No. S272237

In the Supreme Court of the State of California

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

v.

JASON CARL SCHULLER,
Defendant and Appellant.

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

ANSWER TO AMICUS CURIAE BRIEF

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INTRODUCTION

Amicus, the Office of the State Public Defender, echoes the main argument raised in Schuller's opening brief, that the erroneous failure to instruct on imperfect self-defense where murder is charged is a due process error that must be assessed for prejudice under *Chapman.*[1] Amicus places an additional gloss on the issue by arguing that the failure to instruct on imperfect self-defense in a murder case is also a violation of the Sixth Amendment right to a jury trial, which guarantees to defendants in criminal trials a unanimous finding beyond a reasonable doubt on every fact necessary to support a conviction and sentence.

Both theories ultimately depend on the same question: is the absence of imperfect self-defense an element or essential fact necessary to prove murder, making the failure to instruct the jury on the theory a violation of the Constitution? The answer to that question is no. For constitutional purposes, the relevant element or essential fact of murder that the prosecution must prove is malice. California keeps the burden of proving malice at all times on the prosecution, even when a defense such as imperfect self-defense is properly raised, thereby satisfying constitutional requirements. As explained in the answer brief, instructions about defense theories that seek to combat the prosecution's case have not been understood to implicate the federal constitution. (ABM 38-45.) An imperfect self-defense theory falls into the latter category.

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[1] *Chapman v. California* (1967) 386 U.S. 18.

Amicus relies heavily on the principle that the constitution compels the prosecution to *disprove* imperfect self-defense when the theory is properly raised. That principle is true so far as it goes. But a more accurate formulation, as reflected in the decisional law, would be that the prosecution must maintain the burden of proving malice beyond a reasonable doubt even when a defendant properly raises an element-negating theory such as imperfect self-defense. That the prosecution must do so does not mean that any instructional error with respect to imperfect self-defense—or indeed any error that might be said to "directly interfere" with the prosecution's burden to prove an element of the offense (OSPD Br. 12)—implicates the federal constitution. Error with respect to other, similar kinds of instructions that might also be said to directly interfere with the obligation to prove an element of the charged offense have long been understood to implicate state law alone. The constitutional line drawn in this area is that the prosecution must prove the essential facts or elements of an offense as defined by state law. Because the absence of imperfect self-defense is not an element or essential fact of the offense of murder for constitutional purposes, any error in instructing on the theory is assessed under the state law prejudice standard.

ARGUMENT

I. THE ERRONEOUS FAILURE TO INSTRUCT ON IMPERFECT SELF-DEFENSE DOES NOT VIOLATE DUE PROCESS

The principal contention in the Amicus Curiae brief is that, where a defendant is charged with murder and the facts support it, the Due Process Clause of the Constitution requires the

prosecution to prove beyond a reasonable doubt the absence of imperfect self-defense because it is a fact necessary to establish malice murder. (OSPD Br. 14-26.) There is no dispute that due process requires the prosecution to maintain the burden of proving malice beyond a reasonable doubt, even when the defense raises an imperfect self-defense theory. But that is different from saying that the defense theory itself necessarily implicates the federal constitution and that error involving imperfect self-defense instructions must therefore be reviewed under *Chapman*.

The United States Supreme Court has "explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Application of this rule necessarily depends on how a state defines the elements or facts necessary to support a charge: "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged." (*Patterson v. New York* (1977) 432 U.S. 197, 210, italics added.) The United States Supreme Court has in this context "emphasized the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of

producing evidence and allocating the burden of persuasion." (*Martin v. Ohio* (1987) 480 U.S. 228, 232.)

As the high court reasoned in *Engle v. Isaac* (1982) 456 U.S. 107, "the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime." (*Id.* at p. 120.) And the court's precedents "do not suggest that whenever a State requires the prosecution to prove a particular circumstance beyond a reasonable doubt, it has invariably defined that circumstance as an element of the crime. A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. The Due Process Clause does not mandate that when a State treats absence of an affirmative defense as an 'element' of the crime for one purpose, it must do so for all purposes." (*Ibid.*, footnote omitted; see also *People v. Babbitt* (1988) 45 Cal.3d 660, 693; ABM 35-36.)

California defines murder as "the unlawful killing of a human being with malice aforethought. [Citations.] 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." (*Babbit*, *supra*, 45 Cal.3d at p. 693.) In *Babbit*, this Court concluded that "[a]lthough the state, once the defendant raises the issue, has assumed the burden of disproving unconsciousness, this fact of itself does not transform absence of the defense—consciousness—into an element of murder for purposes of due process analysis. This is true even though unconsciousness negates the elements of voluntariness and

intent, and when not voluntarily induced is a complete defense to a criminal charge." (*Ibid*.)

The same is true as to imperfect self-defense. The constitutionally relevant fact or element that the State must prove to a jury beyond a reasonable doubt to sustain a murder conviction as defined by state law is malice. California places the burden of proving malice squarely on the prosecution at all times, as reflected in the standard instructions given in this case. (2 CT 481-482 [CALCRIM No. 520].) But that does not mean that any instructions on a theory like imperfect self-defense that seeks to negate malice necessarily implicates due process. (See *Engle*, *supra*, 456 U.S. at p. 131; *Babbitt*, *supra*, 45 Cal.3d at p. 693.)

In arguing otherwise, amicus relies in particular on *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704. (OSPD Br. 16.) Amicus's argument, however, enlarges the holding of *Mullaney* in a way not supported by the case and that is in conflict with subsequent United States Supreme Court authority.

Mullaney concerned a situation in which a state put the burden on a defendant to disprove the malice element of murder, which the court held was unconstitutional. At issue there was a Maine law providing that, absent justification or excuse, all intentional or criminally reckless killings were presumed to be murder, unless the *defendant* proved that the killing was committed in the heat of passion. (*Mullaney, supra*, 421 U.S. at pp. 691-692.) Under Maine law, murder required malice aforethought. (*Id*. at p. 686.) Without malice aforethought, "homicide would be manslaughter." (*Ibid*.) In practice, therefore,

"if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." (*Ibid.*) In other words, the prosecution benefited from a statutory presumption that all intentional and unjustified homicide was murder punishable by life imprisonment, leaving it up to the defense to disprove malice without requiring the prosecution to prove that element beyond a reasonable doubt. (*Id.* at p. 701.)

Analyzing this statute, the United States Supreme Court determined that "the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction." (*Mullaney, supra*, 421 U.S. at p. 701.) The court thus held as to the Maine burden-shifting law that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (*Id.* at p. 704.) As the high court later summarized, *Mullaney* "held unconstitutional a mandatory rebuttable presumption that shifted to the defendant a burden of persuasion on the question of intent." (*Francis v. Franklin* (1985) 471 U.S. 307, 317.) In other words, a state is "foreclosed from shifting the burden of proof to the defendant" when an affirmative defense

negates an element of the crime. (*Smith v. United States* (2013) 568 U.S. 106, 110.)

California, like Maine, includes malice as an element of murder. Unlike the statutory structure at issue in *Mullaney*, however, California is careful to keep the burden of proving the malice element of murder at all times on the prosecution, even when the defendant raises a theory at trial that attempts to negate malice. (See e.g., *Babbitt*, *supra*, 45 Cal.3d at p. 693.) Even had the trial court in this case given an unreasonable self-defense instruction, Schuller's jury would not have been instructed that he had the burden to prove that he acted in unreasonable self-defense or that without such proof, malice would be conclusively implied from an intentional killing. Because the Maine statute imposed a burden on the defendant where California law does not, *Mullaney's* analysis does not assist amicus.

Amicus draws from *Mullaney* a broader principle than the case announced, asserting that, under *Mullaney*, not only must the state shoulder the burden of proving the malice element, but any defect or omission relating to a defendant's theory which attempts to negate that element also necessarily implicates due process. *Mullaney* does not stand for the proposition that, when a theory seeking to limit culpability or negate an element of an offense is properly raised in a case, disproving that theory becomes an element or essential ingredient of the offense for due process purposes.

The authorities cited above, and in particular *Patterson*, make that clear. At issue in *Patterson* was a *Winship* challenge to a New York statue defining murder as causing death with intent, subject to an affirmative defense of extreme emotional disturbance for which there was a reasonable explanation. (*Patterson*, *supra*, 432 U.S. at pp. 205-206.) The defendant in *Patterson* contended that because the presence or absence of an extreme emotional disturbance affected the severity of sentence, *Winship* and *Mullaney* required the state to prove the absence of that fact beyond a reasonable doubt. (*Id*. at pp. 198, 201.) The court, reasoning that extreme emotional disturbance was an affirmative defense not necessary to prove the commission of the crime, rejected this argument and "decline[d] to adopt as a constitutional imperative . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." (*Id*. at p. 210.) The *Patterson* court expressly disapproved the notion that the prosecution must "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." (*Id.* at p. 207.) *Patterson* clarified that *Mullaney* held only that the state must prove "every ingredient of an offense" and that it cannot shift to

the defendant any part of that burden by means of a presumption. (*Id.* at p. 215.)[2]

Mullaney's statement that the state was obligated to prove beyond a reasonable doubt the absence of heat of passion under the circumstances presented in that case was, in context, another way of saying that the state was obligated to prove malice—an essential element of Maine's definition of murder—beyond a reasonable doubt in the face of the defendant's heat-of-passion defense. (See *Mullaney, supra*, 421 U.S. at p. 704.) That is different from saying that any instructions that do not themselves define the elements or essential facts of a crime, but that may relate to a defense that attempts to negate those elements or essential facts, necessarily implicate due process.

In addition to *Mullaney*, amicus relies on this Court's statement in *People v. Rios* (2000) 23 Cal.4th 450, 462, that if the issue of provocation or imperfect self-defense is properly presented, "the *People* must prove beyond a reasonable doubt that these circumstances were *lacking* in order to establish the murder element of malice." (AB 17, 19.) Again, however, the statement signifies only that the prosecution must still prove

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[2] Amicus dismisses *Patterson* by pointing out that, unlike California, New York's second degree murder statute at issue there did not contain malice as an element. (OSPD Br. 22.) However, the significance of *Patterson* derives not from the particular statute it analyzed but from the high court's discussion of the prosecution's due process obligation to prove the elements or essential facts of a defined offense, as opposed to disproving facts or theories raised by the defense to combat a criminal charge.

malice—the relevant element of murder—beyond a reasonable doubt, even when a defendant properly raises an imperfect-self-defense theory.

In *Rios*, the defendant was tried and convicted of voluntary manslaughter. (*Rios*, *supra*, 23 Cal.4th at p. 454.) The issue on appeal concerned the omission of the elements of provocation and imperfect self-defense in the voluntary manslaughter instruction and whether these missing concepts constituted elements of voluntary manslaughter. (*Id.* at pp. 458-459.) This Court rejected the argument because "provocation and imperfect self-defense are not elements of voluntary manslaughter when, as here, the defendant faces only that charge." (*Id.* at pp. 462-463.) It reasoned that "[h]eat of passion or imperfect self-defense precludes a finding of malice where malice is an element of the charge, but malice is not at issue upon a charge of manslaughter." (*Id.* at p. 463.)

This Court in *Rios* also pointed out that heat of passion and imperfect self-defense are mitigating circumstances that negate the element of malice required for murder. (*Rios*, *supra*, 23 Cal.4th at p. 461.) Although not essential to the analysis, the Court additionally noted that, in cases where murder is charged, evidence of heat of passion or imperfect self-defense is relevant on the issue of whether the defendant acted with malice and thus committed murder, or without malice and thus committed the lesser offense of voluntary manslaughter. It stated, "In such cases, the People may have to prove the absence of provocation, or of any belief in the need for self-defense, in order *to establish*

the *malice element of murder*." (*Id*. at p. 454.) It noted that these concepts are "relevant only to determine whether *malice has been established*, thus allowing a conviction of *murder*, or *has not been established*, thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter." (*Id*. at p. 461.)

This Court's observations in *Rios* that the People must prove malice beyond a reasonable doubt even in the face of a theory of imperfect self-defense falls short of establishing the point that amicus would like to draw from it: that the absence of provocation and unreasonable self-defense, when properly raised, become an essential aspect of the malice element of murder so as to implicate due process. Indeed, as this Court later held in *Martinez*, the absence of imperfect self-defense is not an element of murder. (*People v. Martinez* (2003) 31 Cal.4th 673, 685.) *Martinez* even cited *Rios* for the proposition that imperfect self-defense is a mitigating circumstance of murder, rather than an element of the crime. (*Ibid*.)

As explained above and in the People's answer brief, California does not treat and has not historically treated the absence of imperfect self-defense as essential to establishing the crime of murder. The statutory and judicial designations of murder make clear that the absence of imperfect self-defense is not an element of the crime. The statutory definition of murder makes no mention of the absence of imperfect self-defense, or any other mitigating circumstance for that matter. (Pen. Code, § 187, subd. (a).) Moreover, in construing the elements of the murder

statute, this Court has held that the absence of imperfect self-defense is "not an *element* of the offense of murder to be proved by the People." (*Martinez*, *supra*, 31 Cal.4th at p. 685.) Instead, in California, imperfect self-defense is a "'mitigating circumstance[],' which may reduce murder to manslaughter by negating malice." (*Ibid*., quoting *Rios*, *supra*, 23 Cal.4th at p. 461.) It is akin to other kinds of defenses or theories that may be raised by a defendant and that have been understood to implicate state law alone. (See ABM 38-45.)

Taken to its logical conclusion, the argument of amicus would mean that other types of instructions not recognized as implicating the federal constitution would have to be reviewed under the *Chapman* harmless error standard. For instance, "[a] 'mistake of fact' defense negates an element of a charged crime because it disproves criminal intent." (*People v. Givan* (2015) 233 Cal.App.4th 335, 345.) But error in failing to instruct on a mistake-of-fact defense is evaluated under the *Watson*[3] standard. (*People v. Molano* (2019) 7 Cal.5th 620, 670.) Indeed, since the whole framework of a criminal trial centers on the prosecution's obligation to prove an offense to a jury beyond a reasonable doubt, amicus's theory might also implicate even instructions about such things as evaluating witness testimony. (See, e.g., *People v. Lucas* (2014) 60 Cal.4th 153, 289 [erroneous failure to give instruction about witness's immunity agreement harmless under *Watson*], overruled on other grounds by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) After all, such

[3] *People v. Watson* (1956) 46 Cal.2d 818.

instructions could be said to "directly interfere[] with the jury's finding that defendants are guilty of the murder for which they are charged" (OSPD Br. 12) or to "relieve[] the prosecutor of their burden to prove an element of the offense" (OSPD Br. 13).[4] The constitutional line that has been drawn in this context, however, is at the essential facts or elements making up the criminal charge under state law.

II. THE ERRONEOUS FAILURE TO INSTRUCT ON IMPERFECT SELF-DEFENSE DOES NOT VIOLATE THE SIXTH AMENDMENT

Amicus's additional argument relying on the Sixth Amendment is unsound for essentially the same reasons. As amicus points out, the Fourteenth Amendment's requirement of due process of law and the Sixth Amendment's right to a speedy and public trial by an impartial jury guarantees a criminal defendant a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. (OSPD Br. 28-29, citing *United States v. Gaudin* (1995) 515 U.S. 506, 510.) There is no dispute in this case, however, that the state is constitutionally obligated to prove to a jury every essential fact supporting a charged offense. (See Arg. I, *ante*.) Malice is such an essential fact; the absence of imperfect self-

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[4] Amicus proposes a distinction between element-negating theories and other defenses. (See OSPD Br. 24.) But it is hard to see how any trial error with respect to a criminal defendant's attempt to combat the prosecution's case would not come within amicus's theory that the error must be assessed under *Chapman* because it "interfered" with the prosecution's duty to prove the charges or "relieved" its burden to do so. Virtually any trial error adverse to a defendant would meet that standard.

defense is not. Amicus cites no case in which a court has held that failing to instruct the jury on imperfect self-defense is a violation of the Sixth Amendment because imperfect self-defense is an essential fact of the crime of murder.

In arguing that the error in this case has the additional effect of violating Schuller's jury trial rights under the Sixth Amendment, amicus quotes from Justice Kennard's dissent in *People v. Breverman* (1998) 19 Cal.4th 142, which discussed the obligation of courts, based on principles of fundamental fairness, to instruct on the absence of imperfect self-defense when the issue is properly presented in a murder case. (OSPD Br. 31-32.) Justice Kennard relied on the Sixth Amendment right of a defendant to a jury determination, beyond a reasonable doubt, as to guilt of every elemental fact needed to convict. (*Breverman*, at p. 191 (dis. opn of Kennard, J.).)

But Justice Kennard's statement highlights the People's position that the absence of imperfect self-defense is not an element, or essential fact, of malice murder:

> The crucial consideration is that the presence of heat of passion [or imperfect self-defense] 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 p. 191 (dis. opn of Kennard, J.).) In other words, as argued above, imperfect self-defense is an "additional," exculpatory circumstance that mitigates a defendant's culpability for what would otherwise constitute murder and "establishes liability for voluntary manslaughter."

While it might be "consistent with," or related to, the elemental facts of murder insofar as it seeks to negate malice, the absence of imperfect self-defense is not essential to establish the crime of murder. California defines murder as an unlawful killing with malice aforethought. Those are the essential facts necessary for the imposition of murder liability. California requires the prosecution to prove malice beyond a reasonable doubt even when the defendant properly presents a theory of imperfect self-defense. However, the state does not, and has not, elected to treat the absence of imperfect self-defense as a fact essential to finding liability for murder. (See *Engle*, *supra*, 456 U.S. at p. 120.) It is instead a defense theory, like others, that is governed by state law and therefore subject to the *Watson* harmless-error standard. (See ABM 38-45.)

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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March 17, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICUS CURIAE BRIEF uses a 13 point Century Schoolbook font and contains 3,580 words.

ROB BONTA
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March 17, 2023

DECLARATION OF ELECTRONIC SERVICE
AND SERVICE BY U.S. MAIL

Case Name: ***People v. Schuller***
No.: **S272237**

I declare:

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

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 17, 2023, at Sacramento, California.

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

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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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