IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California, Plaintiff and Respondent, v. Juaquin Soto, Defendant and Appellant.	)	S236164

Monterey Superior Court,
Case No. SSC120180A
The Honorable Carrie M. Panetta, Judge

Sixth Appellate District Case No. H041615

Application to File Amicus Curiae Brief and Amicus Curiae Brief of Senator Ray Haynes Supporting the People of the State of California

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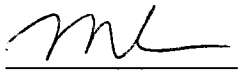
Senator Ray Haynes Application to File Amicus Curaie Brief Supporting the People of the State of California

To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court:

Former Senator Ray Haynes hereby applies for permission to file a brief as amicus curiae supporting the People of the State of California, pursuant to California Rules of Court, rule 8.520, subdivision (f).

This case addresses the effect of the statutory amendment to then-Penal Code section 22 (now renumbered as section 29.4), legislation that amicus helped enact.

Amicus curiae Senator Ray Haynes served in the California State Senate, representing the 36h District, and the Assembly, representing the 66th District, from 1993 until 2007. He served, inter alia, as Senate Republican Whip and Chair of the Senate Constitutional Amendments Committee. In both the Senate and Assembly he was a member of the Judiciary Committee, and was actively involved in the Legislature's amending Penal Code section 22 to reify the reasoning of Justice Stanley Mosk's concurring and dissenting opinion in *People v. Whitfield* (1994) 7 Cal.4th 437. Senator Haynes maintains an ongoing interest in this issue, and publishes analysis on numerous criminal justice issues in the Flash Report. If this Court grants this application, amicus curiae requests this Court permit the filing of the brief that is bound with this application.



Mitchell Keiter
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Senator Ray Haynes

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v.	)	
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Defendants must subjectively appreciate and consciously disregard a grave danger to be guilty of implied malice murder, but Penal Code section 29.4 bars defendants from introducing intoxication evidence to show they did not subjectively perceive (and disregard) an existing danger. Therefore, a defendant who shoots at what he thinks is a tree stump (but is actually a child) may not defend against an implied malice murder charge by showing his intoxication caused him to misperceive the nature of his target.

Does this policy also apply where intoxication causes the defendant to perceive a nonexistent danger, e.g. he shoots at what he thinks is an armed terrorist (but is actually a child)?

In other words, if the law deems intoxication legally irrelevant where the defendant's misperception produces a false negative finding of danger (mistaking a grenade for a ping-pong ball), does the same rule apply where the misperception produces a false positive finding (mistaking a ping-pong ball for a grenade)?

Introduction

Appellant broke into the home of a complete stranger and stabbed him to death as his family hid in the bedroom. Appellant contends the killing deserves mitigation as imperfect self-defense manslaughter because he needed to make an "instantaneous" decision about whether to kill under "highly stressful conditions." (AOB 43) Mitigation is unavailable because the stressful conditions were of his own making.

The primary issue is the exculpatory reach of intoxication evidence. California has long wrestled with the problem of the voluntarily intoxicated offender. He may be less culpable than one who consciously endangers others, but his very unawareness of his surroundings creates a special danger from which society deserves protection. This Court observed the tension over a century ago. Culpability considerations warrant mitigation: "In the forum of conscience, there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication." (*People v. Blake* (1884) 65 Cal.

275, 277, quoting *People v. Rogers* (1858) 18 N.Y. 9.) But public safety demands accountability, as "human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct." (*Ibid.*) Intoxication evidence was thus admissible in homicides only against a charge of express malice murder.

The balance had shifted when the Court again described the issue almost a century later: "On the one hand, the moral culpability of a drunken criminal is frequently less than that of a sober person effecting a like injury. On the other hand, it is commonly felt that a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences." (*People v. Hood* (1969) 1 Cal.3d 444, 455.) It was enough that the intoxicated offender not completely escape the consequences, so a defendant could then present intoxication evidence to show he acted without express or implied malice, and was guilty of only vehicular or involuntary manslaughter, based on negligence. (*People v. Whitfield* (1994) 7 Cal.4th 437, 453-454.)

Whitfield provided the fullest debate on the question. The majority contended implied malice murder was a specific intent offense, so the defendant could show "due to voluntary intoxication, he or she did not appreciate the dangerousness of his or her conduct." (*Whitfield, supra,* 7 Cal.4th at p. 453.) Justice Mosk's separate opinion, however, echoed *Blake, supra,* 65 Cal. 275, in deeming intoxication factually relevant but legally irrelevant to implied malice. "The voluntary inebriate may be perfectly unconscious of what he does and yet he is responsible . . . . Public policy and public safety imperatively require [it]." (*Whitfield, supra,* at p. 471 (conc. & dis. opn. of Mosk, J.) [internal citation omitted].)

The Legislature then amended the law to implement Justice Mosk's position that a defendant's intoxication-caused misperception was factually relevant but legally irrelevant to implied malice. A defendant who shot at a child believing her to be a tree stump, therefore, could not present evidence of his intoxication to show he did not consciously disregard a grave danger to human life.

Appellant now contends he subjectively believed he needed to stab Israel Ramirez to protect himself, and his intoxication was relevant to this belief, and thus to his defense against murder charges. (AOB 22-23.) But rationalizing mistaken perceptions through intoxication evidence is precisely what the post-*Whitfield* amendment forbids. If intoxication, though factually relevant, is legally irrelevant when the *defendant does not perceive an existing danger* (e.g. shooting a child in the backyard because he mistakenly did not perceive her), it must also be legally irrelevant when the defendant *does perceive a nonexistent danger* (e.g. shooting a child because he mistakenly perceived she was pointing a gun at him). (*People v. Wright* (2005) 35 Cal.4th 964, 985 (conc. opn. of Brown, J.).)

The Legislature carefully weighed the policy considerations and concluded voluntary intoxication did not support mitigating a homicide from murder to manslaughter. Appellant offers no ground for creating a different rule where the mistaken perception of danger derives from a false positive finding of danger rather than a false negative one.

Intoxicated offenders ordinarily may assert their mistaken perception and belief in the need for self defense when charged with implied malice murder; they simply may not present intoxication evidence to advance that claim. But appellant broke into Mr. Ramirez's home. Ramirez therefore could lawfully use force to defend himself and appellant could not — even if he *reasonably* perceived a need for it. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1226; *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.) Having created the circumstances privileging Ramirez's use of force over his own, appellant forfeited the right to acquittal on the ground of justifiable homicide, or conviction of voluntary manslaughter through imperfect self-defense.

Statement of Facts[1]

Appellant forcibly entered the home of Israel Ramirez and Patricia Saavedra as the couple was watching television on the couch with their son. (*People v. Soto* (2016) 248 Cal.App.4th 884, 896.) According to Saavedra, appellant stabbed Ramirez in the neck. Saavedra took their son to hide in the bedroom with his sister. Ramirez went to the kitchen while appellant pursued him. Appellant testified Ramirez stabbed him first, and appellant took out his knife to defend himself. (*Id.* at pp. 896-897.)

Police discovered Ramirez's body lying in the apartment hallway, in a pool of blood. Police found blood on the hallway walls, in the kitchen, and in front of the couch. DNA testing matched the blood near the couch with Ramirez's, and both men's blood appeared on the knife found in appellant's pocket. (*Soto, supra*, 248 Cal.App.4th at p. 898.) Appellant did not recall where either man was stabbed. (*Id.* at p. 899.)

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[1] Amicus derives these abbreviated statements of facts and case from the Court of Appeal opinion. They summarize only the facts and procedural history pertinent to the arguments presented in this brief. Following the opinion, the statement of facts appears first.

Appellant had methamphetamine, marijuana, and alcohol in his system. (*Soto, supra*, 248 Cal.App.4th at p. 898.) Appellant's expert testified his impulsiveness and poor decisionmaking reflected a methamphetamine-induced psychosis. This psychosis produces a perception of threats that do not actually exist. (*Id.* at pp. 899-900.)

Statement of the Case

The People charged appellant with homicide. The court instructed the jury under both express malice and implied malice murder theories, and on first degree murder under both a premeditation and deliberation theory and a felony-murder theory based on the commission or attempted commission of a burglary. The People further charged appellant with first degree burglary and with using a deadly weapon in committing both the homicide and the burglary. (*Soto, supra*, 248 Cal.App.4th at p. 900.)

The court instructed the jury on malice with CALCRIM No. 520, and on justifiable homicide in self-defense with CALCRIM No. 505. (*Soto, supra*, 248 Cal.App.4th at pp. 900-901.) The court instructed on imperfect self-defense

voluntary manslaughter with CALCRIM No. 571, adding, inter alia, "Imperfect self-defense does not apply if a defendant's conduct creates circumstances where the victim is legally justified in resorting to self-defense against the defendant. But the defense is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant." (*Soto*, *supra*, 248 Cal.App.4th at p. 901.)

As to voluntary intoxication, the court read a modified version of CALCRIM No. 625. "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or the defendant was unconscious when he acted. Voluntary intoxication can only negate express malice, not implied malice. [¶.] A person is voluntarily intoxicat[ed] if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or logically assuming the risk of that effect. You may not consider evidence of voluntary intoxication for

any other purpose." The court read CALCRIM No. 626 to instruct the jury on unconsciousness produced by voluntary intoxication. (*Soto, supra*, 248 Cal.App.4th at p. 901.)

The jury acquitted appellant of first degree murder and convicted him of second degree murder. (*Soto, supra*, 248 Cal.App.4th at p. 901.) It convicted him of burglary and found the knife allegations true. (*Ibid.*)

The Court of Appeal concluded the instructions misinformed the jury by preventing its consideration of appellant's intoxication evidence in evaluating his defense of imperfect self-defense. (*Soto, supra*, 248 Cal.App.4th at p. 895.) The Court of Appeal found the instructional error harmless. (*Ibid.*) Both parties petitioned for review, and the Supreme Court granted both petitions, deeming appellant as the petitioner.

Argument

I. The Legislature has deemed intoxication legally irrelevant as a defense to implied malice murder.

The intoxication debate illustrates the tension identified in *People v. Blake*, *supra*, 65 Cal. 275, 277, over whether to measure the magnitude of an offense subjectively, "from the standpoint of the offender," or objectively, "from the standpoint of society which suffers from the acts of the intoxicated offender." (*People v. Langworthy* (1982) 416 Mich. 630 [331 N.W.2d 171, 175]; Note, *Constructive Murder–Drunkenness in Relation to Mens Rea* (1920) 34 Harv. L. Rev. 78, 80-81; see Keiter, *How Evolving Values Have Shaped (and Reshaped) California Criminal Law* (2009) 4 Cal. Legal Hist. 393.) The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress enable a constantly shifting adjustment of these competing imperatves. (*Powell v. Texas* (1968) 392 U.S. 514, 536 [88 S.Ct. 2145, 20 L.Ed.2d 1254].) In other words, regardless of how a legislature technically describes the elements of offenses and their defenses, the admissibility of intoxication evidence ultimately depends on policy, as both sides in *Whitfield*

agreed. (*Whitfield, supra*, 7 Cal.4th 437, 451 fn. 5, citing Fletcher, Rethinking Criminal Law (1978) p. 850; *Whitfield, supra*, at p. 463 (conc. & dis. opn. of Mosk, J.); see also *Hood, supra*, 1 Cal.3d 444, 455-456.) States may therefore impute a constructive mental state to a defendant as a matter of law even if he did not subjectively harbor it as a matter of fact. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 58 [116 S.Ct. 2013, 135 L.Ed.2d 361] [conc. opn. of Ginsburg J].)

States have enacted widely divergent rules on this subject. (Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense* (1997) 87 J. Crim. L. & Criminology 482, 510-512 [*Just Say No Excuse*].) Indiana formerly considered a defendant's subjective mental state exclusively, and fully exculpated offenders whose intoxication prevented them from forming an intent.

> The murder statute clearly requires an intentional act on the part of the perpetrator. . . . Any situation which renders the perpetrator incapable of forming intent frees him from the responsibility of his acts.

(*Terry v. State* (Ind. 1984) 465 N.E.2d 1085, 1088, superseded by statute as recognized in *Sanchez v. State* (Ind. 2001) 749 N.E.2d 509, 513-515.)

Other states have chosen to deny any exculpatory effect to

intoxication. (*Egelhoff, supra*, 518 U.S. at p. 48, fn. 2.) Montana prosecutors may therefore establish deliberate homicide (which requires the defendant purposely or knowingly cause the death of another) not only "in a purely subjective sense" but through a law "rendering evidence of voluntary intoxication **logically irrelevant** to proof of the requisite mental state." (*Egelhoff, supra*, 518 U.S. 37, 58 [conc. opn. of Ginsburg J.] [emphasis added].)[2]

Both sides in *Whitfield* noted California has pursued a compromise position. For specific intent cases, Penal Code section 22 (renumbered as 29.4) considers intoxication evidence admissible. In general intent cases, it is subjectively relevant as a matter of fact yet logically irrelevant as a matter of law. The only dispute in *Whitfield* concerned into which offense category implied malice murder fell.

2

This analysis concerns only the admissibility of intoxication evidence to show the absence of a required mens rea. It does not affect its admissibility for other purpose. (See e.g. *State v. Barr* (1935) 336 Mo. 300 [78 S.W.2d 104, 105-106] [intoxication may be relevant to alibi by showing defendant could not physically commit offense].) Similarly, unless otherwise indicated, "intoxication" refers to that which is voluntary or self-induced.

A. *Intoxication is factually relevant to implied malice.*

One can easily discern the factual relevance of intoxication to implied malice murder. "Implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less." (*People v. Knoller* (2007) 41 Cal.4th 139, 143.) The rationale for admitting intoxication evidence is that "it appears only fair and reasonable that defendant should be allowed to show that in fact, *subjectively, he did not possess the mental state or states in issue.*" (*People v. Gorshen* (1959) 51 Cal.2d 716, 733, disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101 [emphasis added].) Insofar as the defendant did not have the mental state at issue — "awareness" that his conduct endangered the life of another — any evidence, including intoxication, is factually relevant to his defense.

Whitfield did not go so far as the former Indiana rule and authorize admission of intoxication evidence in all cases; it held intoxication was inadmissible as a defense to the negligence required for vehicular or involuntary manslaughter. (*Whitfield, supra*, 7 Cal.4th at p. 451.) But

the majority cited the evidence's factual relevance in

> permit[ting] the defendant to defend against a charge of murder on the ground that, *due to voluntary intoxication, he or she did not appreciate the dangerousness of his or her conduct*, hence did not harbor malice, and should be convicted of the lesser offense of manslaughter.

(*Id.* at p. 453 [emphasis added].)

B. *Intoxication is legally irrelevant to implied malice.*

The legislative decision to exclude intoxication evidence as a matter of law in implied malice cases rests on the obvious risks in becoming intoxicated to the point where one is unaware of one's surroundings. The element of implied malice, "defined as conscious disregard of a substantial risk — encompasses the risks created by defendant's conduct in getting drunk." (*People v. Register* (1983) 60 N.Y.2d 270 [457 N.E.2d 704, 709], disapproved on other grounds in *People v. Feingold* (2006) 7 N.Y.3d 288 [852 N.E.2d 1163, 1168.)

> 'The effect of drunkenness on the mind and on men's actions . . . is a fact known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences.' 22 C.J.S. § 68(a) (1961).

(*State v. Vaughn* (1977) 268 S.C. 119 [232 S.Ed.2d 328, 331].)

Therefore, if self-induced intoxication renders an actor unaware of a risk he would have been aware of had he been sober, "such unawareness is immaterial." (*Whitfield, supra*, 7 Cal.4th at p. 475, citing Model Penal Code, § 2.08, subd. (2).)

Many states distinguish between express and implied malice in determining when to admit intoxication evidence. (*Just Say No Excuse, supra*, 87 J. Crim. L. & Criminology 482, 510-512.) The dual policy reflects the distinct vice rendering the element(s) of each adequate to establish malice. Express malice involves the especially *culpable* mental state of an intent to kill. Intoxicated killers harbor less subjective culpability than sober ones, so they do not act with malice on an express malice theory.

Implied malice derives from less subjective culpability (conscious disregard) but more objective *danger* than express malice. (Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law* (2004) 38 U.S.F. L. Rev 261, 263-268 [*With Malice Toward All*].) Contrary to appellant's claim that implied malice murder is a lesser included offense, so that

"whenever there is express malice murder, there is also implied malice" (ARB 4), implied malice has the additional element of objective danger; the natural and probable consequences of the offender's act must be dangerous to human life.[3] Because the law looks to the maintenance of personal security and social order more than to an accurate discrimination as to the moral qualities of individual conduct, a less culpable subjective mental state combined with an objective social danger may establish malice just as much as the more culpable mental state of an intent to kill. (*Blake*, *supra*, 65 Cal. 275, 277.)[4]

The comparable effect of a subjective intent to kill and objective danger was described by then-Court of Appeal

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[3]For murders committed by certain especially dangerous means like poison or explosives, implied malice may support a first degree murder conviction. (Pen. Code, § 189; *People v. Catlin* (2001) 26 Cal.4th 81, 149.)

[4]
Because a jury may find a defendant acted with express malice but not implied malice (by intending to kill through the commission of a relatively nondangerous act (see *With Malice Toward All*, *supra*, at p. 265)), courts should instruct juries that intoxication is legally relevant as a defense to a charged express malice murder even though it is inadmissible as to an implied malice ground.

Justice Cantil-Sakauye in *People v. Curry* (2007) 158 Cal.App.4th 766, 786-789.) So long as an aider-abettor knows of and intends to facilitate a planned crime, she may be liable for any reasonably foreseeable crime committed. (See e.g. *People v. Smith* (2014) 60 Cal.4th 603, 611 [accomplice criminally liable for not just intended crime but any reasonably foreseeable crime that occurs].) An aider-abettor may thus be liable for attempted murder either (1) because she knew of the perpetrator's intent to kill; or (2) because the attempted murder was a natural and probable consequence of the intended crime. (*Curry, supra,* at p. 789.) Although the latter form has a lesser culpability, it also "requires more"; the ultimate crime must be a natural and probable consequence of the planned crime. (*Ibid.*)

For comparable reasons, the law imputes liability to both intoxicated offenders and aider-abettors for subjectively unintended and unanticipated harms. Criminals acting together present a greater danger to society than one acting alone. (*People v. Welch* (1928) 89 Cal.App.18, 22.) Similarly, appellant freely admits his methamphetamine and alcohol

use aggravated the danger to society by making him more likely to act aggressively, start fighting, and use deadly force without any legitimate basis. (AOB 22.)

The rule holding accomplices liable for all "criminal harms they have naturally, probably and foreseeably put in motion" is not unfair; by joining with others whose actions they cannot control they forfeit their personal identity and their right to be held liable for only those acts they subjectively intended. (*People v. Luparello* (1986) 187 Cal.App.3d 410, 439-441, citing Dressler, *Redressing the Theoretical Underpinnings of Accomplice Liability: New Solutions to An Old Problem* (1985) 37 Hastings L.J. 91, 111.) Full accountability for all reasonably foreseeable crimes committed also serves to deter individuals from combining with others to commit crimes. (*Luparello, supra,* at p. 438.)

Inebriates likewise forfeit control over their behavior, aggravating the danger to others. A zookeeper who exposes a crowd to danger by opening the door of a lion's cage is criminally responsible for deaths that ensue, not because he controls the lion's actions but *because he cannot.* (See *People*

v. Register, supra, 457 N.E.2d 704, 707 (opening lion's cage reflects implied malice/depraved mind); *People v. Batting* (N.Y. Ulster Oyer & Terminer 1875) 49 How.Pr. 392, 395 [intoxication turns individuals into "beasts preying upon society"].) It is the inebriate's lack of control/awareness that aggravates the danger to others. (See *People v. Knoller*, *supra*, 41 Cal.4th 139, 158 [emphasis added]: implied malice appeared from defendant's "decision to take the dog Bane unmuzzled through the apartment building, where they were likely to encounter other people, knowing that Bane was aggressive and highly dangerous and that *she could not control him.*")

There is thus a long tradition of extending liability to intoxicated offenders for subjectively unintended or unanticipated harms. Justice Mosk cited a Michigan Supreme Court decision holding an intoxicated offender had

> set his will free from the control of reason--to have suppressed the guards and invited the mutiny; and [so] should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting.

(*Roberts v. People* (1870) 19 Mich. 401, 419, cited in *Whitfield*, *supra*, at p. 471.)

Because the defendant had forfeited his capacity to reason and control his actions, he could not assert he committed the *actus reus* but lacked the *mens rea*.

> There is no ground upon which a distinction can safely be made in such cases, between the acts of his hands and those of his will, which have set in motion and directed the hands.

(*Roberts,* at p. 419.)

The defendant therefore could not disconnect his "hands" (acts) from his "will" (mental state) and claim he did not intend the harmful acts, because it was his "will" that set the hands in motion by voluntarily consuming intoxicants. (*Ibid.*)

The *Roberts* analysis fully describes the justification for Luparello's first degree murder conviction. (*Luparello, supra,* 187 Cal.App.3d 410.) Luparello conspired to commit an aggravated assault with others, but one went further and fatally shot the victim. (*Id.* at pp. 419-420.) The defense contended Luparello should not be responsible for the shooter's acts absent evidence he intended or anticipated the homicide. (*Id.* at p. 438.) But the Court of Appeal essentially

echoed *Roberts*: his "will" had set in motion an uncontrollable and destructive force (the shooter's "hands"), for which Luparello was fairly held responsible.

Justice Mosk thus embraced the Michigan Supreme Court's position that "a man who voluntarily puts himself into a condition to have no control of his actions, must be held to intend the consequences." (*Whitfield*, *supra*, 7 Cal.4th at p. 471, quoting *Roberts*, *supra*, 19 Mich. at p. 416, internal citations omitted.) The imputation of malice was one of law, not fact, so the factual relevance of intoxication could not exculpate. The law

> **does not seek to ascertain the actual state of the perpetrator's mind**, for the fact from which malice is implied having been proved, the law presumes its existence, *and proof in opposition in this presumption, is irrelevant and inadmissible.*

(*Whitfield*, *supra*, 7 Cal.4th at pp. 475-476 [boldface added].) Intoxication was factually relevant but legally irrelevant.

Chief Justice George did not oppose the policy holding voluntary intoxication legally irrelevant to implied malice but found the Legislature had not incorporated that policy into the statute. (*Whitfield*, *supra*, 7 Cal.4th at pp. 448-449.) He explained how the Legislature "easily" could have written the

statute to implement the policy favored by Justice Mosk by stating "voluntary intoxication is admissible solely on the issue whether a defendant harbored express (but not implied) malice." (*Ibid.*) The Legislature did so the next year (omitting the parenthetical). For crimes committed since that date, the law excludes intoxication as a defense to implied malice murder. (*People v. Rangel, supra*, 62 Cal.4th 1192, 1227.)

Voluntary intoxication is factually relevant but legally irrelevant to a defendant's appreciation of danger, as required for implied malice. The same legal irrelevance applies regardless of whether the defendant presents the intoxication as showing a mistake of fact, unconsciousness, or imperfect self-defense.

II. Intoxication evidence is factually relevant but legally irrelevant regardless of whether the defense offers it to show a mistake of fact, unconsciousness, or imperfect self-defense.

A defendant may present intoxication evidence for its exculpatory effect through different theories. Argument I demonstrated how it is unavailable against what appellant terms a "stand alone defense" to implied malice murder. (ARB 3-4; see CALCRIM Nos. 520, 3426.) But there are other theories through which it could be relevant. It could establish a mistake of fact (see CALCRIM No. 3406), it could produce unconsciousness (CALCRIM No. 626), or it could lead a defendant to harbor an unreasonable belief in the need to defense himself. (CALCRIM No. 571.) Appellant thus argues evidence of his intoxication was relevant to his mistaken belief in the need to use deadly force against Mr. Ramirez (AOB 22, 37, ARB 5.) But the reach of the intoxication defense and its exculpatory effect are bound by the policy that intoxication evidence is factually relevant but legally irrelevant against a charge of implied malice murder. That same policy applies regardless of defendant's theory in presenting the evidence.

A. *Mistake of fact*

Appellant contends his homicide deserves mitigation because he made a mistake of fact. (AOB 29.) A mistake may negate a defendant's culpability; an offender who commits an unjustifiable homicide due to a mistake of fact will be less culpable than another who likewise kills with full understanding of his conduct. In other words, someone who shoots at a child believing she is a tree stump deserves less blame than someone else who shoots knowing his target is an innocent child.

> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for . . . abstaining from what [the law] forbids, and a fair opportunity to exercise those capacities. Where these capacities are absent [due to, inter alia, ignorance or mistake] . . . the moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise."

(Hart, Punishment and Responsibility (1968) 152.)

Factual unawareness reflects a moral innocence justifying legal innocence.

But this reasoning does not apply to inebriates because they *had* the "normal capacities" and "fair opportunity to exercise" them but voluntarily forfeited that opportunity. More than a century after *Roberts*, *supra*, 19 Mich. 401, the Michigan Supreme Court confirmed its rationale that a person who unconsciously creates risk due to voluntary intoxication may manifest more moral blameworthiness than a sober person who unconsciously creates risk due to mental deficiency. (*Langworthy*, *supra*, 331 N.W.2d 171, 179.) Mistakes therefore lack exculpatory effect when defendants voluntarily generate them through intoxication. (*People v. Stanley* (1992) 6 Cal.App.4th 700, 706.) Not all mistakes are created equal.

Appellant's contrary assertion conflates voluntary and involuntary intoxication, and treats them as functional equivalents. But *why* a defendant misperceives facts matters.

Mistakes due to mental illness warrant more blame than those due to involuntary intoxication.

> A defendant who commits criminal acts while under a temporary delusion caused by involuntary intoxication is neither morally blameworthy nor a menace to the community and therefore may appropriately use the mistake-of-fact defense to obtain complete exoneration. The same cannot be said of the mentally ill defendant who may represent a continuing threat and who may be blameworthy to some degree, although perhaps not as much as a completely sane individual.

(*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1083-1084.)

Mistakes due to voluntary intoxication, a fortiori, are even more culpable and dangerous.

Just as unawareness of risk due to intoxication deserves more serious sanction than unawareness due to other grounds when presented as a "stand alone defense," so too does "mistake of fact" due to intoxication deserve more serious sanction than other mistakes when presented as an alternative mitigating ground. (Cf. Model Penal Code, § 210.3 commentary at 64 (1985) "[E]xtreme emotional disturbance will not reduce murder to manslaughter if the actor has intentionally, knowingly, recklessly, or negligently brought about his own mental disturbance.") Intoxication-fueled mistakes also differ from mistakes flowing from other grounds for deterrence purposes; the law can deter stupefaction but it

cannot deter stupidity.

"A mistake or accident may happen to a man, whether drunk or sober, and if they are more likely to occur when in the former predicament, he is not entitled to any advantage over the sober man by reason of this." (*State v. Cross* (1858) 27 Mo. 332, 337.) The *Cross* court's analysis, though more than a century and a half old, applies with frightening precision to appellant's contention that his consuming methamphetamine and alcohol for days, thereby aggravating the risk he would "misperceive things," entitled him to use such misperception as a defense to murder. (AOB 22.) "If a man can thus divest himself of his responsibilities as a rational creature and then perpetrate deeds of violence with a consciousness that his actions are to be judged by the irrational condition to which he has voluntarily reduced himself, society would not be safe." (*Cross*, *supra*, at p. 338.)

In sum, mistakes of fact ordinarily are inconsistent with culpability, and thus are factually relevant in refuting it. But the same policy barring intoxication evidence to show the defendant mistakenly did not perceive an existing danger

bars its admission to show the defendant mistakenly perceived one that did not exist.

B. *Unconsciousness.*

The court read CALCRIM No. 626 to the jury. It instructs, inter alia,

> When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter.

(CALCRIM No. 626.)

This instruction was error, because voluntary intoxication is inadmissible as a defense to implied malice murder, regardless of whether the defendant retains or loses consciousness in the process. (*People v. Carlson* (2011) 200 Cal.App.4th 695, 707.)

Carlson rejected a loophole to the rule described above precluding the admission of voluntary intoxication evidence to show the absence of implied malice. The instruction relies on "the premise voluntary intoxication can still negate a finding of implied malice." (*Carlson, supra*, 200 Cal.App.4th at p.

707.) *Carlson* recalled the analysis of *People v. Turk* (2008) 164 Cal.App.4th 1361, 1376-1377, which rejected instructing that juries that intoxication-caused homicides amounted to involuntary manslaughter.

> "This instruction is incorrect because a defendant who unlawfully kills without express malice due to voluntary intoxication can still act with implied malice, which voluntary intoxication cannot negate, in the wake of the 1995 amendment to section 22, subdivision (b). To the extent that a defendant who is voluntarily intoxicated unlawfully kills with implied malice, the defendant would be guilty of second degree murder."

(*Carlson*, *supra*, at p. 707, quoting *Turk*, *supra*, at pp. 1376-1377.)[5]

As intoxication evidence was legally irrelevant to implied malice murder where the defendant was severely intoxicated but still conscious, the Court of Appeal refused to "carve out an exception where a person drinks so much as to render him or her unconscious." (*Carlson*, *supra*, at p. 707.) Intoxication was inadmissible to show the absence of implied malice, both when it led to unconsciousness and when it did not.

The *Carlson* conclusion is unassailable. CALCRIM No.

5

It could be first degree murder if such an intoxicated murderer used poison or other special means. (Pen. Code, § 189; *People v. Catlin*, *supra*, 26 Cal.4th 81, 149.)

626 accurately stated the law as described by the majority in *Whitfield, supra*, 7 Cal.4th 437, when the Court granted review to "consider his claim that he was entitled to an instruction based on a defense of unconsciousness brought about by his voluntary intoxication. . . ." (*Id.* at p. 456.) But Justice Mosk objected to the majority holding, as it would "allow the grossly intoxicated killer an unanticipated defense to murder *based on unconsciousness*. I doubt the Legislature ever intended such a result." (*Id.* at p. 456 [emphasis added].) Whether or not the Legislature ever intended such a result before *Whitfield*, it indicated in 1995 that it opposed it prospectively.

The *Carlson* court correctly concluded the section 22 amendment showed the Legislature believed intoxication should be admissible to show the absence of express malice but not implied malice, so a defendant who committed an act whose natural and probable consequences were dangerous to human life should be guilty of implied malice murder, even if intoxication prevented him from subjectively appreciating the risk. No different result was warranted if the defendant

offered the evidence to show "unconsciousness" under CALCRIM No. 626 rather than a failure of proof as to the "conscious disregard" element under CALCRIM No. 520. Likewise, the outcome must be the same whether the defense is a failure of proof as to the conscious disregard element or the "defense" of imperfect self-defense. (CALCRIM No. 571.)

C. *Imperfect self-defense*

1. Imperfect self-defense reflects a failure of proof as to malice, and does not require affirmative proof of any element.

Procedurally, imperfect self-defense is not an "affirmative defense" but a shorthand description of the circumstances under which the defendant is guilty of only voluntary manslaughter because the People failed to prove malice beyond a reasonable doubt. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; *People v. Rios* (2000) 23 Cal.4th 450, 454; Dressler, Understanding Criminal Law (4th ed. 2006) 250.) Imperfect self-defense voluntary manslaughter simply describes a circumstance under which the jury may decline to find malice. Contrary to appellant's argument, a voluntary manslaughter conviction does not require affirmative proof of

appellant's beliefs at the time of the killing. (ARB 3-4.) Both his assertions misstate the law: imperfect self-defense *does* require the absence of malice and *does not* require "far more" than the absence of malice. (*Rios*, *supra*, at p. 461.) "Provocation and imperfect self-defense are not additional elements of voluntary manslaughter which must be proved" for a homicide conviction to be voluntary manslaughter instead of murder, and evidence tending to show the defendant actually but unreasonably believed in the need for self-defense is "relevant only" to show the absence of malice. (*Rios*, *supra*, at pp. 461, 470.) But the Legislature established the legal irrelevance of intoxication evidence to the jury's determination of implied malice.

It may have been easier to discern how a jury needs to make only one determination, whether the defendant harbored malice, through the instruction formerly in use. The current instruction asks whether the defendant consciously disregarded a known danger to human life, and its literal construction could apply to a surgeon engaged in risky emergency surgery that could save the patient's life but

also hasten her death. By contrast, the former element of "wanton disregard for human life" more directly referenced the antisocial nature of implied malice. (See *Knoller, supra,* 41 Cal.4th 139, 153.) Appellant's conclusion that the jury must make multiple findings derives from the apparent need to determine: (1) whether the defendant acted in conscious disregard of a known danger; and (2) whether the defendant nevertheless acted with an actual belief in the need for self-defense.

But there is only one question, whether the defendant acted with malice, and the People must prove it beyond a reasonable doubt. New York law makes this clearer in requiring the defendant show "utter disregard for *the value of* human life," just as North Dakota proscribes "extreme indifference to *the value of* human life." (*People v. Feingold* (2006) 7 N.Y.3d 288 [852 N.E.2d 1163, 1168] [emphasis added]; *State v. Erickstad* (N.D. 2000) 620 N.W.2d 136, 143 [emphasis added].) Someone who acts according to a perceived need for self-defense (however unreasonable) does not disregard the value of human life, he acts to protect one –

his own.[6] An actual belief in the need to defend life thus cannot coexist with the "malignant heart" described in section 188. (*Rios, supra*, 23 Cal.4th 450, 461.)

Especially in the context of defending others, mitigation serves not only the goal of punishing offenders according to their subjective culpability but also protecting the public. Third parties in these cases perceive victims in apparent danger and must decide whether to intervene, often with only limited information about the nature of the conflict. (*People v. Randle, supra*, 35 Cal.4th 987, 1009 (conc. opn. of Brown J.).) Punishing misjudgment as murder would significantly deter intervention in all cases, with detrimental effects on the protection of innocent human life. (*Ibid*; see *Just Say No Excuse, supra*, 87 J. Crim. L. & Criminology 482, 498, fn. 98.)

Someone acting to protect human life does not evince malice, so a reasonable doubt about whether the defendant subjectively believed in the need for self-defense precludes

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Imperfect self-defense may also cover the defense of others. (*People v. Randle* (2005) 35 Cal.4th 987, 997, disapproved on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

conviction for murder. But as the jury must answer the same ultimate question of malice regardless of whether the defendant asserts he did not subjectively perceive a danger that did exist or asserts he did subjectively perceive a danger that did not, the effect of intoxication evidence must be the same: it is factually relevant but legally irrelevant.

2. Because both CALCRIM No. 520 and CALCRIM No. 571 ask whether the defendant lacked malice due to a mistaken perception, the legal relevance of intoxication must be the same for each inquiry.

A defendant may lack malice because he does not perceive -- and consciously disregard -- a danger to human life (that exists) or because he does perceive one (which does not exist) and believes he must act to protect himself or others. Either way, the People's failure to prove otherwise beyond a reasonable doubt precludes conviction for implied malice murder. (*Rios*, *supra*, 23 Cal.4th at p. 462.) The People must affirmatively establish implied malice beyond a reasonable doubt, regardless of whether defendant's asserted mistake lay in not seeing a real danger or in seeing an unreal one. The legal admissibility of the intoxication evidence must be the same in either case.

CALCRIM 520 defines the presence of malice, whereas CALCRIM 571 defines its absence, but both instruct on the defendant's "knowledge." CALCRIM 520 instructs juries must find the defendant "knew" his act was dangerous to human life; if the defendant believed he shot at a tree stump, not a child, he is not guilty of implied malice murder. But Penal Code section 29.4 renders the defendant's intoxication "irrelevant and inadmissible" to establish this lack of knowledge. (*Whitfield, supra*, 7 Cal.4th 437, 476.)

CALCRIM No. 571 requires the jury find the "defendant actually believed" there was imminent danger and that deadly force was necessary, and it instructs the jury to consider the circumstances as they were "known and appeared to the defendant." If circumstances thus known and apparent to the defendant revealed an armed terrorist attacking him so that he needed to use deadly force to protect himself, he would not be guilty of murder. But just as Penal Code section 29.4 bars the defendant from using intoxication evidence to show he did not know his target was a child, it bars him from using intoxication evidence to show he "knew" or it appeared that the target was a terrorist.

Three justices observed this in *People v. Wright* (2005) 35 Cal.4th 964, 985 (conc. opn. of Brown, J.)

> Intoxication can affect a person in two opposing ways. It can cause a person *not to perceive* a risk that is *real*, as is common in the case of alcohol abuse (see, e.g., *People v. Whitfield* (1994) 7 Cal.4th 437, 442–444 [parallel citations]), and it can cause a person to *perceive* a risk that is *not real*, as is common in the case of cocaine or methamphetamine abuse.

Under the ordinary framework (see CALCRIM No. 520), a false negative finding may show the absence of malice, as where the defendant shoots at a tree but fails to perceive there is a child right in front of it (or that the "tree" itself is actually a child.) Under the imperfect self-defense framework (see CALCRIM No. 571), a false positive finding may show an unreasonably perceived threat; the defendant perceives an assailant pointing a gun at him and so shoots at what is actually a harmless toddler. Justice Brown prescribed the same evidentiary rule for each mistake.

> The Legislature has made clear that, in the former situation, a defendant may be convicted of second degree murder on an implied malice theory, and the evidence of voluntary intoxication is not admissible. (§ 22, subd. (b).) Logic suggests that a similar rule should apply when voluntary intoxication causes the opposite effect.

(*Wright, supra*, at p. 985.)

The two legal theories are even closer in operation. A failure to appreciate an actual risk usually involves not perceiving something that is present, and unreasonably acting in self-defense usually involves perceiving something that is absent. But not always. A defendant could fail to appreciate a danger by shooting near what he knows is a child because he perceives a bulletproof wall protecting her, though none exists. Or a defendant could unreasonably perceive a need for self-defense where he believes someone is about to push him off downwards to his death only because he fails to perceive there is a cushion placed beneath him and the drop is just ten inches. And as the hypothetical in the "question presented" shows, it may even be the *same mistake*; a defendant may mistake a grenade for a ping-pong ball or mistake a ping-pong ball for a grenade. The Legislature's policy deeming intoxication legally irrelevant in determining implied malice must apply to both.

Criminal convictions do not turn on how the defense labels its theory: "The same policy reasons which prevent use

of evidence of mental illness to prove the absence of general intent apply to prevent use of the same evidence under the guise of an affirmative mistake-of-fact defense." (*Gutierrez, supra*, 180 Cal.App.3d 1076, 1083.) It would "subvert[]" legislative policy and frustrate the legitimate ends of criminal justice if defendants enjoyed greater exculpation for their theories simply "by presenting them under the label of mistake of fact." (*Id.* at p. 1084.)

This Court has also rejected altering the proper outcome of a case based on the guise through which the defense presented its evidence. (*People v. Steele* (2002) 27 Cal.4th 1230, 1255.) Steele presented evidence of post-traumatic stress disorder deriving from his Vietnam service and other mental abnormalities, which made him "routinely misinterpret stimuli" and "over-respond [and] misinterpret events or stimuli." (*Id.* at pp. 1240-1241.) These symptoms resemble the symptoms described below, although they at least partially derived not from methamphetamine consumption but service of one's country. (Steele also had an intoxication level estimated around .28. (*Steele, supra*, at p.

1240.)) But the Court rejected his request for the jury to consider his heat of passion defense for a person with his unique background, as that would "resurrect the abolished defense of diminished capacity in the guise of an expanded form of heat of passion manslaughter." (*Steele, supra*, at p, 1255.)

Appellant's instant attempt to use his intoxication to establish the absence of malice pursues a similar loophole. It seeks to resurrect the since-rejected rule of *Whitfield, supra*, 7 Cal.4th 437, (intoxication is legally relevant to the determination of implied malice) in the guise of an expanded form of imperfect self-defense manslaughter. This Court should reject this "attempt to back door in evidence of intoxication that is statutorily precluded and held to be irrelevant." (*Commonwealth v. Jiminez* (Pa. Super. Ct. 2016) 2016 WL 5922700.)

3. No other state deems intoxication evidence to be more exculpatory where the defendant presents it to show imperfect self-defense rather than as a "stand alone" defense.

Appellant contends that intoxication's exculpatory effect of should be broader when offered to refute implied malice by showing the defendant made a false positive finding of danger (under CALCRIM No. 520) rather than a false negative one (under CALCRIM No. 571). He cannot cite any case to support this theory, because there does not appear to be a published case nationwide supporting his theory that evidence may be legally irrelevant to malice when offered as a "stand alone" defense but legally relevant to establishing imperfect self-defense.

Comparing one state's criminal doctrines to those of other states is difficult, as the hypothetical outcome depends on interdependent rules. For example, states grade homicides differently (some states define three degrees of murder[7] and others define only one[8]), they require different

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[7]See e.g. Fla. Stat. Ann. § 782.04; 18 Pa.C.S.A. § 2502.

[8]See e.g. Ala. Code §13A-6-2; 17-a Maine Rev. Stat Ann. § 201.

mental states for murder (some require a purpose to kill[9] whereas others permit murder convictions based on gross negligence),[10] they define imperfect self-defense differently (if at all),[11] and they prescribe varying degrees of exculpation for intoxication (if at all).[12] Furthermore, not every state has determined the application of these interdependent doctrines.

9

See Ohio Rev. Code Ann. § 2903.02 [murder requires purpose to kill]; see also Rev. Stat. Neb. Ann. §§ 28-303, 304 [murder requires purpose to kill unless committed through poison, perjury, or in the course of an enumerated felony].

10

See *State v. Saenz* (Me. 2016) 150 A.3d 331, 335 [defendant commits extreme indifference murder through conduct "he should have known would create a very high degree of risk" of death/serious bodily injury]; *Commonwealth v. Yanoff* (1997) 456 Pa.Super.Ct. 222 [690 A.2d 260 264]: malice appears through acts "in gross deviation from the standard of reasonable care, failing to perceive" [the creation of a substantial and unjustifiable risk].

11

See *Commonwealth v. Grassie* (2017) 476 Mass. 202 [65 N.E.3d 1199, 1206]; *State v. Mize* (1986) 316 N.C. 48 [340 S.E.2d 439, 441-442] (imperfect self-defense applies only where belief in need for self-defense was reasonable but the defendant used excessive force or was the initial aggressor).

12

See *Just Say No Excuse, supra,* 87 J. Crim. L. & Criminology at pp. 510-512.

This should not surprise, as some states produce fewer published decisions in a decade than California does in a year, and even our state has not yet resolved this issue. Nevertheless, it does not appear that any state has ever graded a homicide less severely because intoxication evidence purportedly showed the defendant mistakenly harbored an unreasonable belief in the need for self-defense rather than showing he mistakenly failed to perceive an actual danger.

Intoxication in many states has the same exculpatory effect regardless of whether it is presented as a "stand alone" defense (e.g. CALCRIM No. 520) or in the imperfect self-defense context (e.g. CALCRIM No. 571).

> There were, then, two possible ways the jury could have decided that appellant lacked the intent necessary for a conviction of second degree murder. They could have found either that he was so intoxicated as to be unable to form the intent to kill or, alternatively, that he acted in self-defense, but recklessly or negligently used more force than was necessary to repel the attack.

(*State v. Jones* (1981) 95 Wash.2d 616 [628 P.2d 472, 476] (en banc).)

And the manner of presentation obviously does not matter n the 15 states that completely bar the presentation of intoxication evidence as a defense to any mental state. (See

Appendix.) Some states, however, allow consideration of intoxication to show the absence of malice generally but *not* to support an imperfect self-defense theory, apparently on the theory that one who knowingly uses deadly force has an obligation to do so carefully, with responsibility for the consequences of unreasonable misperceptions.

Intoxication is legally relevant to imperfect self-defense only if it is otherwise legally relevant to malice. Maryland deems intoxication evidence legally irrelevant to malice, and thus it may not support imperfect self-defense manslaughter.

> Even more clearly, he does not qualify for the voluntary manslaughter treatment, where, because of intoxication, he easily loses his self-control; that is to say, he is to be judged by the standard of the reasonable sober man.

(W. LaFave and A. Scott, Criminal Law (2d ed. 1972) 659, quoted in *Brown v. State* (Md. Ct. Spec. App. 1992) 90 Md.App.220 [600 A.2d 1126, 1132].)

By contrast, an Illinois court found a defendant's intoxication was legally relevant to his imperfect self-defense claim. (*People v. Mocaby* (Ill. App. Ct. 1990) 194 Ill.App.3d 441 [551 N.E.2d 673, 679].) But Illinois already permitted consideration of intoxication evidence to show the absence of malice even outside the imperfect self-defense context, much

as California did before the 1995 amendment. (*People v. Brabson* (Ill. App. Ct. 1977) 54 Ill.App.3d 134 [369 N.E.2d 346, 348].) *Mocaby* therefore does not advance appellant's contention that intoxication should have a greater exculpatory effect in imperfect self-defense cases than otherwise permitted by statute.

The California Legislature has determined, like most states, that voluntary intoxication is legally irrelevant to the determination of malice. Appellant offers no persuasive reason for abandoning that policy when misperceptions lead to false positive findings of danger rather than false negative ones.

III. An armed intruder who forcibly enters the victim's home is not entitled to instruction on any form of self-defense, regardless of his level of intoxication.

Appellant references *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1, to support his argument. (AOB 42.) This footnote actually offers another example of how policy overrides evidence's factual relevance. And it offers another ground for why a manslaughter conviction is unavailable to appellant — even if he *reasonably* believed Ramirez was about to kill him.

The full footnote reflects policy: a defendant's belief (however reasonable!) in the need to defend himself will not exculpate where the defendant created that need.

> [O]rdinary self-defense doctrine—applicable when a defendant reasonably believes that his safety is endangered—may not be invoked by a defendant who, *through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified.* ([Citations].) It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense.

(*Christian S., supra*, 7 Cal.4th at p. 773, fn. 1 [emphasis

added.)

This rule resembles the amendment to then-section 22 excluding intoxication evidence from implied malice cases. An inebriate who culpably endangers others by becoming severely intoxicated may not present factually relevant evidence of his intoxication, just as someone who culpably endangers others by initiating an assault or committing a felony (appellant did both in commencing an assault with a deadly weapon against Ramirez) may not show his factually relevant belief in the need for self-defense.

The policy not only reinforces the intoxication policy in the abstract, it precludes appellant's request for instruction on voluntary manslaughter in this case. This Court recently cited the *Christian S.*, *supra*, 7 Cal.4th 768, footnote to bar an imperfect self-defense theory in a case with facts almost identical to ours. (*Rangel*, *supra*, 62 Cal.4th 1192, 1226.)

> Here, defendant and his son, who were armed, broke into Durbin's home while Durbin and his wife and young children were present. Defendant shot Durbin when he rushed into the living room because defendant thought he was "running to get a gun."

(*Id.* at p. 1226.)

But the circumstances of the entry privileged Durbin's use of force, and not the defendant's.

> As defendant appears to concede in his reply brief, *because defendant was "the initial aggressor and the victim's response legally justified, defendant could not rely on unreasonable self-defense as a ground for voluntary manslaughter."* ([*People v. Seaton*, [2001] 26 Cal.4th [598, at p. 664 [parallel citations]; see Pen.Code § 198.5 [resident "presumed to have held a reasonable fear of imminent peril of death or great bodily injury" to himself, his family, or a member of the household when he uses force against a person not a member of the family or household "who unlawfully and forcibly enters" the residence].)

(*Rangel, supra*, at p. 1226 [emphasis added].)

As appellant unlawfully invaded Ramirez's home, Ramirez could lawfully use force and appellant could not. If appellant *correctly* perceived Ramirez was attacking him, a defense of perfect (reasonable) self-defense still would have been unavailable. (*Ibid.*) Appellant therefore could not assert imperfect self-defense. (*People v. Valencia* (2008) 43 Cal.4th 268, 288 [imperfect self-defense available only where reasonable belief would support perfect self-defense].)

The Court of Appeal has likewise recognized Penal Code section 198.5 renders imperfect self-defense unavailable to home invaders. In *People v. Hardin* (2000) 85 Cal.App.4th

625, the defendant testified "he had ingested cocaine and feared people were after him," and presented doctors' testimony that he had experienced a cocaine-induced psychosis. (*Id.* at p. 628.) But whatever his state of mind, he could not invoke even imperfect self-defense when he broke into a woman's home and struck her with a hammer. (*Id.* at p. 627.) Section 198.5 revoked prior legal authority that could "be read as granting home invaders the right of imperfect self-defense to resist attempts at forcible eviction by a residential homeowner." (*Hardin, supra,* at p. 634.)[13] As in *Rangel, supra,* 62 Cal.4th 1192, "The entire situation was created by defendant. [The victim's] use of force was privileged; defendant's was not." (*Hardin, supra,* at p. 634.)

Appellant cites *People v. Quach* (2004) 116 Cal.App.4th 294, 300-301, to show an aggressor may lawfully use force after his victim escalates the level of force. (AOB 43.) But *Quach* involved known adversaries engaging in mutual

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It is more accurate to speak of the *homedweller*, because the right to use defensive force against an intruder does not turn on legal title to the property. (See *People v. Grays* (2016) 246 Cal.App.4th 679, 688.)

combat, not an attack on a complete stranger in his home, as in *Rangel, supra*, 62 Cal.4th 1192, *Hardin, supra*, 85 Cal.App.4th 625, or this case. Instruction in *Quach* thus concerned justification under Penal Code section 197, where the right to use force may shift back and forth depending on the nature of the force used, rather than section 198.5, which presumes the home invader has no right to use force — and the homedweller does. (*Hardin, supra*, at p. 634.) The *Seaton* homedweller therefore could "escalate" and answer the aggressor's punch by using a deadly weapon (hammer) without privileging the home invader's responsive use of force. (*People v. Seaton* (2001) 26 Cal.4th 598, 664.)

The evidence showed appellant stabbed Ramirez in his home, as his blood was found near the couch. (*Soto, supra*, 248 Cal.App.4th 884, 898.) Appellant's argument on appeal, that he attempted to legally "withdraw" by leaving the apartment, must fail. (AOB 42.) A defendant no more regains the right to use force after stabbing a victim in his home by attempting to escape the location than does any other fleeing felon regain a right to use force to shoot at a

pursuing police officer. (*Rangel, supra*, 62 Cal.4th at p. 1226, citing *Christian S., supra*, 7 Cal.4th at p. 773, fn.1.)

The procedural posture of this case is just like that of *Randle, supra*, 35 Cal.4th 987. The issue litigated at the Court of Appeal was the reach of imperfect self-defense, namely, whether it applied when invoked to protect others. (*Id.* at p. 993.) But this Court also considered the question of whether, even if the partial defense could apply, the defendant forfeited its potential application as the initial aggressor. (*Id.* at pp. 1001-1002.) This case, which also considers the reach of the defense, may likewise address whether appellant's aggression forfeited its application to him.

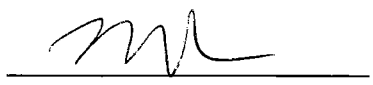
Regardless of intoxication, appellant was an armed intruder who broke into the victim's home. A defendant may show imperfect self-defense only if his self-defense would have been "perfect" had his belief been reasonable. (*People v. Valencia, supra,* 43 Cal.4th 268, 288.) Here it would not have been. He therefore could not rely on an imperfect self-defense defense. (*Rangel, supra,* 62 Cal.2d 1192, 1226.)

Conclusion

The Legislature has determined that evidence of voluntary intoxication is legally irrelevant to the existence of implied malice, and is therefore inadmissible to show the defendant acted without it. Intoxication may cause a person to have mistaken perceptions, but these do not mitigate a homicide from murder to manslaughter when a defendant makes a false negative finding by failing to perceive an actual danger to others. This legal irrelevance must likewise apply to false positive findings of an actual danger to himself (or others). Whether a severely intoxicated defendant kills because he mistakes a grenade for a ping-pong ball, or a ping-pong ball for a grenade, he acts with implied malice and is guilty of murder.

Respectfully submitted,

Dated: May 17, 2017



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Certification of Word Count

(Cal. Rules of Court, rule 8.204, subdivision (c).)

I, Mitchell Keiter, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 9,517 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 17, 2017

Mitchell Keiter

Appendix

This appendix cites authorities in each jurisdiction describing the law on the exculpatory effect of intoxication and on imperfect self-defense.

Federal

Intoxication is legally irrelevant to implied malice.
United States v. Kane (9th Cir. 1968) 399 F.2d 730, 736

Unreasonable belief in need for self-defense may mitigate homicide to voluntary manslaughter.
United States v. Rivera-Muniz (9th Cir. 2017) — F.3d —, — 2017 WL 1404193

Alabama

Intoxication is legally irrelevant to "extreme indifference" murder.
Allen v. State (Ala. Crim. App. 1992) 611 So.2d 1188, 1190-1193

Self-defense must derive from reasonable belief.
Booker v. State (Ala. Crim. App. 1994) 645 So.2d 355, 357, citing Ala. Code § 13A-3-23, subd. (a)(1).

Alaska

Intoxication is legally irrelevant to (second degree) extreme indifference murder.
Jeffries v. State (Alaska 2007) 169 P.3d 913, 920

Intoxication evidence "not germane" to unreasonable self-defense claim.
(*Nygren v. State* (Alaska 1980) 616 P.2d 20, 22

Arizona

Intoxication evidence is never legally relevant as a defense.
Ariz. Rev. Stat. §13-503 see *State v. Moody* (2004) 208 Ariz. 424 [94 P.3d 1119, 1161] (en banc)

Arkansas

Intoxication evidence is never legally relevant as a defense.
Standridge v. State (1997) 329 Ark. 473 [951 S.W.2d 299, 302-303]

Colorado
Intoxication is legally irrelevant to (first degree) extreme indifference murder.
People v. Zekany (Colo. Ct. App. 1991) 833 P.2d 774, 778.

Self-defense must derive from reasonable belief.
Colo. Rev. Stat. Ann. § 18-1-704; see *People v. Ellis* (Colo. Ct. App. 2001) 30 P.3d 774, 780

Connecticut
Intoxication is relevant to show absence of intent to kill required for murder (*State v. Bruno* (1996) 236 Conn. 514 [673 A.2d 1117, 1132]) but not to show absence of recklessness required for first degree manslaughter (*State v. Jenkins* (2005) 88 Conn.App. 762 [872 A.2d 469, 475-477].)

Self defense must derive from reasonable belief.
Conn. Gen Stat. Ann. § 53a-19; *Daniel v. Commissioner of Correction* (Conn. App. Ct. 2000) 57 Conn.App. 651 [751 A.2d 398, 413-414]

Delaware
Intoxication evidence is never legally relevant as a defense.
11 Del. Code § 421; *Wyant v. State* (Del. 1986) 519 A.2d 649, 651-652

District of Columbia
Intoxication is legally irrelevant to implied malice murder.
Bishop v. United States (D.C. Cir. 1939) 71 App.D.C. 132 [107 F.2d 297, 301-302.]

Self-defense must derive from reasonable belief.
Parker v. United States (2017) 155 A.3d 835, 845-848

Florida
Intoxication is legally irrelevant to second degree (depraved mind) murder.
Gentry v. State (Fla. 1983) 437 So.2d 1097, 1099; *Jackson v. State* (Fla.Dist.Ct.App. 1997) 699 So.2d 306, 307-308

Self-defense must derive from reasonable belief (Fla. Stat. Ann. § 776.012; *Hill v. State* (Fla. Dist. Ct. App. 2008) 979 So.2d 1134, 1134-1135), though impulsive reaction to victim's attack may reduce homicide to manslaughter (*Sandhaus v. State* (Fla. Dist. Ct. App. 2016) 200 So.2d 112, 115-116).

Georgia
Intoxication evidence is never legally relevant as a defense. Ga. Code. Ann. § 16-3-4, subd. (c); *Payne v. State* (Ga. 2001) 540 S.E.2d 191, 193

Hawaii
Intoxication evidence is never legally relevant as a defense. Haw. Rev. Stat. Ann. § 702-230, subd. (1); *State v. Souza* (1991) 72 Haw. 246 [813 P.2d 1384, 1385-1386]

Idaho
Intoxication evidence is never legally relevant as a defense. Idaho Code § 18-116

Illinois
Statutorily, voluntary intoxication evidence is never legally relevant as a defense. 720 Ill. Comp. Stat. Ann. 5/6-3: "A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."
However, courts still recognize a voluntary intoxication defense where defendant "had lost his power of reason and was unable to form the requisite mental state for the offense."

People v. Redmond (Ill. App. Ct. 1994) 265 Ill.App.3d 292 [637 N.E.2d 526, 534]
It is thus legally relevant as a defense to malice.
People v. Brabson (Ill. App. Ct. 1977) 54 Ill.App.3d 134 [369 N.E.2d 346, 348]

Unreasonable belief in need for self-defense may mitigate homicide to voluntary manslaughter.
People v. O'Neal (1984) 104 Ill.2d 399 [472 N.E.2d 441, 443-444]

Indiana
Intoxication evidence is never legally relevant as a defense.
Ind. Code § 35-41-2-5; *State v. Sanchez* (Ind. 2001) 749 N.E.2d 549, 551

Iowa
Intoxication is legally irrelevant to second degree murder.
State v. Artzer (Iowa 2000) 609 N.W.2d 526, 531

Self-defense must derive from reasonable belief.
Iowa Code § 704.3; *State v. Bedard* (Iowa 2003) 668 N.W.2d 598, 600

Kansas
Intoxication is legally irrelevant to reckless second degree murder.
State v. Spicer (Kan. Ct. App. 2002) 30 Kan.App.2d 317 [42 P.3d 742, 748]; see *State v. May* (Kan. Ct. App. 2012) 272 P.3d 46 [2012 WL 1352827] (unpublished); *State v. Wise* (Kan Ct. App. 2007) 166 P.3d 450 [2007 WL 2580571] (unpublished)

Actual but unreasonable belief in need for self-defense may warrant mitigation to voluntary manslaughter.
State v. Harris (2012) 293 Kan. 798 [269 P.3d 820, 825-826]

Kentucky
Intoxication is legally irrelevant to wanton murder.
Nichols v. Commonwealth (Ky. 2004) 142 S.W.3d 683, 689

Unreasonable belief in need for self-defense will mitigate murder to second degree manslaughter (unless innocent third party harmed).
Gribbins v. Commonwealth (Ky. 2016) 483 S.W.3d 374-376

Louisiana
Intoxication is legally relevant to intent required for manslaughter but not to negligent homicide.
State v. Hilburn (La .Ct. App. 1987) 512 So.2d 497, 504-505

Self-defense must derive from reasonable belief.
State v. Morris (La. Ct. App. 2009) 22 So.3d 1002, 1012-1013

Maine
Intoxication evidence is legally irrelevant to depraved indifference murder.
State v. Smith (Me. 1980) 415 A.2d 50, 574.

Intoxication is legally relevant to whether defendant caused death "under the influence of extreme anger or extreme fear brought about by adequate provocation.
State v. Rollins (Me. 1972) 295 A.2d 914, 920-921.

Maryland
Intoxication is legally irrelevant to second degree murder.
Hook v. State (Md. 1989) 315 Md.25 [553 A.2d 233, 235]

Unreasonable belief in need for self-defense may mitigate homicide to voluntary manslaughter only if defendant was entitled to take *some* action against the victim.
State v. Marr (2001) 362 Md. 467 [765 A.2d 645, 649];
Peterson v. State (Md. Ct. Spec. App. 1994) 101 Md.App. 153 [643 A.2d 520, 522-523]

Massachusetts
Intoxication evidence is relevant to all forms of malice.
Commonwealth v. Miller (2010) 457 Mass. 69 [927 N.Ed.2d 999, 1003-1005]

Imperfect self-defense applies only where the belief in need for self-defense was reasonable but the defendant used excessive force or was the initial aggressor.
Commonwealth v. Grassie (2017) 476 Mass. 202 [65 N.E.3d 1199, 1206-1206]

Michigan
Intoxication evidence is never legally relevant as a defense.
Mich. Comp. Laws § 768-37, subd. (1); *People v. Nickens* (2004) 470 Mich. 622 [685 N.W.2d 657, 663, fn. 7]

Minnesota
Intoxication not legally relevant to driving while intoxicated-felony murder.
State v. Smoot (Minn. Ct. App. 2007) 737 N.W.2d 849, 854

Self-defense must derive from reasonable belief.
State v. Thompson (Minn. 1996) 544 N.W.2d 8, 12-13

Mississippi
Intoxication is never legally relevant as a defense.
Hale v. State (Miss. 2016) 191 So.3d 719, 724

Missouri
Intoxication is never legally relevant as a defense.
Mo. Ann. Stat. § 562.076.1; *State v. Erwin* (Mo. 1993) 848 S.W.2d 476, 482 [en banc]

Montana
Intoxication is never legally relevant as a defense.
Mont. Code. Ann. § 45-2-203; *State v. McLaughlin* (2009) 351 Mont. 282 [210 P.3d 694, 699]

Nebraska
Intoxication is never legally relevant as a defense.
Neb. Rev. Stat. § 29-122; *State v. Braesch* (2016) 292 Neb. 930 [874 N.W.2d 874, 943]

Nevada
Intoxication is legally irrelevant to implied malice.
State v. Fisko (1937) 58 Nev. 65 [70 P.2d 1113, 1117] disapproved on other grounds in *State v. Fox* (1957) 73 Nev. 241 [316 P.2d 924, 927]

Self-defense must derive from reasonable belief.
Nev. Rev. Stat. Ann. § 200-130, subd. (1); *Daniel v. State* (2003) 119 Nev. 498 [78 P.3d 890, 901, fn. 31]

New Hampshire
Intoxication is legally irrelevant to second degree extreme indifference murder.
State v. Dufield (1988) 131 N.H. 135 [549 A.2d 1205, 1206-1208]

Self-defense must derive from reasonable belief.
State v. Gorham (1990) 120 N.H. 162 [412 A.2d 1017, 1019]

New Jersey
Intoxication is legally irrelevant to reckless manslaughter.
State v. Baum (2016) 244 N.J. 147 [129 A.3d 1044, 1052-1053]

Self-defense based on unreasonable belief may mitigate a homicide to reckless manslaughter.
State v. Munroe (2012) 210 N.J. 429 [45 A.3d 348, 358]

New Mexico
Intoxication is legally irrelevant to second degree (knowing) murder.
State v. Campos (1996) 122 N.M. 148 [921 P.2d 1266, 1275-1278]

Imperfect self-defense may mitigate homicide to voluntary manslaughter for "act committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense."
State v. Fox (N.M. Ct. App. 2016) 390 P.3d 230, 233

New York
Intoxication is legally relevant to murder.
State v. Lassey (N.Y. Sup. Ct. 2013) 40 Misc.3d 530 [966 N.Y.S.2d 848, 850-859].

Jury must evaluate reasonableness of defendant's defensive conduct by assessing his personal circumstances.
People v. Wesley (1990) 76 N.Y.2d 555 [563 N.E.2d 21, 24]

North Carolina
Intoxication is legally relevant to (premeditated) first degree murder but not second degree murder.
State v. Bunn (1973) 283 N.C. 444 [196 S.E.2d 777, 786]

Imperfect self-defense may apply where the defendant initiates the conflict or uses excessive force.
State v. Mize (1986) 316 N.C. 48 [340 S.Ed.2d 439, 441-442]

North Dakota
Intoxication is not legally relevant to extreme indifference murder.
State v. Erickstad (N.D. 2000) 620 N.W.2d 136, 144

Unreasonable belief in need for self-defense may mitigate homicide to manslaughter (where belief is reckless) or negligent homicide (where belief is negligent)
State v. Leidholm (N.D. 1983) 334 N.W.2d 811, 844-848

Ohio
Intoxication is never legally relevant as a defense.
Ohio Rev. Code Ann. § 2901.21, subd. (C); *State v. Arnold* (Ohio Ct. App. 2013) 2 N.E.3d 1009, 1026

Oklahoma
Intoxication is legally relevant to murder.
Johnson v. State (Okla. Crim. App. 1980) 621 P.2d 1162, 1163

Self-defense must derive from reasonable belief.
Perryman v. State (Okla. Crim. App. 1999) 990 P.2d 900, 903-904

Oregon
Intoxication is legally irrelevant to extreme indifference element of first degree manslaughter.
State v. Boone (1983) 294 Or. 630 [661 P.2d 917, 920-921] (en banc)

Self-defense must derive from reasonable belief.
State v. Bassett (Or. Ct. App. 2010) 234 Or.App. 259 [228 P.3d 590, 592-593]

Pennsylvania
Intoxication is legally irrelevant to third degree murder.
Com v. Street (Pa. Super. Ct. 2013) 69 A.3d 628, 632

Self-defense must derive from reasonable belief.
Com. v. Mouzon (2012) 617 Pa. 527 [53 A.3d 738, 740-741]

Rhode Island
Intoxication is legally relevant to murder and may reduce homicide to voluntary manslaughter.
State v. Motyka (R.I. 2006) 893 A.2d 267, 285

Self-defense must derive from reasonable belief.
State v. Catalano (R.I. 2000) 750 A.2d 426, 429-430

South Carolina
Intoxication is never legally relevant as a defense.
State v. South (1993) 310 S.C. 504 [427 S.E.2d 666, 669]

South Dakota
Intoxication is legally relevant to first degree but not second degree murder.
Kleinsasser v. Weber (S.D. 2016) 877 N.W.2d 86 ¶ 24

Self-defense must derive from reasonable belief.
State v. Luckie (S.D. 1990) 459 N.W.2d 557, 559-560

Tennessee
Intoxication is not legally relevant to second degree murder.
State v. Butler (Tenn. Crim. App. 1994) 900 S.W.2d 305, 310

Self-defense must derive from reasonable belief.
State v. Bult (Tenn. Crim. App. 1998) 989 S.W.2d 730, 732

Texas
Intoxication is never legally relevant as a defense.
Texas Penal Code Ann. § 8.04, subd. (a); *Raby v. State* (Tex. Crim. App. 1998) 970 S.W.2d 1, 4-6

Utah
Intoxication is legally relevant to murder.
State v. Cummins (Utah Ct. App. 1992) 839 P.2d 848, 857

Imperfect self-defense requires a reasonable belief that the use of force is legally justifiable or excusable even though it is not.
State v. Low (Utah 2008) 192 P.3d 867, 877-878

Vermont
Intoxication is legally relevant to second degree murder.
State v. Bruno (2012) 192 Vt. 515 [60 A.3d 610, 624-625]

Self-defense must derive from reasonable belief.
State v. Shaw (1998) 168 Vt. 412 [721 A.2d 486, 489-492]

Virginia
Intoxication is legally irrelevant to malice.
Essex v. Com (1984) 228 Va. 273 [322 S.E.2d 216, 221]

Unreasonable belief in need for self-defense may mitigate homicide to voluntary manslaughter.
Couture v. Com. (Va. Ct. App. 2008) 51 Va.App.239 [656 S.E.2d 425, 430]

Washington
Intoxication is legally relevant to second degree murder.
State v. Jones (1981) 95 Wash.2d 616 [628 P.2d 472, 476] (en banc)

Imperfect self-defense may mitigate murder to first degree manslaughter where defendant recklessly/negligently uses more force than necessary.
State v. Jones (1981) 95 Wash.2d 616 [628 P.2d 472, 476] (en banc)

West Virginia
Intoxication is legally relevant to malice.
State v. Keeton (1980) 166 W.Va. 77 [272 S.E.2d 817, 821]

Self-defense must derive from reasonable belief.
State v. Wykle (2000) 208 W.Va. 369 [540 S.E.2d 586, 590-591]

Wisconsin
Intoxication is legally relevant to first degree intentional murder but not second degree intentional homicide.
State v.. Brown (Wis. Ct. App. 1984) 118 Wis.2d 377 [348 N.W.2d 593, 596]

Unreasonable belief in need for self-defense may mitigate intentional homicide from first degree to second degree.
Wisc. Stat. Ann. § 940.01, subd. (2)(b); *State v. Head* (2002) 255 Wisc.2d 194 [648 N.W.2d 413, 430]

Wyoming
Intoxication evidence was legally irrelevant to implied malice murder in *Crozier v. State* (Wyo. 1986) 723 P.2d 42, 53-54.
The Wyoming Supreme Court later redefined the elements of implied malice murder to require an act done "recklessly under circumstances manifesting an extreme indifference to the value of human life extreme indifference" but did not address the effect of intoxication evidence.
Wilkerson v. State (Wyo. 2014) 336 P.3d 1188, 1200.

Self-defense must derive from reasonable belief
Bloomfield v. State (Wyo. 2010) 234 P.3d 366, 376.

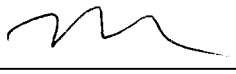
Proof of Service

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

On May 17, 2017, I served the foregoing document described as **AMICUS CURIAE BRIEF** in case number **S236164** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list, or by electronically mailing it. I deposited the envelopes in my office's outgoing mail box in Beverly Hills, California. The envelopes were mailed with postage thereon fully prepaid.

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

Executed this 17th day of May, 2017, at Beverly Hills, California.



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