IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUAQUIN SOTO, Defendant and Appellant.	No. S236164 (Court of Appeal No. H041615) (Monterey County Superior Court No. SSC120180) Hon. Carrie Panetta, Judge

APPLICATION OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND SANTA CLARA COUNTY PUBLIC DEFENDER TO APPEAR AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE, IN SUPPORT OF APPELLANT JUAQUIN SOTO

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

Pursuant to Rule 8.520, California Rules of Court, the California Public Defenders Association and Santa Clara County Public Defender hereby apply for permission to file the attached brief as amicus curiae in support of respondent Juaquin Soto. The case at hand raises issues concerning the admissibility of evidence that a murder defendant was voluntarily intoxicated on the issue of whether he acted with express malice aforethought, including whether such evidence is relevant on the question of whether he acted in the actual but unreasonable belief that it

was necessary to use deadly force in order to defend against the imminent danger of great bodily injury or death. This is an issue of significant statewide importance.

1. Interest of the California Public Defenders Association[1]

The California Public Defenders Association (hereinafter, "CPDA") is the largest organization of criminal defense attorneys in the State of California. Our membership includes over 3,500 attorneys who are employed as public defenders or are in private practice. CPDA has been a leader in continuing legal education for defense attorneys for over 33 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education. Our programs deal with both adult and juvenile justice.

CPDA has been granted leave to appear in over 50 California cases resulting in published opinions. (See e.g., *People v. Gonzales* (2017) 2 Cal.5th 858; *People v. Morales* (2016) 63 Cal.4th 399; *People v. Mosley* (2015) 60 Cal.4th 1044; *People v. Beltran* (2013) 56 Cal.4th 935; *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112; *Galindo v. Superior Court* (2010) 50 Cal.4th 1; *People v. Nguyen* (2009) 46 Cal.4th 1007; *Chambers v. Superior Court* (2007) 42 Cal.4th 673; *People v.*

[1] The undersigned, Michael S. Ogul, on behalf of CPDA and the Santa Clara County Public Defender, certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

Warner (2006) 39 Cal.4th 548; *San Francisco v. Cobra Solutions Inc.*, (2006) 38 Cal.4th 839.) CPDA has also served as amicus curiae in the United States Supreme Court. (See, e.g., *Monge v. California* (1998) 524 U.S. 721; *California v. Trombetta* (1984) 467 U.S. 479.)

Members of the CPDA Legislative Committee and CPDA's legislative advocate attend key Senate and Assembly committee meetings on a weekly basis and take positions on hundreds of bills in a constant effort to ensure that our criminal and juvenile justice procedures, and rules of evidence, remain fair and balanced. In sum, CPDA and its legal representatives have the necessary experience, collective wisdom, and interest in matters of justice and procedure to serve this court as amicus curiae.

2. Interest of the Santa Clara County Public Defender

Molly O'Neal is the Santa Clara County Public Defender, which employs 125 attorneys. The Santa Clara County Public Defender represents almost 9,000 felony defendants each year, including many defendants who are charged with murder and would be affected by this Court's decision in the case at hand.

Based on the foregoing reasons and the accompanying brief, CPDA and the Santa Clara County Public Defender apply for permission to jointly file the accompanying brief as amicus curiae in

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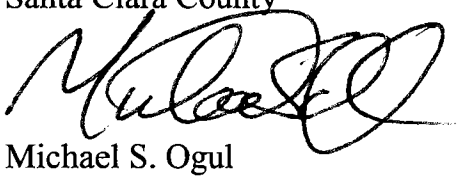
support of defendant and appellant Juaquin Soto.

Dated: May 2, 2017.

Respectfully submitted,

California Public Defenders Association

Molly O'Neal
Public Defender
Santa Clara County



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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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BRIEF OF AMICUS CURIAE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND SANTA CLARA COUNTY PUBLIC DEFENDER IN SUPPORT OF APPELLANT JUAQUIN SOTO

ISSUE PRESENTED:

This court granted review herein to address whether the trial court erred by instructing the jury in a manner that precluded the jury from considering evidence of defendant's intoxication on the issue of whether he acted in the actual but unreasonable belief that it was necessary for him to use deadly force in order to protect against the imminent danger of great bodily injury. Although review was also granted to consider the related question whether any such error was prejudicial, this amicus brief does not address the latter issue.

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ARGUMENT:

I.

UNDER PENAL CODE SECTION 29.4 AND THE FEDERAL CONSTITUTIONAL GUARANTEE TO DUE PROCESS OF LAW, EVIDENCE OF INTOXICATION IS ADMISSIBLE ON THE ISSUE OF WHETHER A MURDER DEFENDANT ACTED WITH EXPRESS MALICE AFORETHOUGHT.

E. Penal Code section 29.4 expresses the clear legislative intent to allow consideration of a defendant's intoxication on the question of whether he acted with express malice.

Penal Code section 29.4, subdivision (b), expressly allows evidence of intoxication to be presented on the question of whether the defendant acted with "express malice aforethought." The Attorney General acknowledges, as she must, that the statute "allows a defendant to submit voluntary intoxication evidence to support a claim that the defendant did not kill the victim with express malice." (RB, p. 25.)

Although the Attorney General claims the provision is ambiguous, there is nothing ambiguous about it. Respondent goes to great lengths in an attempt to inject ambiguity into the statute, but it is a fundamental rule of statutory construction that courts should not resort to extrinsic aids to divine legislative intent where the statute is clear and unambiguous. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119–1120 ["Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language

as conclusive; 'no resort to extrinsic aids is necessary or proper.'" (Citations omitted.)]; *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227; *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321.) Such is the case here. There can be no doubt that evidence of intoxication is admissible on the question of whether or not the defendant acted with express malice.

Not only is the intent to allow evidence of intoxication on the issue of express malice clear and unambiguous on the face of Penal Code section 29.4, subdivision (b), but its legislative history confirms this purpose. The statutory language at issue was enacted by Senate Bill No. 121 (1995-1996 Regular Session, hereafter SB 121), which amended Penal Code section 22, subdivision (b)[2], to limit the admissibility of intoxication evidence in a murder prosecution to the issues "of whether the defendant premeditated, deliberated, or harbored *express* malice aforethought..." (emphasis added), in contrast to the previous version of the statute, which allowed its admission on malice aforethought, including implied malice. From its inception, SB 121 was intended as a response to *People v. Whitfield* (1994) 7 Cal.4th 437, which had permitted the jury to consider evidence of the defendant's intoxication in determining whether he acted with implied malice when

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[2] Former Penal Code section 22 was renumbered as current Penal Code section 29.4 in 2012. (Stats. 2012, c. 162 (Sen. Bill No. 1171), § 119.)

his driving while intoxicated caused a fatal automobile accident. The purpose of SB 121 was to prohibit a driving-under-the-influence murder defendant (see *People v. Watson* (1981) 30 Cal.3d 290) from using evidence of his intoxication to defeat the implied malice element of the murder charge. It was never intended to affect the admissibility of intoxication evidence on the issue of whether a murder defendant acted in the actual but unreasonable belief that his use of deadly force was necessary to defendant against the imminent danger of great bodily injury or death. The former purpose—to prevent drunk drivers from using evidence of their intoxication in defending against murder charges—was repeatedly expressed throughout the progress of SB 121, but the latter issue (precluding the consideration of intoxication evidence on the issue of imperfect self-defense) was never mentioned at all. While amendments to SB 121 expanded its scope to prohibit all murder defendants, not merely drunk-driving murder defendants, from relying on their own intoxication to defeat the component of implied malice requiring proof that they were subjectively aware that their conduct risked a high probability of death, that issue is distinct from the question of whether a defendant who subjectively acted with such conscious awareness did so because of the actual but unreasonable belief that his actions were necessary to defend against the imminent danger of great bodily harm.

Although as originally introduced, the bill expressly spoke in terms of murder convictions based on repeat drunk drivers (SB 121, as introduced January 19, 1995), the subsequent amendments did not change the purpose of the bill, which was to prevent drunk drivers from using evidence of their intoxication to defend against murder charges based on implied malice. Indeed, after the bill was amended on March 23, 1995, to limit evidence of voluntary intoxication in murder prosecutions to the issue of express malice, and saw its final, technical amendments on April 3, 1995[3], the Senate Floor Analysis identified one and only one argument in favor of the bill: "defendants charged with second degree murder *when driving under the influence* should be prohibited from eliciting a defense of voluntary intoxication." (Senate Floor Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.), as amended April 3, 1995, p. 3; emphasis added.) Likewise, the analysis provided by the Assembly Appropriations Committee on that same day gave the following, and only the following, explanation of how the bill would change the law:

> Under existing law, successful use of this defense would probably result in a conviction of *voluntary manslaughter while intoxicated* (incarceration ranging from 16 months to ten years). Eliminating this defense would

[3] The April 3, 1995, amendment changed the words "charged with a homicide" to "charged with murder..." in subdivision (b), and changed the word "such" to "that" in subdivision (a). (Sen. Amend. to Sen. Bill 121 (1995-1996 Reg. Sess.), April 3, 1995.) The bill saw no further amendments.

probably result in a conviction of second degree murder (15 years to life).

(Appropriations Committee Fiscal Summary, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.), as amended April 3, 1995, p. 1; emphasis added.) Since the offense of voluntary manslaughter while intoxicated is limited to drunk-driving homicides (see Penal Code section 191.5), the foregoing analysis once again illustrates that the Legislature envisioned that the potential application of SB 121 would be limited to drunk-driving homicides.

Similarly, the March 23, 1995, analysis by the Senate Committee on Criminal Procedure was likewise focused on addressing the admission of voluntary intoxication evidence in the drunk-driving murder conviction of *People v. Whitfield, supra*, 7 Cal.4th 437. (Senate Com. on Crml. Procedure, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.), as amended March 23, 1995, pp. 3-4, specifically quoting the rationale articulated in *Whitfield* that explained evidence of voluntary intoxication was admissible in defending a drunk-driving murder charge because the statute, as it then stood, permitted such evidence in murder prosecutions based on both express malice and implied malice.)

The analyses prepared by the respective Assembly committees are to the same effect. The July 10, 1995, analysis by the Assembly

Committee on Public Safety summarized the need for the bill as follows:

> The decisive problem with Whitfield is that it contradicts the specific intent doctrine it purports to serve. California law provides that aggravated drunk driving can increase a defendant's liability for a vehicular homicide to a second-degree murder. Post Whitfield, however, intoxication, if sufficiently severe, can simultaneously mitigate liability to involuntary or vehicular manslaughter by negating implied malice. Allowing the same fact to both aggravate and mitigate liability is contradictory and confusing to juries. Justice Mosk noted this problem is his dissenting opinion in Whitfield. In effect, Whitfield created a strained interpretation of California homicide law and created a needless loophole that is suspiciously close to the legislatively discredited diminished capacity defense.

(Assembly Com. on Public Safety, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.), as amended April 3, 1995, p. 5.)

Finally, the August 31, 1995, Assembly Floor Analysis crystallizes the limited legislative intent underlying SB 121. After explaining that implied malice exists from the intentional commission of an act that is dangerous to human life, "deliberately performed with the knowledge of the danger to, and with conscious disregard for, human life" (Assembly Floor Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.), as amended April 3, 1995, pp. 1-2), the analysis points out that the bill would prohibit the consideration of voluntary intoxication on the issue of implied malice, and proceeds to quote the author's stated motivation for the bill:

> "As a result of People v. Whitfield, individuals who kill and are charged with second-degree murder can now use their own voluntary intoxication to disprove their culpability for their actions, i.e., 'I was too high on heroin to know what I was doing' or 'I was too drunk to have formed the intent needed to constitute murder when I slammed into that car.'"

(*Id.* at pp. 2-3.) The Assembly Floor Analysis then described the "decisive problem with Whitfield" in the identical manner as the Assembly Public Safety Committee Analysis from the previous month, and concluded by observing that the bill would make voluntary intoxication evidence inadmissible on the issue of implied malice, thereby preventing it "from being used as a quasi-diminished capacity defense", but still allowing it to "be admissible on the issue of whether or not the defendant actually formed a required specific intent, or when charged with a homicide, whether the defendant premeditated, deliberated or harbored express malice aforethought." (*Id.* at p. 3.)

These legislative summaries demonstrate that the purpose of SB 121 was to prohibit the use of voluntary intoxication evidence to contest the component of implied malice that requires a second-degree murder defendant to act "with the knowledge of the danger to, and with conscious disregard for, human life...," such as by contending that "'I was too high on heroin to know what I was doing' or 'I was too drunk to have formed the intent needed to constitute murder when I slammed into that car.'" No other purpose was identified. Nor is there any statement

in any portion of the legislative history of SB 121 that articulates any dispute or concern with the admissibility of intoxication evidence on the separate and distinct question of whether a murder defendant actually but unreasonably acted in the belief that it was necessary to use deadly force in order to defend against the imminent danger of great bodily harm. Thus, just as this court concluded in the context of the 1981 statutory amendments to Penal Code section 188, "[t]he Legislature did not refer to imperfect self-defense" and the statutory amendments did not affect the availability of imperfect self-defense. (*In re Christian S.* (1994) 7 Cal.4th 768, 778.)[4]

Therefore, the undersigned amicus respectfully submits that Penal Code section 29.4 clearly and unambiguously allows evidence of voluntary intoxication to be considered on the question of whether a murder defendant acted with express malice, and the Legislature did not intend to exclude intoxication evidence from consideration of whether a

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[4] The Attorney General refers to a letter from Senator Thompson, the sponsor of SB 121, to support her argument that implied malice murder is not a specific intent crime, but that letter was written only after the bill passed both houses of the Legislature, when it was pending the signature of Governor Wilson. So while it may be relevant to understanding the intent of Governor Wilson when he signed the bill, or Senator Thompson when he sponsored it, it fails to shed any light on the intent of the legislators in either house when they voted on the bill. And the Attorney General does not point to any portion of the letter that mentions the concept of imperfect self-defense or the admissibility of intoxication evidence on the question of whether the defendant acted in the actual but unreasonable belief in the need to defend against the imminent danger of great bodily injury.

murder defendant acted in the actual but unreasonable belief of the need to protect against the imminent danger of great bodily harm.[5]

Further, while the Attorney General tries to cast doubt on the meaning of "express malice aforethought", that term is well-defined by the case law, and was well-established long before Penal Code section 29.4 was amended in 1995. It is a cardinal rule of statutory interpretation that the legislature is presumed to be aware of existing law, and when it uses terms that are clearly defined by existing law, it is presumed that the legislature meant to use those terms in the same way. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007.) So it is here, as explained in the immediately following subsection of this amicus brief.

F. The Due Process Clause of the Fourteenth Amendment and California law require the prosecution to prove, beyond a reasonable doubt, that the defendant did not act in the actual belief that deadly force was necessary to protect against the imminent danger of great bodily harm in order to establish the element of express malice aforethought.

California and federal constitutional law have long established that in order to prove the element of express malice aforethought where issues of imperfect self-defense and heat-of-passion provocation are present, the prosecution must prove beyond a reasonable doubt that the defendant did not act in the actual but unreasonable belief that deadly

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[5] Indeed, the foregoing legislative history demonstrates that SB 121 was not intended to prohibit consideration of the defendant's intoxication in evaluating issues of imperfect self-defense in *any* malice-murder prosecution, be it based on theories of express and/or implied malice.

force was necessary to protect against an imminent danger of great bodily injury or death, and that the defendant did not act while under a heat of passion that was provoked by conduct of the decedent that would have caused a person of average disposition to act rashly. As explained by this court:

> If the issue of provocation or imperfect self-defense is thus "properly presented" in a murder case (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 [95 S.Ct. 1881, 1892, 44 L.Ed.2d 508]), the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice.

(*People v. Rios* (2000) 23 Cal.4th 450, 462; original emphasis.) In the case relied upon in *Rios*, the Supreme Court of the United States held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 [95 S.Ct. 1881, 1892, 44 L.Ed.2d 508].)

The Attorney General misstates the requirements of malice, defining it as requiring "(1) an intent to kill that (2) is itself unlawful." (RABM, p. 25.) But that is incomplete. Malice also requires proof that the defendant did not act in the actual but unreasonable belief that deadly force was necessary to protect against an imminent danger of great bodily injury or death, and that the defendant did not act while

under the heat of passion that was provoked by conduct of the decedent that would have caused a person of average disposition to act rashly.[6] While reviewing courts tend to use the shorthand explanation that these latter facts "negate malice", it is not the defendant's burden to prove these facts. Instead, whenever these issues are "properly presented," the Due Process Clause requires the prosecution to demonstrate the absence of imperfect self-defense and heat-of-passion manslaughter beyond a reasonable doubt. (*Mullaney v. Wilbur*, *supra*, 421 U.S. 684, 704.) As succinctly explained in CALJIC 8.50,

> When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, or in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.

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[6] As noted, *Rios*, *supra*, 23 Cal.4th 450, 462, and *Mullaney v. Wilbur*, 421 U.S. 684, 704, emphasize the constitutional requirement that the prosecution must prove these elements beyond a reasonable doubt if the issues are "properly presented." Thus, the jury does not need to be instructed on these principles where the evidence fails to reasonably place them in issue. These rules apply in the same way to issues of perfect self-defense. That is, the jury need not be instructed on the potential justification of self-defense where there is no substantial evidence to warrant a reasonable juror to conclude that the defendant acted in self-defense. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1270 [there was no substantial evidence to support giving "perfect" self-defense instructions because there was "no evidence defendant killed [the victim] because defendant believed he was in *imminent danger* of being killed by him." (Original emphasis.)]; *Christian S.*, *supra*, 7 Cal.4th 768, 783 ["[W]e reiterate that, just as with perfect self-defense or any defense, '[a] trial court need give a requested instruction concerning a defense *only if there is substantial evidence to support the defense.*'" (Original emphasis.] To put it another way, if there is no reasonable basis in the evidence for a jury to conclude that a defendant acted in imperfect or perfect self-defense, the failure of the evidence to raise these issues suffices to prove their absence beyond a reasonable doubt.

(CALJIC No. 8.50, 2d. paragraph (April 2017 ed.).)

Further, as reflected in the court of appeal opinion below and observed by appellant, evidence of intoxication is relevant and admissible on another component of express malice: whether the defendant acted with unlawful intent. (Slip opn., p. 16; *People v. Soto*, review granted, formerly published at 248 Cal.App.4th 884, 903-904.) Where a defendant kills with the intent to protect against an imminent danger of great bodily harm or death, she acts with the intent required for lawful self-defense. Thus, she does not act with unlawful intent. (*Christian S.*, *supra*, 7 Cal.4th 768, 778-779; *People v. Anderson* (2002) 28 Cal.4th 767, 782.) As explained by this court in *Anderson*:

> Express malice exists "when there is manifested a deliberate intention *unlawfully* to take away the life of a fellow creature." (§ 188, italics added.) A killing in self-defense is *lawful*. Hence, a person who actually, albeit unreasonably, believes it is necessary to kill in self-defense intends to kill lawfully, not unlawfully. "A person who actually believes in the need for self-defense necessarily believes he is acting lawfully." (*In re Christian S.*, *supra*, 7 Cal.4th at p. 778.) Because express malice requires an intent to kill unlawfully, a killing in the belief that one is acting lawfully is not malicious.

(*Anderson*, *supra*, 28 Cal.4th 767, 782, quoted with approval in *People v. Elmore* (2014) 59 Cal.4th 121, 134; emphasis supplied in *Anderson*.)

G. Under the rule of lenity, any reasonable dispute concerning the proper interpretation of Penal Code section 29.4, subdivision (b), must be construed in defendant's favor.

Finally, if there was any reasonable dispute concerning whether Penal Code section 29.4, subdivision (b), allows evidence of voluntary intoxication to be considered in evaluating whether a defendant is not guilty of express malice murder because he acted in the actual but unreasonable belief of the need to defend against imminent great bodily injury, this court should apply the rule of lenity, just as it did in *Christian S.*, *supra*, 7 Cal.4th 768, 780. As reiterated in *Christian S.*, """[w]hen language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted."""" (*Ibid.*)

To borrow from this court's conclusion in *Christian S.*, "[b]ecause the language of section [29.4]'s [reference to] express malice is, at the very least, reasonably susceptible to the construction asserted by defendant, [this court should] adopt that construction." (*Ibid.*) This court should hold that the statutory amendments did not abrogate the admissibility of intoxication evidence on the issue of imperfect self-defense in a prosecution based on express malice, just as the *Christian S.* court held that the statutory amendments before it did not abrogate the doctrine of imperfect self-defense (*id.* at p. 771).

H. Implied malice is not necessarily included in express malice.

In an attempt to avoid the requirement that evidence of voluntary intoxication must be considered in determining whether a defendant

acted with express malice, the Attorney General contends "that express malice is simply implied malice plus the specific intent to kill" (RB p. 31), essentially treating implied malice as lesser included offense of express malice. But that is wrong. Implied malice is not a lesser included offense of express malice.

As this court has summarized:

> To determine if an offense is lesser and necessarily included in another offense for this purpose, we apply either the elements test or the accusatory pleading test. "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former."

(*People v. Shockley* (2013) 58 Cal.4th 400, 404.)

Express malice is not implied malice with the addition of an intent to kill. One could intend to kill without subjectively knowing that one's conduct creates a high probability of death, for example, where one intends to kill, does something extremely dangerous in the hopes it will achieve his desired goal of killing, but because of a lack of intelligence or some other reason does not consciously realize that his conduct is likely to succeed. The prosecution is not required to prove that the defendant was consciously aware that his conduct created a high probability of death in order to establish express malice. Instead, the

requirement is merely to prove that he acted with the specific intent to kill. Thus, implied malice is not a lesser included element of express malice.

II.

IT WAS ERROR TO GIVE CALCRIM NO. 625 BECAUSE, COMBINED WITH CALCRIM NO. 520, IT PRECLUDED THE JURY FROM CONSIDERING EVIDENCE OF APPELLANT'S INTOXICATION ON THE ISSUE OF EXPRESS MALICE.

As explained above in section IB, *ante*, pp. 14-16, in order to establish the element of malice aforethought in a murder case where the issue of imperfect self-defense is "properly presented", the due process clause requires the prosecution to prove beyond a reasonable doubt that the defendant did not act in the actual (albeit unreasonable) belief in the need to protect against the imminent danger of great bodily injury. (*Mullaney v. Wilbur*, *supra*, 421 U.S. 684, 704; *People v. Rios*, *supra*, 23 Cal.4th 450, 462; CALJIC No. 8.50, 2d. paragraph (April 2017 ed.).) Amicus recognizes that the instructions must be considered as a whole, not in isolation. But although the jury was instructed pursuant to CALCRIM No. 625 that voluntary intoxication could negate express malice, neither CALCRIM No. 625 nor any other instruction explained how it could negate malice, or that the prosecution had to prove the absence of imperfect self-defense in order to establish the element of malice aforethought.

Rather, CALCRIM No. 520 simply defined express malice as being present if the defendant "unlawfully intent to kill." Neither CALCRIM No. 520 nor any other instruction explained to the jury that express malice is not present where the defendant acts in the actual but unreasonable belief that he must use deadly force in order to protect against the imminent danger of great bodily harm. Although CALCRIM No. 571 does state that the burden of proof is on the prosecution to disprove imperfect self-defense, and that the defendant is not guilty of murder if the prosecution fails to meet that burden, it never mentions the term "malice aforethought" or explains that there is no express malice if the defendant acted in imperfect self-defense. As such, CALCRIM No. 571 stands in stark contrast to CALJIC No. 8.50, *supra*. Unlike CALJIC, there is nothing in CALCRIM that mentions the relationship between express malice and imperfect self-defense, or tells the jury they can consider the defendant's intoxication in deciding whether he acted in imperfect self-defense. Thus, by telling the jury that they could consider defendant's intoxication *only* on the issue of express malice (CALCRIM No. 625), by defining express malice without any reference to imperfect self-defense (CALCRIM No. 520), and by instructing on imperfect self-defense without any reference to express (or implied) malice (CALCRIM No. 571), the instructions failed to advise the jurors that they could consider defendant's

intoxication in evaluating whether the prosecution had proven that defendant did not act in the unreasonable belief that it was necessary to use deadly force to protect against the imminent danger of great bodily injury.

Several decisions from last year illustrate the nature of the error herein. *People v. Townsel* (2016) 63 Cal.4th 25, 63-64, held that the trial court's instruction limiting consideration of defendant's intellectual disability "solely on the question whether he formed the mental state required for the murder charges ... effectively told the jury it must not consider that evidence on any other question...," including the witness-killing special circumstance and the charge of dissuading a witness. The error was prejudicial, requiring reversal of these allegations, because "the intellectual disability evidence was entirely consistent with, and reinforced, the argument that defendant acted out of jealousy and frustration rather than out of rational thought, a planning process, or a weighing of the consequences."

People v. Ocegueda (2016) 247 Cal.App.4th 1393, 1396, also found error from a similar limiting instruction, finding that the trial court committed error "by precluding the jury from considering evidence of defendant's mental disabilities in deciding whether he harbored the state of mind required for imperfect self-defense." The defendant, who was prosecuted for attempted murder among other

offenses, presented evidence that he was intellectually disabled. The trial court, however, instructed the jury, based on CALCRIM No. 3428, that such evidence could be considered only on the issues of whether defendant acted with the intent to kill, and whether he acted with premeditation and deliberation. The court of appeal explained that

> California law allows the jury to consider a defendant's mental disabilities in deciding whether he or she had an actual but unreasonable belief in the need for self-defense. ...Therefore, by limiting the jury's consideration of mental disability evidence to the question of whether defendant had an intent to kill—but not whether he harbored express malice—the trial court's instruction ran afoul of Section 28.

(At p. 1407.)

Although the jury herein was instructed that they could consider evidence of defendant's intoxication on the issue of express malice, malice was defined as being limited to the question of whether defendant acted with the intent to kill, and the jury was not told that an unreasonable belief in the need for self-defense defeated express malice or an intent to kill. Thus, the bottom line herein is the same as in *Ocegueda*.

Finally, *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1204, held that the trial court erred in a murder prosecution where defendant presented evidence of mental impairments by failing to modify CALCRIM No. 3428 to permit the jury to consider evidence of his

impairment "in determining whether certain untruthful statements were knowingly made, and therefore evidenced his consciousness of guilt." The pattern instruction limited consideration of his mental illness to the mental state required for murder, specifically, whether he acted with malice aforethought, premeditation and deliberation, but it should have been modified to permit its consideration on consciousness of guilt. "If ... defendant's mental illness or impairment prevented him from knowing those statements were false, the statements would not have been probative of his consciousness of guilt." (At p. 1205.)

Similarly, the instructions herein were deficient because they failed to advise the jury that it could consider evidence of defendant's intoxication in deciding whether the prosecution had proven beyond a reasonable doubt that defendant did not act in the unreasonable belief that his use of deadly force was necessary to protect against the imminent danger of great bodily harm.

CONCLUSION:

Under Penal Code section 29.4, subdivision (b), evidence of a defendant's voluntary intoxication must be considered in evaluating whether the prosecution has proven that a murder defendant acted with express malice aforethought, including the question of whether the prosecution has established beyond a reasonable doubt that the defendant did not act in the actual belief that his deadly force was

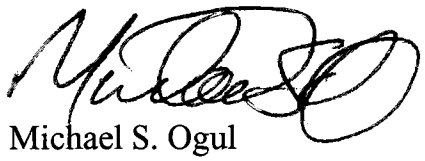
necessary to protect against the imminent danger of great bodily harm. This conclusion is required by the clear terms of the statute, the unambiguous legislative intent, the legislative history of SB 121, and the Due Process Clause of the Fourteenth Amendment. But CALCRIM Nos. 625, 520, and 571 failed to instruct defendant's jury that it could consider evidence of his intoxication on the issue of imperfect self-defense, or that defendant did not act with express malice if imperfect self-defense applied to the case. Moreover, no other instruction given by the trial court filled this void. To the contrary, the instructions affirmatively prohibited the jury from considering evidence of defendant's intoxication on the issue of imperfect self-defense. Therefore, the instructions were erroneous and violated the Due Process Clause of the Fourteenth Amendment.

Dated: May 2, 2017.

Respectfully submitted,

California Public Defenders Association

Molly O'Neal
Public Defender
Santa Clara County



Michael S. Ogul
Deputy Public Defender
Santa Clara County
California State Bar No. 95812

CERTIFICATE OF WORD COUNT

I, Michael S. Ogul, counsel for amicus curiae California Public Defenders Association and the Santa Clara County Public Defender, hereby certify that the word count of the attached application to file amicus brief and brief of amicus curiae in support of petitioner is 5,724 words as computed by the word count function of Word, the word processing program used to prepare this brief.

DATED: May 2, 2017.

Michael S. Ogul
Deputy Public Defender
California State Bar No. 95812

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA	)	Supreme Court No. S236164
	)	
COUNTY OF SANTA CLARA	)	People of the State of California v. Juaquin Soto

I am a citizen of the United States and am employed in the Office of the Public Defender for Santa Clara County; I am over the age of eighteen years and not a party to this action. My business address is: 120 West Mission Street, San Jose, CA 95110.

On May 2, 2017, I served the attached Application of California Public Defenders Association and Santa Clara County Public Defender to Appear as Amicus Curiae, and Brief of Amicus Curiae in Support of Appellant Juaquin Soto, Supreme Court No. S236164, on the following parties by placing true copies thereof in envelopes addressed to same and placing them in the United States Mail that same day with postage prepaid, addressed as follows:

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(continued on next page)

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

Executed on this 2nd day of May, 2017, at San Jose, California.