imposed by the due process clause because California has included the element of malice in the definition of murder.

In this way, the crime of voluntary manslaughter resulting from an unlawful, non-malicious killing done in imperfect self-defense operates differently under California law than in the state laws at issue in the United States Supreme Court opinions of *Patterson*, *supra*, 432 U.S. 197 and *Engle v. Isaac* (1982) 456 U.S. 107 (*Engle*), two cases cited by respondent to demonstrate that the absence of imperfect self-defense is not an element of murder. (Answer Brief at pp. 32–38.) In New York at the time of the *Patterson* opinion, the crime of second-degree murder had two elements: (1) a mens rea element of intending to cause the death of another person; and (2) an actus reus element of actually causing the death of "such person or of a third person." (*Patterson*, *supra*, 432 U.S. at p. 198.) Unlike in California, in New York, "[m]alice aforethought [was] not an element of the crime" of second-degree murder. (*Ibid.*)

New York also permitted a defendant to raise an affirmative defense of extreme emotional distress to reduce the murder to manslaughter but placed the burden on the defendant to prove its presence. (*Patterson, supra,* 432 U.S. at pp. 198–199.) The *Patterson* Court rejected the defendant's argument that shifting the burden to the defendant to prove this defense violated the due process clause because the burden remained on the State to prove beyond a reasonable doubt the elements of murder—the victim's death, the defendant's intent to kill, and the defendant's actions causing the victim's death. (*Id.* at p. 205.) The jury found the defendant guilty and, in so doing, the Court concluded the prosecution had "satisfied the mandate of *Winship* that it prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which (Patterson was) charged.'" (*Id.* at p. 206.)

But unlike in New York, malice *is* an element of murder in California. If the prosecution seeks to convince a jury the defendant has committed a murder, the prosecution has the burden to prove beyond a reasonable doubt that the killing was done with malice to satisfy the mandate of *Winship*. California also recognizes that a killing done in imperfect self-defense is a killing without malice, and the prosecution has the burden to *disprove* the evidence of imperfect self-defense to establish the element of malice beyond a reasonable doubt. Thus, California law differs from the New York law at issue in *Patterson* in ways that are critical to concluding that due process requires the prosecution to disprove imperfect self-defense in order to prove malice and thereby obtain a murder conviction.

Indeed, this is the point the high court noted in *Smith v. United States* (2013) 568 U.S. 106: the burden of proof of beyond a reasonable doubt must reside with the prosecution "when an affirmative defense *does* negate an element of the crime." (*Id.* at 110, citing *Martin v. Ohio* (1987) 480 U.S. 228, 237 (*Martin*) (dis. opn. of Powell, J.), original italics.) Any instruction therefore must be "adequate to convey to the jury that all of the evidence, including the evidence going to [a defense], must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." (*Martin*, *supra*, 480 U.S. at p. 234.) But without an instruction on imperfect self-defense as negating malice, there was no way that the jury could understand that the element of malice was not proven if the defendant acted in unreasonable self-defense.

Respondent goes on to cite *Engle* for the unremarkable proposition that states have "the ability to decide the elements that define their crimes, with some limit upon state authority to reallocate the traditional burden of proof." (Answer Brief at p. 33.) But *Engle* really is a case about default in federal habeas corpus proceedings. (See *Engle*, *supra*, 456 U.S. at p. 110 [applying the principle of *Wainwright v. Sykes* (1944) 433 U.S. 72, concluding that respondents who failed to comply with state contemporaneous objection rule to jury instructions may not challenge those instructions in federal habeas proceeding].) To the extent the case addressed the issue of a prosecutor's burden to disprove evidence if that evidence negates an element of the crime, *Engle* bolsters rather than undermines the conclusion that, in California, the prosecution

is required by due process to disprove evidence of imperfect self-defense to prove the element of malice.

The *Engle* Court began by making clear 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*." (*Engle*, *supra*, 456 U.S. at p. 120, italics added.) Looking to the Ohio Code, the *Engle* Court characterized the State's decision "requiring the prosecution to disprove certain affirmative defenses" as providing defendants with "assist[ance]" rather than a mandate that the prosecution bear the burden. (*Id.* at p. 120.)

That conclusion changed, however, when the affirmative defense "negates these elements of criminal behavior." (*Engle, supra*, 456 U.S. at p. 121.) The Supreme Court recognized that the respondents had raised a "colorable constitutional claim" when they argued that *Mullaney* and *Patterson* placed the burden on the prosecution to prove the absence of self-defense when self-defense will negate an element of the charged crime under the state's law. (*Id.* at p. 122.) The Supreme Court simply declined to answer the question because respondents failed to preserve an objection to the self-defense instruction given at their trial, noting that *Winship*, decided "four and one-half years" before their trials, "laid the basis for the constitutional claim." (*Id.* at p. 131.) The Court went on: "[N]umerous courts agreed that the Due Process Clause requires the prosecution to bear the burden of disproving certain affirmative defenses." (*Id.* at p. 133.)

Of course, malice-negating theories of voluntary manslaughter are not affirmative defenses. (See RBM at 9-10, citing

People v. Barton, *supra*, 12 Cal.4th at pp. 200-201 ["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"].) But even if such theories were a defense, they would be among those that due process requires to be disproven by the prosecution to prove malice beyond a reasonable doubt. California defines murder as an unlawful killing with malice aforethought; California also defines a killing in imperfect self-defense as an unlawful killing without malice, resulting in the crime of voluntary manslaughter. The consequence of California's choice to include malice as a necessary element of murder is to put the burden on the prosecution to disprove imperfect self-defense when it has been "properly presented" in a murder prosecution to establish the element of murder beyond a reasonable doubt. *Engle* supports that requirement, identified in *Mullaney*, and recognized in *Rios*.

3. *Mullaney* holds that due process requires the prosecution to disprove evidence negating malice to prove malice beyond a reasonable doubt

Respondent invites this Court to limit *Mullaney* to its facts. According to respondent, *Mullaney* only recognizes due process violations where the state has expressly shifted the burden to the defendant to prove a malice-negating theory. But *Mullaney's* actual holding, while certainly recognizing a due process violation on those facts, was not framed in terms of the burden *shifting* but in terms of *who* held the burden. The due process violation occurred, according to the Court, when the prosecutor did not shoulder the burden. (*Mullaney*, *supra*, 421 U.S. at 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."].) It does not matter how the prosecution is relieved of the burden—express burden shifting, lack of instructions, or mistaken instruction—if it happens, it is a due process violation.

4. Malice-negating "defenses" are not like other "defenses"

Finally, respondent claims that the "absence of imperfect self-defense is analogous to other types of defenses that implicate state law only." (Answer Brief at pp. 38–45.) Respondent points to *People v. Babbitt* (1988) 45 Cal.3d 660, but that case is inapposite. There, the court concluded that due process did not require the prosecution to disprove the defense of unconsciousness in a murder case. Consciousness, the Court reasoned, was not an express element of murder, thus due process did not impart a duty on the prosecutor to disprove it:

> Pursuant to our statutory scheme, murder is defined as the unlawful killing of a human being with malice aforethought. (§§ 187-189.) The death, the causation, and the malice are the facts the state must prove beyond a reasonable doubt if the defendant is to be convicted of murder. (§§ 1096, 1105, subd. (a).) Unconsciousness is a defense. (§ 26.) 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.

(*Id.* at p. 693.) Imperfect self-defense, however, unlike unconsciousness, actually negates an express element of murder—malice.

More fundamentally, the *Babbitt* court observed the jury had been instructed in a way that enabled it to give effect to the evidence raising a reasonable doubt about the defendant's consciousness. Specifically, the jury was instructed that if they had a reasonable doubt that he was conscious, they "*must* find him not guilty." (*People v. Babbitt*, 45 Cal.3d at pp. 694-696, original italics.)

The high court in *Martin*, *supra*, 480 U.S. at 233-234, made similar observations before concluding that Ohio did not violate due process when it placed the burden on the defendant to prove he killed in self-defense. Self-defense did not negative any of the elements of murder in Ohio, which the state defined as "purposely, and with prior calculation and design, caus[ing] the death of another." (*Id.* at p. 230.)[8] And critically, just as in *Babbitt,* the Court drew a line between cases where juries were still able to give effect to the evidence in considering the elements of the crime and cases where they are not:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i.e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such an instruction would relieve the State of its burden and plainly run afoul of *Winship*'s mandate. 397 U.S., at 364, 90 S.Ct., at 1072. The instructions in this case

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[8] In California, self-defense negates two express elements of murder: (1) an *unlawful* killing, (2) with *malice*.

> could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.

(*Id.* at pp. 233-234.)

The opposite is true in this case. The jurors received no instruction informing them that if they found the defendant killed with an actual but unreasonable belief in the need for self-defense, he acted without malice. In other words, they had no way to give effect to the evidence suggesting he acted in imperfect self-defense when considering the element of malice. Because California's murder statute includes the element of malice in the definition of murder, and because this Court has recognized that an imperfect self-defense killing is an unlawful but non-malicious killing, imperfect self-defense is not a defense akin to unconsciousness. The jury's inability to give effect to evidence of imperfect self-defense "plainly run[s] afoul of Winship's mandate." (*Martin*, *supra,* 480 U.S. at p. 234.)

II.
FAILURE TO INSTRUCT A JURY THAT THE PROSECUTOR BEARS THE BURDEN TO DISPROVE IMPERFECT SELF-DEFENSE VIOLATES THE DUE PROCESS CLAUSE AND SIXTH AMENDMENT OF THE FEDERAL CONSTITUTION

The interplay between the due process clause's requirement that the prosecution prove every element of a charged offense beyond a reasonable doubt and the Sixth Amendment's jury trial guarantee requires "criminal convictions to rest upon a jury

determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509–511, 522–523; accord *Victor v. Nebraska* (1994) 511 U.S. 1, 5; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277–278; *Mullaney, supra,* 421 U.S. at p. 698; *People v. Hendrix*, *supra*, 13 Cal.5th at p. 942; accord *Apprendi*, *supra*, 530 U.S. at p. 490 [right to unanimous jury determination, beyond a reasonable doubt, of any finding "increas[ing] prescribed range of penalties to which a criminal defendant is exposed"].) Thus, "[a] jury misinstruction that relieves the prosecution of its burden to prove an element of the crime—by either misdescribing the element or omitting it entirely—violates this requirement." (*People v. Hendrix*, *supra*, 13 Cal.5th at p. 942, citing *Neder v. United States* (1999) 527 U.S. 1,10 [misdescriptions and omissions preclude jury from "making a finding on the *actual* element of the offense"].)

Consequently, defective instructions on the prerequisites for malice—including failing to instruct the jury on the prosecution's burden of *disproving* evidence the killing was done in imperfect self-defense to prove the element of malice—violate due process and the Sixth Amendment. (See *United States v. Gaudin, supra,* 515 U.S. at pp. 509–511, 518–519, 523; *Mullaney*, *supra*, 421 U.S. at p. 704.) The fact that a trial court did instruct the jury on the prosecution's burden to prove malice—in the abstract and without a second instruction explaining the malice-negating theories of voluntary manslaughter—does nothing to cure the federal constitutional harm. Without the second instruction, there is no way for the jury to

give effect to the evidence of an actual but unreasonable belief that the killing was committed in self-defense.

Moreover, the jurors in this case would have received instruction under section 188 that an intentional killing or a killing done with conscious disregard for life is a malicious killing and therefore murder. The evidence strongly suggested—indeed no one seems to have disputed—that the killing was intentional. The defense was premised largely on explaining that the killing was motivated in part by delusions arising from the defendant's mental illness. In the absence of voluntary manslaughter instructions explaining that a killing based on unreasonable self-defense was not malicious, the instructions effectively created a presumption of guilt and lessened the prosecutor's burden of proof. (Cf. *Carella v. California* (1989) 491 U.S. 263, 265 [jury instructions must not lessen prosecutor's burden of proof as to any essential fact or element]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524 [because jury could have interpreted instruction either as a burden shifting presumption or conclusive presumption, defendant deprived of due process of law]; *Francis v. Franklin* (1985) 471 U.S. 307, 317 [reaffirming rules of *Mullaney* and *Sandstrom* that due process prohibits States from using jury instruction that have effect of creating a mandatory rebuttable presumption and relieve state of burden of proof enunciated in *Winship*].)

The facts of this case could not more clearly demonstrate the problem. The evidence indicated that Mr. Schuller, suffering from mental illness and hallucinations, shot W.T. because he thought W.T. was chasing him and was about to stab and shoot him.

(*Schuller*, *supra*, 72 Cal.App.5th at p. 227.) The jury was instructed that murder is the unlawful killing of a human being with malice, and that malice can be either express if Mr. Schuller intended to kill W.T., or implied if Mr. Schuller acted with a conscious disregard for W.T.'s life. (See CALCRIM No. 520.) Mr. Schuller clearly intended to kill W.T. (*Schuller, supra,* 72 Cal.App.5th at pp. 227-228), and as a consequence, the jurors were left with the inevitable conclusion that he acted with malice and was therefore guilty of murder. The absence of an instruction on imperfect self-defense meant that jurors had no way to give effect to the evidence supporting imperfect self-defense: they remained free to convict him of murder even if the evidence reflected that Mr. Schuller actually (although unreasonably) believed he needed to defend himself.

In her *Breverman* dissent, Justice Kennard observed that fundamental fairness compels courts to instruct on malice-negating theories to avoid this exact result. Her explanation cannot be improved upon:

> As I have noted above, the relationship between murder and voluntary manslaughter is unique. The presence of heat of passion is consistent with the mental state and other facts that would support a murder verdict, but nonetheless heat of passion precludes a murder verdict. If a state has chosen to structure its crimes in this fashion, such that if the jury finds facts X plus Y it is a different crime with a greater punishment than if the jury finds facts X plus Y plus Z, it is fundamentally unfair (at least when there is evidence of Z in the record) not to inform the jury that if Z is present it may not convict the defendant of the greater crime. That is, the state cannot omit an instruction on voluntary manslaughter and thereby prevent the jury from determining the additional circumstance of heat of

> passion that would make the defendant factually innocent of murder; the defendant has a right to have the jury decide whether that additional circumstance, which is entirely consistent with the facts necessary to convict the defendant of murder, is present.
>
> To omit the instruction creates the very real possibility that the defendant will be convicted of an offense of which, in the jury's view, he is factually innocent under the evidence presented at trial, and it is hard to imagine anything more fundamentally unfair than that. It is manifestly unjust to permit the state to use the jury's ignorance of the elements of voluntary manslaughter to convict a defendant of murder when the jury, had it known of voluntary manslaughter, could have found the additional circumstance of heat of passion that would have instead made the defendant liable only for that lesser crime. Such a procedure fails to ensure fundamental fairness in the determination of guilt at trial. The crucial consideration is that the presence of heat of passion is an additional circumstance, consistent with the elemental facts required to support a murder verdict, that not only establishes liability for voluntary manslaughter but precludes liability for murder.

(*Breverman*, *supra*, 19 Cal. 4th at pp. 190–191 (dis. opn. of Kennard, J.).)

Because California's definition of murder includes the element of malice, and because this Court has expressly held that a killing done in imperfect self-defense is a non-malicious killing resulting in voluntary manslaughter, it follows that when sufficient evidence of imperfect self-defense is presented in a murder prosecution, the due process clause and the Sixth Amendment mandate the jury be instructed that the prosecution has the burden to disprove imperfect self-defense to prove malice beyond a reasonable doubt. The erroneous refusal to give these instructions deprives a defendant of

the right to a jury trial on all *elements* of an offense under *Apprendi*, the right to complete instructions on the elements of murder under *Gaudin*, and entirely relieves the prosecution of its burden to overcome evidence of imperfect self-defense beyond a reasonable doubt in violation of *Mullaney*. Accordingly, a trial court's failure to provide the jury with these instructions is a federal constitutional violation that must be analyzed under the *Chapman* standard of prejudice.[9]

III.
RESOLVING THE ISSUE BY LABELING VOLUNTARY MANSLAUGHTER A "LESSER INCLUDED OFFENSE" OF MURDER DOES NOT CURE THE DUE PROCESS OR SIXTH AMENDMENT ERRORS

Because California has chosen to include malice as an element of murder, the federal Constitutional principles mandating jury instruction on voluntary manslaughter when evidence of imperfect self-defense has been properly presented in a murder prosecution are well-established. *Chapman* must therefore apply. This Court has not yet held as much, however, because of the confusion engendered by labeling voluntary manslaughter as a "lesser included offense" of murder and this Court's holding in *Breverman* that failure to instruct on lesser included offenses is reviewable under *Watson*. (*Breverman*, *supra*, 19 Cal.4th at p. 178.)

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[9] Amicus concurs with petitioner's explanation of the *Chapman* standard and, applying *Chapman*, why the trial court's failure to instruct on imperfect self-defense was not harmless beyond a reasonable doubt in this case. (See Opening Brief at pp. 58–68.)

Characterizing voluntary manslaughter as a lesser included offense of murder cannot determine the issue. Simply labeling voluntary manslaughter as a lesser included offense of murder does not and cannot relieve the prosecution of its obligation to prove the elements of murder. Evaluating a violation of constitutional demands solely by reference to the label attached to an offense is akin to the practice condemned in *Mullaney*, where the Court warned that a state cannot undermine the critical interests protected in *Winship* simply by labeling the elements of an offense as sentencing factors. (*Mullaney*, *supra*, 421 U.S. at pp. 698–699; see also *Ring v. Arizona* (2002) 536 U.S. 584, 610 (conc. opn. of Scalia, J.) ["[T]he fundamental meaning of the jury–trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt"].)

Regardless of whether voluntary manslaughter is or is not a lesser included offense of murder, the federal Constitution requires a trial court to instruct the jury in a murder prosecution regarding theories that negate the element of malice. A jury must know that if the defendant killed with an actual but unreasonable belief in the need to for self-defense, the defendant killed without malice, and the prosecution has the burden to *disprove* the existence of those circumstances to establish the malice element of murder beyond a

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reasonable doubt. The prejudice flowing from a trial court's failure to give such instructions must therefore be analyzed under *Chapman*.

Dated: December 9, 2022

Respectfully submitted,

MARY K. MCCOMB
State Public Defender

/s/ Anne W. Lackey
ANNE W. LACKEY
Senior Deputy State Public Defender

/s/ Jessie Peterson
JESSIE PETERSON
Deputy State Public Defender

/s/ William Whaley
WILLIAM WHALEY
Deputy State Public Defender

Attorneys for Amicus Curiae

CERTIFICATE OF COUNSEL

I, Anne W. Lackey, have conducted a word count of this brief using our office's computer software. On the basis of the computer–generated word count, I certify that this brief is words 6,544 in length, excluding the tables and this certificate.

Dated: December 9, 2022 Respectfully submitted,

/s/ Anne W. Lackey
ANNE W. LACKEY
Senior Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: *People v. Jason Carl Schuller*
Case Number: Supreme Court Case No. S272237
Third Appellate District Case No. C087191
Nevada County Superior Court
Case No. F16000111

I, **Ann-Marie Doersch**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPLICATION TO FILE AMICUS CURIAE BRIEF; and AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT JASON SCHULLER

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Hon. Candace S. Heidelberger Nevada County Superior Court 201 Church Street Nevada City, CA 95959

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David L. Polsky Attorney at Law P.O. Box 118 Ashford, CT 06278–0118	Court of Appeal Third Appellate District 914 Capitol Mall Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **December 9, 2022**, at Sacramento County, CA.

Ann-Marie Doersch Digitally signed by Ann-Marie Doersch
Date: 2022.12.09 11:05:03 -08'00'

ANN-MARIE DOERSCH

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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12/9/2022
Date

/s/Ann-Marie Doersch

Signature

Lackey, Anne (172969)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm